



GAHC010140022020

Page No.# 1/41



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4201/2020

MINTOO DAS
S/O LT. BARINDRA DAS, R/O TULATGRAM PT.-I, P.O. SONAIMUKAH, P.S.
SONAI, DIST- CACHAR, ASSAM, PIN-788119

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE SPECIAL SECY. TO THE GOVT. OF ASSAM, PUBLIC WORKS
DEPTT., DISPUR, GHY-6, ASSAM, DIST- KAMRUP

2:THE COMMISSIONER AND SECY.
FINANCE DEPTT.
GOVT. OF ASSAM
DISPUR
GHY-6
DIST- KAMRUP

3:THE COMMISSIONER OF TAXES
KAR BHAWAN
DISPUR
GHY-6

4:THE CHIEF ENGINEER
PWD (ROADS)
CHANDMARI
GUWAHATI
ASSAM

5:THE EXECUTIVE ENGINEER
PWD
SILCHAR RURAL ROAD DIVISION
PRESENTLY KNOWN AS PWRD SILCHAR AND UDHARBOND



TERRITORIAL ROAD DIVISION
SILCHAR-788001
DIST- CACHAR
ASSAM

6:THE ASSTT. EXECUTIVE ENGINEER
PWD
SILCHAR RURAL ROAD SUB DIVISION NO.II
PRESENTLY KNOWN AS PWRD UDHARBOND TERRITORIAL ROAD SUB-
DIVISION
UDHARBOND
DIST- CACHAR
ASSA

Linked Case : WP(C)/1610/2019

ZABED AHMED CHOUDHURY
S/O. LATE HUSSAIN AHMED CHOUDHURY
RATANPUR ROAD
HAILAKANDI TOWN
WARD NO.1
P.O. RATANPUR ROAD
DISTRICT- HAILAKANDI
PIN- 788151.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
TO BE REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM
MUNICIPAL ADMINISTRATION DEPARTMENT
DISPUR
GUWAHATI-6.

2:THE ADDL. CHIEF SECRETARY
TO THE GOVT. OF ASSAM
FINANCE (TAXATION) DEPTT.
JANATA BHAWAN
DISPUR
GUWAHATI-06.
3:THE COMMISSIONER OF STATE TAX

ASSAM
DISPUR
GUWAHATI-06.
4:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM



URBAN AREAS DEVELOPMENT
DISPUR
GUWAHATI-06.
5:THE DIRECTOR TOWN AND COUNTRY PLANNING

ASSAM
DISPUR
GUWAHATI-06.
6:THE DY. COMMISSIONER

P.O. AND DIST. HAILAKANDI
PIN-788151.
7:THE HAILAKANDI MUNICIPAL BOARD
REP. BY ITS CHAIRMAN
P.S. AND DIST. HAILAKANDI
ASSAM-788151.
8:THE EXECUTIVE OFFICER

HAILAKANDI MUNICIPAL BOARD
P.O. AND DIST. HAILAKANDI
PIN-788151.

Linked Case : WP(C)/3694/2019

BIPUL DAS
S/O. LT. GHANA DAS
R/O. ARATI PLAZA
FLAT NO. 4(D)
CHANDMARI
R.G. BARUAH ROAD
GUWAHATI
DIST. KAMRUP (M)
ASSAM
PIN-781003.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
REP. BY THE ADDL. CHIEF SECRETARY TO THE GOVT. OF ASSAM
FINANCE DEPTT.
ASSAM SECRETARIAT
DISPUR
GUWAHATI-781006.

2:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM



FINANCE (TAXATION) DEPTT.
DISPUR
GUWAHATI-781006.
3:THE COMMISSIONER OF STATE TAX

OFFICE OF THE COMMISSIONER OF TAXES
GOVT. OF ASSAM
DISPUR
GUWAHATI-781006.
4:THE DY. SECRETARY TO THE GOVT. OF ASSAM

PUBLIC WORKS DEPTT. (ROADS)
DISPUR
GUWAHATI-06.
5:THE CHIEF ENGINEER

PWD (ROADS)
PUBLIC WORKS DEPTT.
GOVT. OF ASSAM
CHANDMARI
GUWAHATI-781003.
6:THE EXECUTIVE ENGINEER

PWD (ROADS)
JORHAT RURAL ROADS DIVISION
JORHAT
ASSAM.
7:THE SUPERINTENDENT OF TAXES

GUWAHATI UNIT-C
DISPUR
GUWAHATI
ASSAM-781006.
8:THE ACCOUNTANT GENERAL

ASSAM
BELTOLA
GUWAHATI
PIN-781029.

Linked Case : WP(C)/9052/2019

DHIRAJ BANIA
S/O- LATE KHAGEN BANIA
R/O- BAIHATA CHARIALI
VILL- AGDALA
PIN- 781381
DIST- KAMRUP(R)



ASSAM

VERSUS

THE STATE OF ASSAM AND 7 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM
FINANCE DEPTT
ASSAM SECRETARIAT
DISPUR
GUWAHATI- 781006

2:THE COMMISSIONER AND SECRETARY
GOVT OF ASSAM
FINANCE (TAXATION) DEPTT
DISPUR
GHY- 781006

3:THE COMMISSIONER OF SALES TAX
OFFICE OF THE COMMISSIONER OF TAXES
GOVT OF ASSAM
DISPUR
GUWAHATI- 781006

4:THE DEPUTY SECRETARY
GOVT OF ASSAM
PWD(ROADS)
DISPUR
GUWAHATI- 781006

5:THE CHIEF ENGINEER
PWD(ROADS) PWD
GOVT OF ASSAM
CHANDMARI
GUWAHATI- 781003

6:THE SUPERINTENDENT ENGINEER
PWD (ROADS)
GUWAHATI ROAD CIRCLE
GHY- 781001

7:THE SUPERINTENDENT OF TAXES
GUWAHATI UNIT D
DISPUR
GUWAHATI- 781006

ASSAM

8:THE ACCOUNTANT GENERAL
ASSAM
BELTOLA
GUWAHATI- 781029



Linked Case : WP(C)/7169/2018

PARTHO KUMAR NATH
S/O PRODIP KUMAR NATH
AJACHAK PALLY
HAILAKANDI TOWN
WARD NO.1
P.O. AND DISTRICT- HAILAKANDI
PIN- 788151.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
TO BE REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
MUNICIPAL ADMINISTRATION DEPARTMENT
DISPUR
GUWAHATI-6.

2:THE ADDITIONAL CHIEF SECRETARY TO THE GOVT. OF ASSAM
FINANCE (TAXATION) DEPARTMENT
JANATA BHAWAN
DISPUR
GUWAHATI-6.

3:THE COMMISSIONER OF STATE TAX (GST)
ASSAM
DISPUR
GUWAHATI-6.

4:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM
URBAN AREAS DEVELOPMENT
DISPUR
GUWAHATI-6.

5:THE DIRECTOR TOWN AND COUNTRY PLANNING
ASSAM
DISPUR
GUWAHATI-6.

6:THE DEPUTY COMMISSIONER

P.O. AND DIST.- HAILAKANDI
PIN- 788151
7:THE HAILAKANDI MUNICIPAL BOARD

REP. BY ITS CHAIRMAN
P.S. AND DIST.- HAILAKANDI
ASSAM



PIN- 788151
8:THE EXECUTIVE OFFICER

HAILAKANDI MUNICIPAL BOARD
P.O. AND DIST.- HAILAKANDI
PIN- 788151.

Linked Case : WP(C)/7571/2019

NABIRUL ISLAM
S/O. SHAHID ALI
R/O. HATIGAON
PRAGATI PATH
HOUSE NO.6
DISPUR
GUWAHATI-781038
DIST. KAMRUP (M)
ASSAM.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
FINANCE DEPTT.
ASSAM SECRETARIAT
DISPUR
GUWAHATI-781006.

2:THE COMMISSIONER AND SECRETARY
GOVT. OF ASSAM
FINANCE (TAXATION) DEPTT.
DISPUR
GUWAHATI-781006.

3:THE COMMISSIONER OF SALES TAX

OFFICE OF THE COMMISSIONER OF TAXES
GOVT. OF ASSAM
DISPUR
GUWAHATI-781006.

4:THE DY. SECRETARY
GOVT. OF ASSAM
PUBLIC WORKS DEPTT. (ROADS)
DISPUR
GUWAHATI-781006.

5:THE CHIEF ENGINEER
P.W.D. (ROADS)
PUBLIC WORKS DEPTT.



GOVT. OF ASSAM
CHANDMARI
GUWAHATI-781003.
6:THE CHIEF ENGINEER
P.W.D. (BUILDING)
PUBLIC WORKS DEPTT.
GOVT. OF ASSAM
CHANDMARI
GUWAHATI-781003.
7:THE SUPERINTENDENT OF TAXES

GUWAHATI UNIT-D
DISPUR
GUWAHATI-781006
ASSAM.
8:THE ACCOUNTANT GENERAL ASSAM

BELTOLA
GUWAHATI-781029.

Linked Case : WP(C)/8628/2019

NABIRUL ISLAM
S/O SHAHID ALI
R/O. HATIGAON
PRAGATI PATH
HOUSE NO. 6
DISPUR
GUWAHATI- 781038
IN THE DIST. OF KAMRUP(M)
ASSAM.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
FINANCE DEPTT.
ASSAM SECRETARIAT
DISPUR
GHY.-781006.

2:THE COMM. AND SECY.
GOVT. OF ASSAM
FINANCE (TAXATION) DEPTT.
DISPUR
GHY.-06.
3:THE COMMISSIONER OF SALES TAX



O/O. THE COMMISSIONER OF TAXES
GOVT. OF ASSAM
DISPUR
GHY.-06.
4:THE DY. SECY.
GOVT. OF ASSAM
P.W.D. (ROADS)
DISPUR
GHY.-06.
5:THE CHIEF ENGINEER
P.W.D. (ROADS)
GOVT. OF ASSAM
CHANDMARI
GHY.- 781003.
6:MISSION DIRECTOR
NATIONAL RURAL HEALTH MISSION
ASSAM
CHRISTIANBASTI
GHY.-05.
7:THE SUPDT. OF TAXES
GUWAHATI UNIT-D
DISPUR
GHY.- 781006
ASSAM.
8:THE ACCOUNTANT GENERAL
ASSAM
BELTOLA
GUWAHATI- 781029.

Advocate for the Petitioners : Mr. R. C. Das, Advocate

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MR. P. Nayak, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 21.11.2023

Date of Judgment : 21.11.2023

JUDGMENT AND ORDER (ORAL)

The instant batch of seven writ petition are taken up for disposal by this common judgment and order taking into account the issues involved are common in nature. The first issue involved is as to whether the deduction of tax in respect to the petitioners should be made in term with the Assam Value Added Tax Act, 2003 (for short, 'the Act of 2003') or under the Assam Goods and Service Tax Act, 2017 (for short, 'the Act of 2017') taking into account that though the petitioners were awarded the contracts prior to coming into effect of the Act of 2017, but the bills as well as the payments were made post coming into effect the Act of 2017. Incidentally, on the basis of the said Issue, another question which would be required to be adjudicated is as to whether the petitioners would be liable for payment of GST in respect to the Invoices and payments raised and received post the coming into effect the Act of 2017. The second question arises only if the first question is decided against the petitioners which is if the petitioners are liable to pay GST would they have a right to claim the additional tax in the form of GST from the respondent authorities.

2. Before deciding the issues, this Court finds it relevant to take note of the brief facts involved in the instant batch of writ petitions:-

WP(C) No.4201/2020

3. The petitioner herein is a Class 1A contractor under PWD (Roads) Division. A Notice Inviting Tender (NIT) was issued by the respondent No.3, i.e. the Chief Engineer, PWD (R) dated 26.12.2016 for construction of roads from DMB Hill Road to Bhuban Nagar via Panichaki Khasia Punjee including 2 nos. of RCC bridge (Ch.0.00 m to 1000.00 m) under RIDF-XXII of NABARD under PWD, Silchar Rural Road Division

for the year 2016-17, Package No.Cachar/RIDF-XXII/07 at a Bid price of Rs.3,04,13,271.00p. The said NIT when issued, the Act of 2003 was in effect. The petitioner submitted his bid along with others and while submitting his bid, the petitioner added existing rate of 5% VAT in his quotation. After the evaluation of all bids which includes financial bids, the respondent No.3 accepted and approved the bid of the petitioner at a Bid value of Rs.3,04,13,271.00p. Thereupon, the administrative approval was affirmed through sanctioning order No.RBPC/97/2016/Pt-III/27 dated 11.04.2017 with certain conditions. The petitioner claim that one of the conditions for deduction of Tax is under the Act of 2003 which stipulated that Tax admissible under the Act of 2003 would be deducted and deposited into to Government account through Treasury Challan as per Rule. Thereupon, an agreement was entered into by and between the respondent No.3 with the petitioner and on 19.08.2017, the work order was issued. The petitioner after receipt of the work order dated 19.08.2017 started work as per work schedule and employed his men and machinery for completion of the awarded works under the agreement. It is also seen from the materials on record that the Central Government issued notification dated 22.08.2017 for imposition Goods and Services Tax Act by notifying that 6% of the tax is leviable by the Central Government towards works contract and the State Government is also empowered to levy 6% tax towards contract works. Therefore, total 12% tax was imposed. It is the case of the petitioner that the respondent authority released the running account bills by deducting 12% GST under the Act of 2017 instead of 5% as per the Act of 2003. The petitioner raised objection against such deduction of tax under the Act of 2017 instead of tax under the Act of 2003 but the respondent authorities rejected such objections for which the instant writ petition was filed. At paragraph No.9 of the writ petition, the petitioner specifically mentions that by deducting 12% GST from the bills an additional amount of Rs.15,32,126.00 had been deducted from the bills of the petitioner.

4. The reliefs sought in the writ petition is also relevant to take note of in as much as



the petitioner sought for a declaration that the respondent authorities should deduct tax under the Act of 2003 from each RA of bills as well as from the final bills; for refund of an amount of Rs.15,32,126.00 to the petitioner with interest and in the alternative, if the petitioner is liable to pay the GST on his invoices, a direction be issued to reimburse the additional amount deducted under the GST with interest.

5. Before proceeding further, this Court however finds it relevant to take note of some of the terms and conditions of the NIT. The Preamble which has been enclosed and more particularly, Clause 3 to the writ petition reveals that the rates and prices tendered in the prices Bill of Quantities shall, except in so far as it is otherwise provided under the contract, shall include all Impale plant, labour, supervision, materials, erection of display board, sign/caution board, maintenance during Imp, insurance, profit, taxes and duties, together with all general risks, liabilities and obligations set out or implied in the Contract. Clause 5 of the said Preamble stipulates that the rate or a price shall be entered against each item in the Bill of Quantities, whether quantities are stated or not. The cost of items against which the Contractor has failed to enter a rate or price shall be deemed to cover by other rates and prices entered in the Bill of Quantities. The rate should be quoted considering all the taxes. Clause 10 stipulated that income tax, Labour Cess, AVAT would be deducted from each bill of the Contractor as per the Prevailing rate.

WP(C) No.7169/2018

6. The petitioner herein is a registered Contractor in General Category under Hailakandi Municipal Board, Hailakandi. Pursuant to a Short Tender Notice dated 07.09.2015 issued by the Executive Officer, Hailakandi Municipal Board inviting sealed tenders from the eligible registered contractors under the Hailakandi Municipal Board, the petitioner submitted his tenders against the Group Nos. 2, 3, 4, 5, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 28, 29, 32, 42, 43, 44 and 45 of the Tender Notice dated 07.09.2015. The petitioner was issued a letter of acceptance on 20.02.2016 by the Respondent No.6 thereby allotting the works against the Groups to the petitioner for

execution under the Chief Minister's Special Package Scheme within the Hailakandi Municipal Board. It was mentioned that the Letter of Acceptance will be valid and after acceptance of the formal tender agreement. The time for completion of the work was fixed as six months by the Respondent No.6 from the date of issuance of the formal letter to proceed with the work and the payment for the work would be made when the fund would be available with the Board & on good progress of the work. Thereupon on 20.02.2016, the formal agreement was signed between the petitioner and the Hailakandi Municipal Board. Pursuant thereto, the notice to proceed with the work was issued on 24.02.2016.

7. From a further perusal of the writ petition it reveals that the petitioner asserts that he has completed 100% in respect to some groups and partially completely in respect to other groups. It is also noteworthy to mention that on 01.07.2017, the Act of 2017 was brought into effect and the tax percentage which was applicable was increased from 5% to 12% as already above stated. It is the further case of the petitioner that in view of coming into effect of GST, the tax rate increased by 7% which was not incorporated in the total cost price by the petitioner at the time of his submission of the tender, and as such, the petitioner would be entitled to the said amount, i.e. the additional burden of 7% on account of the GST. In that regard, representation was submitted by the petitioner to the respondent authorities. However, the respondent authorities having not accepted the same, the instant writ petition was filed seeking for a direction that in view of the new enactment of the Act of 2017, the petitioner is legally entitled to add the additional amount of tax to his contract bills as fixed vide work order dated 24.02.2016; a direction to calculate the differential tax amount in view of the tax under the Act of 2017 and accordingly load the same to the total contract work of the petitioner vide the work order dated 24.02.2016 and for a direction to the respondents to include the additional tax amount in the bills raised by the petitioner.

8. This Court finds it relevant to take note of Annexure-2 to the writ petition which is

the notice inviting tender. It was mentioned that VAT and Income Tax registration, up to date contractor registration, up to date labour license and other particulars are to be submitted along with the tender without which no tender will be considered. It was also mentioned that VAT, Income Tax, Forest Royalty & labour welfare cess etc. as per Government norms will be deducted from the contractors' bill. It is however relevant to take note of that the rest of the tender documents containing the various terms and conditions are not the part of the writ petition.

9. It is relevant to take note of that pursuant to the filing of the instant writ petition, this Court vide an order dated 09.10.2018 issued notice. This Court further in the interim directed that no coercive action shall be taken by the respondents regarding payment of the GST.

10. The records further reveal that an affidavit-in-opposition was filed by the Commissioner of Taxes. In the said affidavit reference was made to a Circular No.3/2017-GST dated 24.08.2017 as well as the Circular No.6/2017_GST dated 05.09.2017. Both the Circulars have been enclosed as Annexure-A and Annexure-B to the said affidavit.

11. From a perusal of the Circular No.3/2017-GST dated 24.08.2017, it reveals the following:-

(a) As regards the works contract executed upto 30.06.2017 and the bills/invoices etc. also have been raised on or before 30.06.2017, but the payment is pending or made on or after 01.07.2017, then in such cases, the deduction of the tax at source will be made as per the provisions of Section 47 (1) of the Act of 2003. The applicable tax shall be either 15% of the taxable turnover or 5% of the gross turnover. It was also mentioned that the provisions of deduction of tax at source under the Act of 2017 shall not apply.

(b) In respect to work contract executed upto 30.06.2017 but the bills/invoices etc

have been raised on or after 01.07.2017, i.e. during GST period and the payment is also pending or made on or after 01.07.2017, then in such circumstances, deduction of tax at source will be made as per the provisions of Section 51 of the Act of 2017 since two events, i.e. raising of the invoice and payment arose under the GST regime. The transaction cannot be accounted for under the Act of 2003. It was also mentioned that the applicable rate for deduction of tax at source shall be 1% under the Central Goods and Service Tax Act, 2017 (CGST) and 1% under the Act of 2017 in the case of intra-State supply or 2% under the Integrated Goods and Service Tax Act, 2017 (IGST) in the case of inter-State supply. It is also mentioned that such contractors shall remain liable to pay balance tax as per the rate of tax applicable under the GST law and the provision of deduction of tax at source under the Act of 2003 shall not apply.

(c) In case of work contract partially executed on or before 30.06.2017, i.e. during the period when the Act of 2003 was in force and the balance was being executed on or after 01.07.2017 during the GST regime, then in case of supplies of goods, which were partially made on or before 30.06.2017, there can be two situations. The First would be in case of bills/invoices were raised before GST, deduction of tax at source (TDS) will be made as per provision of the Act of 2003 and in respect of bills/invoices raised after GST, TDS would be made as per the provision of the relevant GST Act. It was further mentioned that work contract which was partially executed on or after 01.07.2017 and the invoices were raised during the GST regime and the payment was received during the GST regime it was stipulated that since the transaction was not accounted for under the Act of 2003, the TDS will be made as per the provisions of the relevant GST Acts. The said Circular No.3/2017-GST also dealt with the supply of goods/services and from the said, the following transpires:-

(i) Supply of goods made upto 30/06/2017 and the bills/invoices etc. also

have been raised on or before 30/06/2017 (during VAT period) but the payment is pending or made on or after 01/07/2017:

In respect of such payment, deduction of tax at source will be made as per the provisions of section 47(3) of the Assam VAT Act.

(ii) Supply of goods made upto 30/06/2017 etc but bills/invoices etc have been raised on or after 01/07/2017 (during GST Period) and the payment is pending or made on or after 01/07/ 2017:

In respect of such payment, deduction of tax at source will be made as per the provisions of Section 51 of the Assam GST Act, 2017.

(iii) Supply of goods partially made on or before 30/06/2017 (during VAT period) and partially made on or after 01/07/2017 (during GST regime):

In case of supplies of goods, which were partially made on or before 30/06/2017 (during VAT period), there can be two situations:

A. Bills/invoices were raised before GST: TDS will be made as per provision of the VAT Act, as mentioned in para (i) above relating to supply of goods or services.

B. Bills/invoices were raised after GST: TDS will be made as per provision of the GST Act, as mentioned in para (b) above relating to supply of goods or services.

In case of supplies partially made on or after 01.07/2015(during GST regime), and invoices are raised during GST regime and payments are received during GST period.

(iv). Supply of goods and or services during post GST regime i.e., on or after 01/07/2017:

In case of supplies of goods or services, which are exclusively made on or after 01/07/2017 (during GST period) and invoices/bills are also raised during GST period, TDS will be made as per provisions of the GST Act, as

mentioned in para (ii) above, relating to supply of goods or services.

12. This Court further finds it relevant to take note of Circular No.6/2017-GST dated 05.09.2017 which also relates to the deduction of tax at source in respect of work contract and supplies. From the said Circular No.6/2017-GST, it reveals that it was issued pursuant to receiving large number of communication from the field formation, tax consultant etc. citing variation in the interpretation of the Circular No.3/2017-GST dated 24.07.2017 in respect of rate of tax under GST on works contract. Under such circumstances, for the purpose of bringing uniformity in the implementation of the GST Acts, certain clarifications were issued. It was stipulated therein that under GST, work contract is considered as a composite supply of services by virtue of entry 6 (a) of Schedule-II of the Act of 2017. The effective rate of tax for a works contract shall be either 12% or 18%, as the case may be. However, irrespective of such rate of tax, the applicable rate for deduction of tax at source shall be Act of 2017 @ 1% and CGST @ 1% in case of intra-State supply or IGST @ 2% in case of inter-State supply.

13. This Court further finds it relevant to take note of that during the course of hearing, it was brought to the notice of this Court that a circular was issued by the Principal Secretary to the Government of Assam, Finance Department whereby the DDOs of the Government Departments/undertaking/agencies/local authorities were directed to make the payment to the works contractors or suppliers without deducting GST in respect of such work contracts or supplies which fall under the purview of the GST till such date was notified by the Government. It was however mentioned that the contractors/suppliers shall deposit the full amount of GST in respect of such work contracts/supplies where no deduction of tax at the source has been made by the DDOs. The said direction issued by the Principal Secretary to the Government of Assam, Finance Department assumes importance in view of the fact that in most of the writ petitions, no deduction of GST has been made till date as submitted by the learned counsels for the petitioners in the batch of writ petitions.



WP(C) No.1610/2019

14. The petitioner herein is a registered Contractor in General Category under Hailakandi Municipal Board, Hailakandi and pursuant to a short Tender Notice dated 05.08.2015 issued by the Executive Officer, Hailakandi Municipal Board inviting sealed tenders from the eligible registered contractors under the Hailakandi Municipal Board, the petitioner participated in the said tenders against the Group No. C & D for Construction of Storm Water Drainage (Drains & Culverts) at Hailakandi Town (Phase1) under UIDSSMT Scheme for the drains marked D-4, D-4-1, New D-4-111, New & D-9 of Length-1292.21 M and Construction of Storm Water Drainage (Drains & Culverts) at Hailakandi Town (Phase-1) under UIDSSMT Scheme for the drains marked D-13, D15V & D-17 of Length-1130.52 M. The petitioner was issued a Preliminary Work Order by the Respondent No.8 vide the letter dated 02.03.2016 in favour of the petitioner. On the very date, a tender agreement was also entered into. It is claimed by the petitioner that the petitioner completed 75% of the total works and have received an amount of Rs.47,57,139.00 in three installments. It is the case of the petitioner that in respect to the first installment he received, tax under the Act of 2003 was deducted. However, for the remaining two installments as well as in respect to the remaining amount yet to be received he would have to pay GST in view of the Circular No.3/2017-GST. As per the petitioner after the GST law has been pressed into application w.e.f 01.07.2017, the percentage of tax now applicable is higher than as it was earlier under the VAT regime.

15. It is the case of the petitioner that the work order which was for an amount of Rs.1,82,80,946.00p was only inclusive of VAT and it did not contemplate such percentage of change in the tax rate and therefore as the petitioner is now required to pay more, in view of the subsequent enactment of new Law, the authorities at Municipal Board, Hailakandi will have to reimburse the additional amount of tax to the earlier work orders cost amount of Rs. 1,82,80,946.00. In that regard, the petitioner has submitted representation before the authorities for inclusion of the GST tax in the bills

raised by the petitioner. However, as the respondent authorities have not taken away steps, the instant writ petition was filed seeking a declaration that the petitioner is legally entitled to add the additional burden of tax to his contract bills as fixed by work order dated 02.03.2016 in respect to both the work orders and also for a writ of mandamus directing the respondents to include the GST tax amount in the bills raised by the petitioner. The record reveals that this Court vide an order dated 11.03.2019 issued notice and in the interim directed the respondents not to any coercive steps against the petitioner for non-payment of the GST against the contract bills. It was further observed that pendency of the writ petition shall not be a bar for the petitioner to pay the GST dues.

WP(C) No.3694/2019

16. The petitioner herein a registered Class 1(B) contractor registered with the Government of Assam and the PWD Department. Pursuant to a bid, the petitioner was allotted certain works under the Jorhat Rural Roads Division under the Executive Engineer, PWD (Roads), Jorhat Rural Roads Division. Two of these works which are the subject matter of the present petition are (i) the construction of road from Hatimuria to Kamar Gaon Tiniali via Bhuyanhat Gaon, (from Ch 2312.00m to Ch 3019.00m, L=.707 Km) under A.P. (SCSP Area) for the year 2015-16, Mariani LAC and (ii) construction of Bhogpur Satra Approach Road (from Ch 0.00 m to Ch 1026.00m) under RIDF-XXII of NABARD for the year 2016-17). The work at Sl. No. (i) was allotted on 16.02.2016 and in respect to the work at Sl. No.(ii) on 20.06.2017 which were prior to the commencement or implementation of GST regime in the State of Assam. The petitioner states that in respect to the work at Sl. No.(i), there was deduction of tax under the Act of 2003 in respect to the payment made on 31.05.2017 but in respect to the other amounts so received pertaining to the said work there was no deduction of tax under Act of 2003. As regards the work at Sl. No.(ii), the authorities have not deducted any tax under VAT. The petitioner apprehends that on the basis of the Circular No.3/2017-GST,

the petitioner would be imposed tax @ 12% in respect to both the contracts when the bill were raised with the coming into effect of the respective Acts of GST for which the instant writ petition has been filed challenging the Circular No.3/2017-GST as well as also issuance of a direction upon the respondent authorities not to deduct tax under the GST w.e.f. 01.07.2017 in respect to the two works or in the alternative seeking a direction upon the respondent PWD to revise the work estimate value by adding the GST amount of 7% differential tax.

17. Pursuant to the writ petition being filed, this Court vide an order dated 19.06.2019 issued notice and the petitioner was further directed to deposit the admitted amount of Rs.5,56,758.00 payable to the Finance Department of the State and any balance amount of the GST payable by the petitioner involved was made subject to the outcome of the writ petition .

WP(C) No.7571/2019

18. The instant writ petition has been filed by the petitioner who is Class I(A) Contractor registered with the Government of Assam and the PWD (Roads & Building) Department. The petitioner was allotted works under the Prime Minister Gramin Sarak Yojna (RCIP-I), package No.AS-05-81 for construction of road from 3rd km of B.S. Road at Jogirmal to Salmara, under the Executive Engineer, PWD, Dhubri Rural Road Division and final work order was issued on 25.12.2013 by the Chief Engineer, PWD (Roads), Assam. The total value of the work was Rs.3,48,19,661.00p. It is claimed by the petitioner that the petitioner received running account bills from the PWD department after deducting tax under the Act of 2003 @ 5% from the respective bill amount as at the relevant point of time, when the Act of 2003 was applicable. The petitioner completed the work on 17.11.2017 and the final payment of Rs.32,86,633.00p was released in favour of the petitioner on 01.11.2017 without deducting tax from the bill amount and the petitioner was asked to pay GST applicable @12% over the said amount.

19. Similarly, the petitioner was also allotted a work for improvement of approach road to the proposed permanent Ro-Ro service (Dhubri-Hatsingimari) Ghat under IWAI under the Executive Engineer, PWD, Dhubri Rural Road Division and issued final work order dated 11.09.2017 by the Chief Engineer, PWD (Roads), Assam. The total value of the work was Rs.1,23,30,278.00p. Upon received of the final work order, the petitioner started the work and claims that the petitioner received R/A bills from the PWD after deducting VAT @ 5% from the respective bill amount as at the relevant point of time, the VAT was applicable. At this stage, this Court finds it relevant to observe that the said statement made in the writ petition is contrary to the GST scheme and circular in as much as if the work order was issued on 11.09.2017, how there could be deduction of tax under the Act of 2003, that too, when the Act of 2017 and the CGST came into effect from 01.07.2017. The petitioner further claimed that the petitioner completed the work and the payments were by made by the PWD in two installments, i.e. Rs.41,24,981.00p on 21.01.2018 and Rs.45,19,101.00p on 15.03.2018 respectively in favour of the petitioner without deducting tax under the Act of 2023 from the bills amount and the petitioner was asked to pay GST @ 12% over the said amount.

20. It is also seen from the perusal of the writ petition that apart from those two works, the petitioner was also allotted the work for construction of road from Chakrashila PMGSY road to NH-31 under RIDF-XXI of NABARD, Package No.DHUBRI/RIDF-XXI/54, under the Executive Engineer, PWD (Roads), Dhubri Rural Road Division for a bid price of Rs.1,27,50,000.00p. The work order was issued on 02.03.2016 in favour of the petitioner. It is claimed by the petitioner that the petitioner received certain R/A bills from the PWD after deducting tax @ 5 % under the Act of 2003 from the respective bill amount. Thereupon the final payment of Rs.65,87,324.00 was released in favour of the petitioner on 31.03.2018 without deducting tax under the Act of 2003 from the bill amount and the petitioner was asked to pay GST @ 12% over the said amount.

21. In a similar manner, the petitioner was also was allotted the work for construction

of two storied Circuit House at Bilasipara including electrical works under the Executive Engineer, PWD (Building), Dhubri Building Division for a contract price of Rs.1,53,06,796.00p. On 19.09.2012 the petitioner was issued a letter of acceptance and the petitioner was requested to deposit a sum of Rs.8,48,000.00 as security deposit within a period of 15 days. Thereupon the petitioner was issued the work order. The petitioner started the work and received running account bills after deduction of tax under the Act of 2003 @ 5% from the respective bill amount. The said work has been stated to have not been completed and on 31.03.2018, another R/A bill amount of Rs.62,68,630.00p was released in favour of the petitioner without deducting tax under the Act of 2003 from the bill amount and the petitioner was asked to pay GST @ 12 % over the said amount. It is the case of the petitioner that as during the continuation of the work the GST was implemented, the respondent authorities should be directed to revise the work estimate in respect to the five works mentioned herein above by incorporating the contract value extenuation caused due to imposition of 7% tax differential on account of the application of the GST regime. The petitioner has also sought for other reliefs. The Circular No.3/2017-GST has also been put to challenge in the instant writ petition.

22. It reveals from the records that this Court vide an order dated 04.10.2019 issued notice. The petitioner was allowed to deposit the admitted amount of Rs.14,05,233.00. However, it was also observed that as regards the balance amount alleged to be due to be paid by the petitioner, the same would be subject to the outcome of the writ petition and no coercive action should be initiated against the petitioner as regards the balance amount.

WP(C) No.8628/2019

23. The petitioner herein is a registered Class I(A) Contactor registered with the Government of Assam and the PWD (Roads & Building) Department. The petitioner herein was allotted various works details of which are as under:

(i) A contract for improvement of Dhubri Jagrarpur Gauripur Road under SPA for Development Programme of Riot affected areas under Dhubri district for 2012-13, Phase-I (From Ch.2000.00m to Ch.6820.00m including conversion of SPT Br. No.6/1 to RCC Bridge) under the Executive Engineer, PWD, Dhubri Rural Road Division by issuance of a final work order bearing on 21.09.2013. The value of the work is Rs.5,14,73,672.00p. The petitioner received the running account bills in respect to the said work and prior to the implementation of GST, the respondent authorities deducted tax @ 5% under the Act of 2003. After successful completion the received the final payment of Rs.2,29,57,300.00p and the same was released on 26/03/2019 without deducting tax under the Act of 2003 from the bill amount and the petitioner was directed to pay GST applicable @ 12% over the said amount.

(ii) The petitioner was awarded the work for construction of improvement of S. K. Road to Banigram (road length 4 Kms) under Chief Minister's special package for Barak Valley During 2013-14 under the Executive Engineer, PWD, Silchar Rural Road Division and final work order was issued on 21.05.2014. The total value of the work is Rs.2,35,13,384.00p. The petitioner received the R/A bills prior to coming into effect of the GST after deducting of tax @ 5% under the Act of 2003. The petitioner successfully completed the work and received the final bill payment on 20.03.2019 for Rs.39,38,495.00 in favour of the petitioner without deducting tax under the Act of 2003 from the bill amount and the petitioner was asked to pay GST @ 12% over the said amount.

(iii) The petitioner was issued another work by the Mission Director for construction of Community Health Centre Model Hospital including residential quarters at Jaleswar in Goalpara district under NRHM on turnkey basis at a bid price of Rs.4,69,62,300.00p. The final work order was issued on 08.04.2013. The petitioner received his R/A bills from the Mission Director after deducting tax @

5 % under the Act of 2003. Thereupon, the final payment was made in two installments, i.e. Rs.76,83,544.00p without deducting any tax under the Act of 2003 from the bills and the petitioner was asked to deposit 12 % GST.

(iv) The petitioner was awarded the work for construction of Community Health Centre (Model Hospital) including residential quarters, Grade-I at Fakirganj in Dhubri district (balance work under NHM for the bid value of Rs.1,95,74,610.00. The final work order was issued on 21.03.2017 in favour of the petitioner. The petitioner completed the said work and received the final payment on 21.08.2018 of an amount of Rs.83,02,635.00 without deducting tax under the Act of 2003 from the bills and the petitioner was asked to deposit 12 % GST on the said amount.

24. The petitioner herein similar to other writ petitioners challenged the Circular No.3/2017-GST and had also sought for a mandamus directing the respondent authorities to revise the work estimate value in respect to the contract works awarded to the petitioner and simultaneously deduct the enhancement value in order to meet/equalize the differential in the higher tax on the Book of the State Exchequer.

25. It reveals from the records that this Court vide an order dated 22.11.2019 issued notice and in the meantime directed no coercive action shall be taken against the petitioner till the next date.

WP(C) No.9052/2019

26. The petitioner herein is a registered Class 1(B) Contactor, registered with the PWD (Roads) Department, Government of Assam. The petitioner was awarded two contracts the details of which are as under:-

(i) The petitioner was awarded the contract for work for the improvement of Repair and Rehabilitation of Sualkuchi Phulbari Pahar Road (E & D) office bye lane for the year 2015-16 under the Executive Engineer, PWD (R), Guwahati

Road Division and was issued work order on 24.12.2015 by the Superintending Engineer, PWD (Roads), Guwahati Road Circle. The total value of the work was Rs.6,02,895.00p. The petitioner completed the work and received the final payment of Rs.5,45,902.00p on 28.05.2018 without deducting tax under the Act of 2003 from the bill amount and the petitioner was asked to deposit @ 12% GST over the said amount.

(ii) The petitioner was allotted the work for the construction of Improvement of Road from 7 No. Issadgharia L.P. School to Rangia Hajo Road (Ch.0.00m to Ch.1160m) under A.P. (General Area) for the year 2015-16 Rangia LAC under Executive Engineer, Rangia Rural Road Division and was issued the final work order on 24.02.2016 by the Superintending Engineer, PWD (Roads), Guwahati Road Circle. The total value of the work was Rs.47,99,974.00. The petitioner received two R/A bills from the PWD Department amounting to Rs.17,92,584.00p on 10.07.2017 and Rs.16,98,015.00p on 28.02.2018 after deducting GST @ 12% from the respective bill amount as at the relevant point of time GST was applicable in the State of Assam. The petitioner thereupon completed the said work and received the final payment of Rs.13,08,741.00p without deducting any tax from the bill amount and the petitioner was asked to pay 12% GST on the said amount.

27. The petitioner herein also like the earlier writ petitioners has challenged the Circular No.3/2017-GST and also sought for a direction upon the respondent authorities to prepare a revised work estimate value in respect to the said work invoking price escalation Clauses due to the imposition of 7% tax differential on account of the application of the GST regime and simultaneously deduct the enhancement in value to meet/equalize the differential in the higher tax on the Book of the State Exchequer.

28. Pursuant to the filing of the instant writ petition, this Court issued notice and in the interim observed that the balance alleged to be due to the petitioner, the same shall be

subject to the outcome of the writ petition and no coercive action shall be initiated against the petitioner as regards the balance amount.

29. As already observed herein above, the Respondent in the Finance and Taxation Department of the Government of Assam through the Commissioner of Taxes had filed an affidavit-in-opposition in WP(C) No.7169/2018. The details of which have been already referred herein above. It was submitted by the learned counsel appearing on behalf of the Finance and Taxation Department of the Government of Assam that the said affidavit be taken as the stand of the Finance and Taxation Department of the Government of Assam in respect to all other writ petitions. The other Respondents under whom the contracts were executed did not file them affidavit-in-oppositions inspite of the fact that these writ petitions have been pending since 3 to 4 years. This Court expresses great displeasure at such indifference shown by those Departments for reasons best known.

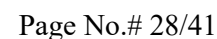
30. This Court has duly heard the learned counsel for the parties and also perused the materials on record. The two primary issues have already been delineated above. To recapitulate the same, the first pertains to as to whether the Circular No.3/2017-GST is required to be interfered with. The second would arise, if the first is decided against the petitioner, i.e. to whether the petitioners herein would be entitled to claim the differential 7% increase in the tax on account of the GST from the respondent authorities.

31. Let this Court first analyze the challenge made to the Circular No.3/2017-GST. From the pleadings as well as the contentions of the learned counsel for the petitioners it reveal that the Circular No.3/2017-GST dated 24.08.2017 had been challenged merely on the ground that the NITs were invited and the contracts were entered into prior to the implementation of the GST regime and the petitioners while submitting their rates had taken only the tax component as prevalent at that time, i.e. 5% on the gross turnover, and as such, the said impugned Circular which imposes a higher amount of tax element had been challenged on the ground that it is s patently unfair and arbitrary.

32. On the other hand from the affidavit-in-opposition filed by the Commissioner of Taxes in WP(C) No.7169/2018, it reveals that the tax liability arises on happening of a taxable event, i.e. supply of goods/services. It was mentioned that even if the agreement is made prior to 01.07.2017, the liability to pay GST will arise at applicable rate, if the invoice is raised and payment received during GST regime, i.e on or after 01.07.2017. It was the specific stand in the affidavit that in respect to the works contract if bills/invoices etc. were raised on or before 30.06.2017, but the payment is pending or made after 01.07.2017, then the deduction of tax would be made as per the provisions of the Act of 2003. However, in respect to the works contract executed upto 30.06.2017, but bills/invoices etc. have been raised on or after 01.07.2017 and the payment is also pending or made after 01.07.2017, then in such cases, the deduction of tax at the source will be made as per the provisions of Section 51 of the Act of 2017 and CGST since the two events, i.e. raising of the invoice and payment of the supply arises under the GST regime. It was also mentioned that in respect to the works partially executed on or before 30.06.2017 and the balance would be executed on or after 01.07.2017, then in such cases two situations arises of which in respect to those bills and invoices raised before GST, tax would be deducted as per provision of the Act of 2003. But in respect Bills/invoices were raised after GST, tax would be deducted as per provision of the Act of 2017 and CGST and the tax would have to be paid as per the Act of 2017 and CGST. Similar is also in the case of supply of goods/services as detailed out at paragraph No.11 hereinabove.

33. To deal with the above aspect of the matter, this Court finds it relevant to take note of the provisions of the Act of 2017 as well as CGST, both these Acts came into operation w.e.f. 01.07.2017. The said Acts were made for levy and collection of tax on intra-State supply of goods or services or both by the State of Assam and Union respectively and matters connected therewith or incidental thereto.

34. Section 12 & 13 of the said Act of 2017 and CGST are pari-materia. Being



relevant for the purpose of deciding as regards the legality and validity of Circular No.3/2017-GST dated 24.08.2017, the same requires to be looked into. Section 12 relates to time of supply of goods whereas Section 13 relates to time of supply of services. For the purpose of the instant case and taking into account the facts involved, Sub-Section (1) and (2) of Section 12 and Sub-Section (1) and (2) of Section 13 of the Act of 2017 are quoted herein below:-

“12. (1) The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of goods shall be the earlier of the following dates, namely:-

(a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or

(b) the date on which the supplier receives the payment with respect to the supply:

Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.

Explanation 1.— For the purposes of clauses (a) and (b), "supply" shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.

Explanation 2.— For the purposes of clause (b), "the date on which the supplier receives the payment" shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.

13. (1) The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of services shall be the earliest of the following dates, namely:—

(a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or



(b) the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or

(c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:

Provided that where the supplier of taxable service receives an amount upto one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation.— For the purposes of clauses (a) and (b)-

(i) the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;

(ii) “the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

35. A perusal of the above quoted provisions would show that Section 12 relates to time of supply goods. As per Sub-section (1) of Section 12, the liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of the said section. Sub-section (2) of Section 12 stipulates that the time of supply of goods shall be the earlier of the following dates, namely, (a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or (b) the date on which the supplier receives the payment with respect to the supply.

36. Section 13 is in relation to time of supply of services. Sub-section (1) of Section 13 stipulates that the liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of Section 13. Sub-section (2) of Section 13 stipulates the time of supply of services shall be the earliest of the dates stipulated in sub-clauses (a), (b) and (c). Sub-clause (a) stipulates that the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or (b) the date of

provision of service, if the invoice is not issued within the period prescribed under Sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or (c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of Sub-clause (a) or clause (b) do not apply.

37. A conjoint reading of the provisions of Sections 12 & 13 and more particularly Sub-section (1) of both the Sections 12 & 13, it would reveal that liability to pay tax on service shall arise at the time of supply in the manner to be determined in terms with the succeeding sub-sections of Section 12 & 13 respectively. It would therefore be seen that if the invoice is issued and the payments are received on 01.07.2017 or subsequent thereto, liability to pay tax arises under the Act of 2017 and CGST for intra-State supply of goods and services.

38. In the backdrop of the above, if this Court takes note of the Circular No.3/2017-GST, it would clearly show that if the invoice in respect to works contract was/were issued prior to the coming into effect of the Act of 2017 and CGST, even if the payment was made subsequently, then it would not be a case coming under the ambit of the Act of 2017 and CGST for which deduction of tax would have to be made in terms with the Act of 2003. However, if it is a case where invoice(s) in receipt to works contract had/have been issued subsequent to the coming into effect that Act of 2017 and CGST, i.e. w.e.f. 01.07.2017 and thereupon the payments are being made, then in that case, the liability accrues under the Act of 2017 and CGST and the imposition of tax and deduction of tax is therefor to be made in terms with the Act of 2017 and CGST. The said aspect of the matter was further clarified in the Circular No.6/2017-GST dated 05.09.2017 wherein it was stipulated that works contract would be considered as supply of services on the basis of Schedule II of the Act of 2017.

39. In that view of the matter, it is opinion of this Court that the Circular No.3/2017-GST dated 24.08.2017 is in accordance with Sections 12 & 13 read with Clauses 6 of Schedule II of the Act of 2017 and merely on the ground that it had caused

inconvenience to the petitioners, the same cannot be a ground for interfering with the said impugned Circular No.3/2017-GST dated 24.08.2017.

40. In the backdrop of the above, it is the opinion of this Court that the petitioners herein would be liable to pay GST in respect to the payment received as well as receivable pertaining to the works in question where invoices were raised after 01.07.2017. Under such circumstances, let this Court take up the next issue as to whether the petitioners herein would be entitled to claim an additional 7% from the concerned respondent authorities who have awarded the contracts on account of the increase in the tax element due to the implementation of GST. At the outset, this Court finds it relevant to take note of that from the materials placed before this Court by the petitioners, the terms under which the petitioners were awarded the contracts in question, more particularly as to what constituted the price at which the contracts were awarded could not be ascertained due to non-placing of documents forming the contract. At the same breath, this Court finds it relevant to observe that had the Respondents filed their affidavits, then the said would have been more helpful in aiding to the cause of justice. Be that as it may, it is not clear as to whether the contract price at which the contracts have been awarded to the petitioners were inclusive of all taxes and dues etc. or exclusive of taxes. However, it is relevant to take note of that in the affidavit filed by the respondent Commissioner of Taxes, there is a mention that in respect to the writ petitioner in WP(C) No.7169/2018, the value of the works contract was inclusive of VAT. This aspect of the matter would be further dealt with at a subsequent stage of the instant judgment.

41. The primary facts which could be ascertained from a perusal of the writ petitions and the documents enclosed are that the petitioners in the present batch of writ petitions were awarded certain contracts and at that point of time, the Act of 2003 was holding the field. It further reveals from the contentions so raised by the learned counsels for the petitioners that with the coming into effect of the Act of 2017 and CGST, the GST in

respect to such contracts became 12% and under such circumstances, this additional 7% of the GST eats into the profits of the petitioners for which the payment of the additional tax on account of the GST would lead to losses. Under such circumstances, the petitioners are to be reimbursed the additional burden of tax by including the same in work estimate.

42. At this stage, this Court finds it relevant to take note of the provisions of Section 64A of the Sale of Goods Act, 1930 (for short, ‘the Act of 1930’). The said Section is quoted herein below:-

“64A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.—

(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,—

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) *The provisions of sub-section (1) apply to the following taxes, namely:—*

(a) *any duty of customs or excise on goods;*

(b) any tax on the sale or purchase of goods."

43. A perusal of Sub-section (1) of Section 64A reveals that if any of the enumerated at Sub-section (2) of Section 64 A is “imposed, increased, decreased or remitted” in respect of goods governed by the contract in consideration, certain consequences follow. Dissected thus, the said provision deals with four specific situations, i.e. (i) imposition

of new taxes; (ii) increase in existing taxes; (ii) decrease in existing taxes or (iv) refund of taxes provided that such imposition, increase, decrease or refund specifically relates to goods which are the subject matter of the contract and takes affect after the contract comes into being. In such cases as per sub-clause (a) of Sub-Section (1) of Section 64A operates to provide that the seller would be entitled to recover the newly imposed or increased tax from the buyer and Clause (b) of Sub-section (1) of Section 64A enables the buyer, as the case may be, to claim the benefit from the seller of the remission or decrease in the tax. In other words, both Clauses (a) and (b) confer (i) respective rights of the entitlement to the seller or buyer, as the case may be to claim price adjustment on account of change in the tax incidence and also confer (ii) the right to sue the other party for failing to give effect to the right created. Therefore, in the event of Clause (a) or (b) of Sub-section (1) of Section 64A become applicable, it does not remain a mere choice but a legal right accrues to the buyers or the sellers as the case may be to seek adjustment with the change in tax incidence in relation to the goods being sold.

44. The Constitution Bench of the Supreme Court in the case of ***Chhotabhai Jethabhai Patel and Co. vs. Union of India***, reported in ***AIR 1962 SC 1006*** had the occasion to consider the application of Section 64A of the act of 1930 in the context of a new levy of excise duty. It was observed by the Constitution Bench that the object of the said provision is that when the contract for the sale of goods are entered into and the price payable therefor determined on the basis of existing rates of duty - either of excise or of customs - neither party shall be prejudiced or advantaged by reason of the increase or decrease of the duty. In paragraph No.22, the Supreme Court explained the scope and ambit of Section 64A of the Act of 1930 and the same is quoted herein below:-

“22. It will be seen that Section 64-A is in two parts : the first clause (a) dealing with the case of an increase in duty and conferring on the seller the right to recover the amount of the increased duty from the buyer, and the second limb clause (b) making provision regarding the correlated case of a reduction in the duty with corresponding rights to the buyer to obtain the benefit of a reduction. Whatever argument might be raised based upon the language of the

second limb of the section, it is not open to doubt that in the case of an increase in duty, the seller would be entitled to recover the duty from the buyer provided : (a) there was no contract to the contrary by which he had precluded himself from claiming such enhanced duty i.e. the contract having negative or limited the seller's right to prefer such a claim, or was at least silent as regards what was to happen in the event of the duty being increased, (b) the change in the rate of duty was effected after the date of the contract. In these circumstances, it appears to us that there might not be even a factual basis for the complaint of Learned Counsel for the appellants that in the case of a retrospective increase in duty, the duty ceases to be a duty of excise by becoming a "direct" tax because it was incapable of being passed on. The answer of Learned Counsel to this point regarding the operation of Section 64-A of the Sale of Goods Act was merely that the Court could not take account of the provisions of another statute for dealing with the validity of a provision of the Finance Act, 1951. This submission has no force at all because Section 64-A of the Sale of Goods Act refers in express terms to "duties of excise" and has, therefore, to be read as part and parcel of every legislation imposing a duty of excise. In view of our conclusion, however, that the duty in the present case, notwithstanding its imposition with retrospective effect, and even if it be that it was incapable of being passed on to a buyer from the taxpayer, was a duty of excise within Entry 84 as properly understood it is not necessary to rest it upon this narrower ground."

45. It is pertinent to note from the above observations that there are two pre-conditions which are required to be fulfilled for the purpose of invoking the provision of Section 64A of the Act of 1930 as held by the Constitution Bench of the Supreme Court. First, that there was no contract to the contrary by which either the seller had precluded himself from claiming such enhanced duty, i.e. the contract having negative or limited the seller's right to prefer such a claim, or at least silent as regards what was to happen in the event of a duty being increased. The second pre-condition is that the change in the rate of duty was affected after the date of the contract.

46. This very provision of Section 64 A of the Act of 1930 was relied upon by the Supreme Court in *Mafatlal Industries Ltd. and Others vs. Union of India and Others*, reported in (1997) 5 SCC 536 in the context of examining the application of the principle of unjust

enrichment and it was held that in view of the ability of the seller to recover the increase in the difference of excise or customs “it would be legitimate for the Court to presume, until contrary is established that a duty of excise or customs have been passed on by the seller to the buyer.

47. This Court finds it relevant to take note of that the expression “unless a different intention appears from the terms of the contract” appearing in Section 64A of the Act of 1930 would mean that such intention must be manifest from the terms of the contract itself, i.e. the intention of the parties must be ascertained on the basis of the contractual stipulation. This further implies that in the event that a party agrees to a “firm price” which rules out any price adjustment, then it must be understood that intent of the contracting parties were clear that the contract was for a fixed price providing for no variation and thus if any variation arose whether on account of increase or decrease in the rate of taxation, the impact of the said would be on the contractor.

48. This Court at this stage finds it further relevant to take note of another judgment of the Supreme Court in the case of *Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Charan*, reported in (2012) 5 SCC 306. In the said case, the contract had a Clause which is Clause 9.3. The said Clause is quoted herein under as the same would entail a better understanding to the concept so provided by the Supreme Court in the said case:-

“4. Clause 9.3 thereof reads as follows:

“9.3. The contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the tax authorities for the account of the contractor and the company shall provide the contractor with required tax deduction certificate.”

49. From the above quoted Clause 9.3, it would show that it was agreed to that the contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under the contract. Any income tax or any other taxes or

duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the tax authorities for the account of the contractor and the company shall provide the contractor with required tax deduction certificate. The contract in the said judgment was entered into on 17.06.1998. In the said case, the Company deducted 5% on the bills of the contractor, for the period from 30.11.1997 to 06.08.1999 and this deduction was objected to by the contractor for which an Arbitration Proceedings were initiated. The case of the contractor in the said proceedings was that service tax initially was payable by the service provider. However, on 12.05.2000 (though retrospectively effective from 16.07.1997), the liability to pay service tax was shifted to the person availing the service and therefore it was the case of the contractor that during the period from 30.11.1997 to 06.08.1999, there should not have been any deduction of service tax from the contractor.

50. The Supreme Court while dealing with the issue involved as regard the legality and validity of the deduction of 5% took note of the relevant terms of the contract and particularly, Clause 9.3, the Clause already quoted herein above. Apart from that, the obligation of the contractor and the Clause pertaining to how the Bills of the contractor would be prepared and paid were taken into consideration. Paragraph Nos.36, 37, 38, 39, 40 & 42 of the said judgment are quoted herein below:-

“36. It was submitted on behalf of the respondent that Clause 9.3 and the contract must be read as a whole and one must harmonise various provisions thereof. However, in fact when that is done as above, Clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind Clause 9.3 was that the petitioner as a public sector undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor.

37. As far as the submission of shifting of tax liability is concerned, as observed in para 9 of Laghu Udyog Bharati³, service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax.



38. *Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of sales tax, where the seller is the assessee, and is liable to pay sales tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the sales tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider.*

39. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between the two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

40. If this clause was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same.

42. It was pointed out on behalf of the appellant that it is conventional and accepted commercial practice to shift such liability to the contractor. A similar clause was considered by this Court in *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.* In that matter, the question was as to whether the contractor was liable to pay and bear the countervailing duty on the imports though this duty came into force subsequent to the relevant contract. The relevant Clause 2(b) read as follows: (SCC p. 479, para 16)

“16. ... 2. (b). All taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor....”

Reading this clause and the connected documents, this Court held that they leave no manner of doubt that all the taxes and levies shall be borne by the contractor including this countervailing duty.”

51. From the above quoted portions of the judgment rendered in *Rashtriya Ispat Nigam*

55. In the backdrop of the above, this Court finds it relevant to formalize the proposition of law so far it relates to the second Issue, i.e. whether the petitioners herein would be entitled to the enhancement of the cost value of the contract taking into consideration that post entering into agreement, the GST became applicable. The propositions are:-

(a) For getting the benefit under Section 64A of the Act of 1930, two conditions are required to be fulfilled-

(i) There exists no contract to the contrary by which the seller had precluded himself from claiming such enhanced duty. For that purpose, one has to find out as to whether the agreed consideration was a firm price which rules out any price adjustment on account of the increase/decrease of the tax incidence. In other words, if any variation arose whether on account of increase or decrease of rate of taxation, the impact of the said would on the contractor.

(ii) The change in the rate of duty or the imposition came into effect after the date of contract.

(b) Liability to pay the tax by the assessee as per the statutory provisions is relevant as between the assessee and the Statutory Authority. This however does not affect the contract between the parties to shift the burden to pay the taxes. For example, though the buyer is liable to pay the tax, the buyer and the seller can enter into the agreement whereby the seller would pay on behalf of the buyer. The rationale behind such contracts would be that the buyer would expose itself only to a known and determined liability under the contract and all other risks including taxes arising out of the obligation of the seller are assumed by the seller.

(c) Even in a case where there is no agreement to the contrary thereby denying the benefit of Section 64A of the Act of 1930, Section 171 of both the Act of 2017



and CGST would have to be taken in consideration in as much as in the case of reduction in the rate of taxes on supply of goods and services or benefit of input tax credit availed, the recipient of the goods would be entitled to the benefit by way of commensurate reduction in prices.

(d) For the purpose of discerning the entitlement under the provisions of Section 64A of the Act of 1930, the terms of the contract are required to be looked into which would include inter-alia the obligation of the parties to the contract inter-se; the manner how the price/consideration is fixed; as to whether the price/consideration is firm, i.e. without price adjustment; whether the parties agreed to shift the burden of taxes amongst themselves. The said aspect would be dependent on the terms of each contract for which this Court had by way of illustration had given some of the perquisites.

56. In the backdrop of the above analysis, the instant writ petitions are disposed of with the following observations and directions:-

(i) The Circular No.3/2017-GST dated 24.08.2017 is in accordance with the provisions of Section 12 and Section 13 read with Clause 6 (a) of Schedule II of the Act of 2017 and CGST.

(ii) The petitioners would be liable to pay GST @ 6% under the Act of 2017 and 6 % under the CGST in respect to those invoices raised on or after 01.07.2017 and in respect to which received payments and/or receivable on or after 01.07.2017. Accordingly, the directions so issued in some of the writ petitions directing the petitioners to deposit GST @ 12% in respect to invoices raised on or after 01.07.2017 are in accordance with law. The interim order so passed by this Court thereby granting protection to the petitioners therefore no longer survives in view of the above opinion. Further to that, the deductions so made by the respondents in respect to those invoices issued on or after 01.07.2017 from the Bills of such contractors are in accordance with the provisions of the Act of 2017 and CGST for



which there arises no question of issuance of a writ to release such amounts so deducted. Be that as it may, the petitioners would be entitled to release of such amount if the petitioners are in a position to show before the Authorities concerned in terms with the Circular No.3/21017-GST dated 24.08.2017 that invoices were raised before 01.07.2017.

(iii) This Court is not in a position to decide as to whether the petitioners are entitled to the benefit of Section 64 A of the Act of 1930 in as much as the materials placed before this Court are insufficient to decide the various aspects as detailed out at paragraph No.55 (d) of the instant judgment. This Court however grants the liberty to the petitioners to place the materials before the Respondent Authorities by submitting representation and claim the additional imposition by way of reimbursement. It is observed that if the petitioners file representation(s), the Respondent Authorities shall duly take note of the observations made in the instant judgment and consider whether the petitioners would be entitled to reimbursement of the additional tax component. The said representation be disposed off (if so filed) within a period of 6 (six) months from the date of receipt of the representation(s). The petitioners shall also submit a certified copy of the instant judgment along with the representation(s). For the sake of clarity, it is observed that the representation(s), if so advised, are to be filed before the Authorities who awarded the contracts.

JUDGE

Comparing Assistant