

## Calcutta HC order confirming demand on pre-GST works contract challenged; SC grants stay

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SC issues notice in SLP filed by contractor (Petitioner) against order of Calcutta HC (Circuit bench) at Jalpaiguri which affirmed liability to tax on works contract services provided to PWD department w.r.t. pre-GST regime work-orders; Grants interim-stay over order passed by Division Bench (DB) which dismissed writ appeal against order passed by Single Judge and confirmed the recovery of tax, interest and penalty under Section 74 of the WBGST/CGST Act; Assessee received work orders from Public Works Department (PWD/Authorities) for which tendering started in pre-GST regime and work order was issued and work started in post GST regime; It received payment certificates for the period 2018-19 which would clearly show that no amounts has been paid on account of GST as being not included in the schedule of rates for the work executed; DB of the Calcutta HC had dismissed the appeal on the ground that GST law being a code in itself, the demand was valid and no interference was needed; Before the SC, Petitioner's submissions primarily rests on the fact that DB erred in appreciating that GST component was not included and could not have been included in the contract price at the time of submitting the bids, non-reimbursement of GST amount from the PWD (recipient of service), etc; Petitioner's contentions axles around the following (i) Non-receipt of the GST component with respect to the works contract services provided by the assessee to the PWD so as to deposit the same in the Government kitty (ii) No direction issued to the PWD authorities for the payment of GST on works contract services provided on or before and after July 01, 2017 and on-going projects either to assessee or deposit the same into the Government Exchequer (iii) Non-reimbursement of GST amount from the PWD will result in substantial loss to and financial burden on the Petitioner; Accordingly SC opines *"Interim stay of the Appellate Court's order.. subject to the petitioner depositing 50% of the disputed tax amount..."*

The matter is before Division Bench comprising of Justice B.V. Nagarathna and Justice Augustine George Masih.

Advocates Ankit Kanodia, Megha Agarwal and others are appearing on behalf of the Petitioner.

*The information contained in this alert is source based.*

### Background

Assessee is a proprietor and most of the work carried by the petitioner is for P.W.D., Govt. of West Bengal.

Assessee received work orders to do civil construction. While tendering started in pre-GST regime and work order was issued and work started in post GST regime. GST authority demanded tax @12% on the payments received from the PWD department.

Assessee received intimating notice of tax ascertained on the ground of tax-liability difference between GSTR-7 and GSTR-3B to for the period of FY 2018-19. A demand order u/s 74 and summary of Order in FORM GST DRC - 07 was passed by which payment of tax was confirmed against the assessee. Appellate order in FORM GST APPL-04 was passed rejecting the appeal of assessee and without making the PWD department a party to the proceedings. Thereafter, assessee filed writ petition before the HC which came to be dismissed by the Single Judge of Calcutta HC, Circuit Bench at Jalpaiguri. HC held that assessee was obliged to pay GST for the entire payment received against the execution of works contract in the post GST regime.

Assessee is aggrieved by the order passed by Division Bench of Calcutta HC, Circuit Bench at Jalpaiguri (the DB) which upheld the first appeal order of Single Judge which confirmed the demand raised by the Adjudicating Authority for payment of tax under Section 74 of the WBGST/CGST Act.

## Key Submissions

- Counsel for the Petitioner submitted that there has been refusal to reimburse the GST sought to be levied in respect of the works contracts, particularly highlighting that GST component was not included in the contract price at the time of submitting the bids by the petitioner inasmuch as there was no provision for levy of GST at such material time.
- Counsel for the Petitioner contended that the DB didn't even discussed the case laws relied upon by the assessee and dismissed the writ appeal by holding the demand and appeal orders passed by the GST authorities.
- The DB ought to have referred the matter to the Larger Bench if it had to disagree with the judgments passed by the Single Bench of the Principal Bench of the High Court at Calcutta.
- The DB erred in not appreciating that GST being an indirect tax has to be borne by the recipient of the goods or services which shall be paid by the recipient to the suppliers viz. assessee in the instant case, which is thereafter deposited by the supplier to the Government exchequer at the time of filing of its return in GSTR-3B.
- Counsel for Petitioner asserted that the DB did not consider that GST component with respect to the works contract services provided by the assessee to the Respondent authorities has not yet been received by the assessee so as to deposit the same in the Government kitty.
- Counsel for Petitioner pointed out that the DB did not direct the PWD to direct the appropriate respondents to remit the amount of GST on works contract services provided on or before and after 01.07.2017 i.e., before or after the introduction of GST and on-going projects.
- Counsel for Petitioner relied on Notification no. 5050- F(Y) dated August 16, 2017 that clarifies that post GST contracts or ongoing projects where estimates have been approved before July 01, 2017 i.e. those work orders given/ to be given for supply of goods or services or both (works contracts), GST rates will be applicable.
- Counsel for Petitioner contended that it was entitled to receive the amount of GST applicable on the works contract service executed during the GST regime from Government Contractee and application of GST in case of the contracts between the State of West Bengal and the petitioner without reimbursement of the same will result in substantial loss to and financial burden on the petitioner.
- Counsel for Petitioner submitted that as a result of non-pay and / or refusal on the part of the State of West Bengal to reimburse the additional taxation liability being saddled upon the petitioner in view of the introduction of the GST laws, the petitioner is being denied the opportunity of recovering GST from the beneficiary i.e. the State of West Bengal which, in law, the petitioner is entitled to recover.
- Counsel for Petitioner highlighted that GST was not included in the tendered amount of the work

## Observations

SC has granted interim stay of the Appellate Court's order "subject to the petitioner depositing 50% of the disputed tax amount"