25.03.2025
Item No.21
gd/ssd

MAT/1961/2022
IA NO: CAN/1/2022, CAN/2/2024
AMAR KUMAR SAHA, PROPRIETOR
OF AMAR CONSTRUCTION
VS
THE JOINT COMMISSIONER,
HOWRAH CGST AND CX
COMMISSIONERATE AND ORS.

Mr. Ankit Kanodia,
Ms. Megha Agarwal,
Mr. Jitesh Sah
..for the Appellant.

Mr. Tanoy Chakraborty,
Mr. Saptak Sanyal
..for the State.

Mr. Uday Sankar Bhattacharya,
Mr. Tapan Bhanja,
Ms. Banani Bhattacharya
..for CGST Authorities.

1. This intra court appeal by the writ petitioner is directed against the order/direction dated 5th December, 2022 in WPA 26134 of 2022.

2. The writ petition was filed challenging the adjudication order passed by the Service Tax Authority pertaining to certain transactions done during the period 2016-17 upto June, 2017,

3. The learned writ court did not go into the merits of the matter but dismissed the writ petition on the ground of available statutory appellate remedy under Section 85 of the Finance Act, 1994.

4. By an order dated 21.4.2023 this court considered the submissions of the learned advocates for the parties and pointed out that before a decision is taken as to what is the relief the appellant would be entitled to in this appeal.

5. A clear stand should be taken by the Executive Engineer, Hooghly Highway Division No.1, Public Works (Roads) Directorate, Government of West Bengal.

6. This observation was made taking note of the fact that the appellant had made several representations to the respondent no.3 with a request to make payment of service tax payable in respect of letter of acceptance-cum-work order dated 21st September, 2016, 22nd September, 2016, 23rd September, 2016 etc. The court noted that the case of the appellant raised upon a post-facto approval granted by the Government of West Bengal dated 6th June, 2017.

7. Therefore, a direction was issued to the respondent no.3 to consider the representations of the appellant and passed a reasoned order on the representation. The interim protection which was granted earlier was directed to continue. The respondent no.3 was also permitted to take the assistance of the Finance Department, Government of West Bengal or any other authority and also the CGST

authorities, if needed. Subsequently the necessity arose to implead the respondent no.7 which was done by order dated 16.6.2023. The time for compliance of the direction issued to the respondent no.3 was extended by order dated 6.10.2023. Subsequently the authority passed an order on 1st November, 2023 and the appellant was permitted to challenge the said order led to the filing of CAN 2 of 2024. In the said application affidavits have been exchanged.

8. Thus, Mr. Bhattacharya, learned senior standing counsel for the Service Tax Authority would contend that the adjudicating authority having adjudicated the matter and having confirmed the demand of service tax, the department is entitled to get the entire amount and even after the advent of the GST regime in terms of Section 174 of the GST Act, 2017 all actions taken during the previous regime would stand protected.

9. In the interregnum the State authorities after the GST regime have recovered around of Rs.65.28 lakhs on the ground that the same is payable for the consideration which was received when the GST regime was invoked. The only issue which requires to be considered as to the effect of the post-facto approval which was granted on 6th June, 2017.

10. On a plain reading of the said approval it is seen that the Governor has granted post-facto

administrative approval for the project/works described therein and the estimated cost has also been mentioned which states including 3% contingency and 15% service tax.

11. It is the argument of the learned advocate for the State that the contract is inclusive of all aspects and charges and taxes and this post-facto approval has to be read in the light of the terms and conditions of contract and the stand taken by the PWD Authorities in the order which is challenged in CAN 2 of 2024 is fully justified.

12. This court had an occasion to consider an identical issue in FMA 340 of 2023 and FMA 342 of 2023. In the said case also the argument was based upon the post-facto approval dated 6th June, 2017.

13. Apart from considering the said approval, the other internal correspondence between the various authorities of the department were also taken note of by the court and it was held that it will be too late for the respondents to now contend that the sanction was a post-facto sanction for the project and the question of payment of any amount of the contractor would not arise.

14. At this juncture, it would be relevant to take note of the findings in the said judgment and order dated 11.3.2025:

“3. Before examining other documents, which have been filed along with the appeal, it is relevant to take note of the stand taken by the department in their affidavit-in-opposition filed in the writ petitioner, more particularly, in paragraph 5(c). It has been stated in the said paragraph that all works were completed and bills were raised before 01.07.2017 i.e. before the GST regime by the petitioner. Out of those bills, three ad-interim payments of Rs.32,42,000.00, Rs.31,87,000.00 and Rs.32,50,000.00 were made respectively on 30.06.2017 against three of those bills for the works mentioned in the tender invited during the year 2017-2018. Further, it has been stated that the writ petitioner claimed for Service Tax reimbursement against three bills and Service Tax was reimbursed for Rs.14,51,850.00 subsequently on 31.03.2018 vide bill no.986/17-18 by the answering respondent. Further, it has been admitted that other bills were raised prior to July 1, 2017(by the writ petitioners) but could not be paid immediately due to lack of available fund for the said works during the relevant period. Further, it has been admitted that those bills were paid to the writ petitioner subsequently on 31st March, 2018 during the GST regime. Having taken such a stand there is denial in certain other paragraphs, which have to be necessarily eschewed 4 in the light of the candid admission. The case of the appellants is not only such a stand taken in the affidavit-in-opposition but fortified with the Note Sheet which was prepared by the Executive Engineer, Bankura Highway Division, PW (Roads) Department dated 14.02.2020. The Note Sheet reveals approval granted by the Joint Secretary, PWD vide order dated 06.06.2017 and the subsequent order dated 29.12.2017 and it is stated that after issuance of post-facto approval from competent authority in phases, fund was placed to Executive Engineer, Hooghly Highway Division No.1 for making payments of all contractors engaged in five Divisions in the district of Hooghly in four different phases and Rs.92.86,40,311.00 has been spent for making payment of all contractor’s bill including service tax. Further, it has been admitted that during the period of service tax, some agencies had already paid service tax and the same has been reimbursed along with work bill in the month of March 2018. Thereafter, the note sheet proceeded to give details break up of fund spent under Works head and Service Tax head of account in a tabulated format. Furthermore, the Note Sheet mentions that apart from the said fact, in the era of GST, some agency has paid GST in place of service tax. The Note Sheet then proceeded to give all the details concerning the appellants/writ 5 petitioners' tender wise bill amount, fund spent in phases and service tax paid accordingly against different tender and GST to be paid and in the said tabulation format the actual amount to be reimbursed to the appellant in FMA 340 of 2023 is Rs.68,98,565/- and for the appellant in FMA 342 of 2023 is Rs.34,95,220.00. Further, the Note Sheet states that as of now GST is the only tax which has subsumed all earlier indirect taxes viz. Excise Duty, VAT, VST, Entry Tax, Service Tax etc. so in all these cases in which the work started prior to implementation of GST on 01.07.2017 and balance work/payment continued even after 01.07.2017 GST has to be paid at appropriate rate. Further, the Note Sheet mentions that earlier the rate of Service Tax was 15% which was payable to Central Government only, but now there is a total GST of 12% (6% of GGST + 6% SGST) in this case, which is equally distributed between the Central and State Governments. Further, the Note Sheet admits all the liability to reimburse the GST amount already paid to Government comes to Rs.1,03,93,785/- which is to be paid to the Contractors. Further, by paying service tax & GST total mount comes under Service Tax Head is Rs.1,18,45,635/- which will remain within the sanctioned cost against Service Tax Head. Thus, the total amount expenditure comes to 6 Rs.94,04,85,946/- which will remain within the total sanctioned cost including Service Tax. Ultimately, the Executive Engineer would state that all the bills/challans have attained finality and the bill amount has been paid excluding GST amount to the respective contractors with the copies of the challans evidencing payment of GST to the Government along with CA certificates was submitted by both the appellants and it transpires that a total of Rs.1,03,93,785/- has to be paid to the contractors of Service in terms of aforesaid tender agreement as the matter is already delayed. Apart from that there are other documents, namely the communication sent by the Joint Secretary, Public Works Department to the Chief Engineer (HQ), PW Directorate dated 06.06.2017. Along with the said communication there is an annexure which shows the amount which is to be paid for electrical works, contingencies and service and the total amount mentioned is Rs.1.06,15,11,197.00. This report has been prepared by the Superintendent Engineer, Presidency Circle, PWD and has been approved by the Chief Engineer, Head Quarter, Public Works Directorate, Government of West Bengal and Chief Engineer (South Zone), PWD & Nodal Officer of Singur Project. Therefore, it will be too late for the respondent now to contend that the sanction was a post facto sanction 7 and, therefore, the question of payment of the amount to the contractor would not arise. This stand taken in the written instruction given to the senior officer is wholly contrary to the stand taken by the department. Thus, in the aforementioned document/report there is one other document containing revised demand of fund for payment for GST in connection with the work as prepared by the Executive Engineer, Bankura Highway Department dated 14.02.2020. This document contains a tabulated statement for first phase and in column no.10 it has been mentioned “Progress expenditure against Service Tax/GST upto date”. In column no.11 it has been mentioned that “Expenditure (work + Service TAX/GST) during previous year. Column no.12 states “Progress expenditure (work + Service Tax/GST) upto date”. Finally, in the remarks column it has been mentioned that the fund may be placed to Executive Engineer, Hooghly Highway Division No.1, PW (Roads) Directorate. All these documents clearly show that the claims made by the appellants were never denied or disputed by the department, rather accepted and supported by the department and the reason pleaded was lack of funds. Therefore, the respondent cannot wriggle out of the liability to make payment to the appellants.

4. In the result, the appeals and the connected applications are allowed and the orders passed by the learned Single Bench in the respective writ petitions are set aside and there will be a direction upon the respondent department to make payment of GST which has been estimated by the appellant which is Rs.68,98,565 in the case of M/s. Rajlaxmi Construction and Rs. 34,95,220/- in the case of M/s. Biswas Enterprise within a period of twelve weeks from the date of receipt of the server copy of this order. In the event the amounts are not refunded within the time frame the appellant in both the appeals

> are entitled to simple interest at the rate of 6% per annum from the date the amount becomes due and payable till it is actually paid.”

15. The above finding will squarely apply to the case of the appellant since the name of the appellant also finds place in the annexure to the post-facto approval dated 6th June, 2017 as was found in the case of the appellant in FMA 340 of 2023 and FMA 342 of 2023.

16. The only difference in the instant case is that since the consideration was received by the appellant during the GST regime, the GST authorities have demanded GST on that and recovered Rs.65.28 lakhs. This amount has to be necessarily refunded to the appellant by re-credited to the cash/credit ledger of the appellant. After doing so the PWD Authorities have to pay the appellant a sum of Rs.84,84.035/- which being the service tax demanded by the Service Tax Department and such payment should be made to the appellant within a stipulated time and on receiving the said payment the appellant should remit the said amount to the service tax authorities within three days from the date of the receipt of the money.

17. So far as the penalty which has been imposed on the appellant in the adjudication order dated 29.9.2022, in the light of the confusion which had arisen inter-departmentally in the instant appeal and the matter had been lingering quite a long time and

only after directions were issued in this appeal, the clear stand of the GST Authorities came to light and it has been tested for his correctness and found to incorrect stand, we deem it appropriate to hold that this is not a fit case where penalty should be imposed on the assessee either under Section 78 of the Finance Act read with Section 174 of the CGST Act, 2017 and Section 77(1)(a) of the Finance Act, 1994 and Section 77(2) of the Finance Act, 1994.

18. Accordingly, the penalty imposed on the appellant/assessee in the adjudication order dated 29.9.2022 is set aside.

19. The same reasoning will equally apply to the interest which has been imposed.

20. Accordingly, the same also stands deleted.

21. In the result, the appeal is allowed. The order passed by the State authorities are set aside and there will be a direction to the State authorities to re-credit to the appellant's credit/cash ledger a sum of Rs.65.28 lakhs within a period of four months from the date of receipt of a server copy of this order and within six weeks from the date of receipt of the order the Public Works Department shall pay to the petitioner the service tax demanded, namely, Rs.84,84.035/- and upon receipt of the said amount the appellant is directed to remit the said amount to the Service Tax Department under the CGST Head within three days

from the date of receipt of the amount from the Public Works Department.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(CHAITALI CHATTERJEE (DAS), J.)