

[2023] 147 taxmann.com 273 (Andhra Pradesh)/[2023] 96 GST 744 (Andhra Pradesh)/[2023] 72 GSTL 73 (Andhra Pradesh)[25-11-2022]

GST : Issue relating to demand in respect of solar power project should be decided based on CBIC Circular No. 163/19/2021-GST clarifying applicability of amendment for relevant period

■ ■ ■

[2023] 147 taxmann.com 273 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Sterling and Wilson (P.) Ltd.

v.

Joint Commissioner^{*}

C. PRAVEEN KUMAR AND DR. V.R.K. KRUPA SAGAR, JJ.

WRIT PETITION NO. 20096 OF 2020

NOVEMBER 25, 2022

Solar power project - Chapter 84, 85 or 94 - Classification - Petitioner used to enter into contracts with prospective buyers of solar power plants for supply and installation of equipment under turnkey basis and paid GST at 5 per cent on supply value of equipment and 18 per cent on erection and installation of said equipment - Petitioner contended that Renewable Energy Projects involving erection and commissioning of solar equipment was composite supply of goods and services where principal supply was that of goods - Department contended that once solar equipment was installed, they become immovable qualifying as composite supply of works contract service - Relevant notifications were amended following which value of supply of goods and services in erection and commissioning of solar equipment was deemed to be in ratio 70:30 where 70 per cent would be value of goods and 30 per cent would be value of services - Vide CBIC Circular No. 163, dated 6-10-2021, such amendment was made applicable for relevant period also - HELD : Matter was to be remanded to Appellate Authority to decide case in terms of impugned CBIC Circular [Andhra Pradesh Goods and Services Tax Act, 2017] [Paras 24 and 25] [In favour of assessee/Matter remanded]

Circulars & Notifications : CBIC [Circular No. 163/19/2021-GST, dated 6-10-2021](#); [Notification No. 24/2018-CT\(R\), dated 31-12-2018](#) and [Entry No. 234 of Notification No. 1/2017-CT\(R\), dated 28-6-2017](#)

CASES REFERRED TO

Sirpur Paper Mills Ltd. v. CCE [1997 taxmann.com 265 \(SC\)](#) (para 13), *CCE v. Solid & Correct Engineering Works* [2010] 5 SCC 122 (para 13), *Sri Velayuthaswamy Spinning Mills (P.) Ltd. v. Inspector General of Registration* Manu/TN/0164/2013/2013 (2) CTC 551 (para 13), *Vodafone Mobile Services Ltd. v. CST* [\[2018\] 100 taxmann.com 245 \(Delhi\)](#) (para 13), *IGE (India) Ltd. v. CCE* [1990 taxmann.com 492 \(CEGAT - New Delhi\)](#) (para 13) and *McNally Bharat Engineering Company Ltd., In re* [\[2019\] 111 taxmann.com 501 \(AAR - AP\)](#) (para 19).

ORDER

C. Praveen Kumar, J. - The Present Writ Petition came to be filed by the Petitioner challenging the Order-in-Appeal No. ZH3710OD19206, dated 20-10-2020, passed by the 1st Respondent demanding the Petitioner to

pay GST amounting to Rs. 63,00,19,512/- for the period from November 2017 to September 2018 along with interest and penalties equal to 10% of the tax demanded.

2. The Petitioner is a company engaged as a contractor by various entities for supply, installation, testing and commissioning of Solar Power Generating System.

3. Realizing the importance of regenerative nature and cheap cost of product, the Government accorded greater importance for setting up of solar power projects and imposed Goods and Service Tax at 5% (2.5% CGST and 2.5% SGST) on solar equipment. However, the services relating to setting up of solar power projects are charged GST at 18% (9% CGST and 9% SGST).

4. The Petitioner herein, used to enter into contracts with prospective buyers of solar power plants for supply and installation of equipment under turnkey basis and paid GST at 5% on supply value of equipment and 18% on the erection and installation of the said equipment.

5. It is submitted that, the import duty/GST on the inputs procured by the Petitioner *i.e.* on solar modules and steel was charged at 18% as against the GST rate of 5% on the finished goods cleared by the Petitioner. Due to this inverted duty structure, the Petitioner accumulated Input Tax Credit. To have cash flow, the Petitioner filed a refund application for accumulated ITC, citing inverted duty structure, and claimed refund of Rs. 8,65,63,538/- for period from January 2018 to March 2018. However, the said claim was rejected by the competent authority, aggrieved by which, Petitioner filed an appeal.

6. While things stood thus, the Assistant Commissioner of State Tax issued notice dated 17-9-2019, proposing demand of GST @ 18% on the ground that the proposing assessment activity rendered by the petitioner is under the Works Contract Service and has nothing to do with the supply of Goods and provisions of Service and accordingly demanded GST @ 18% of the value of the supply.

7. A reply came to be filed disputing the claim made by the authorities. However, the original authority confirmed the activity under the Works Contract Service and consequently demanded GST of Rs.63,00,19,512/- (CGST - Rs. 31,50,09,756/- and SGST- Rs. 31,50,09,756/-) along with interest covering the period from November, 2017 to September, 2018 and imposed equivalent penalty under section 74(1) of the GST enactments.

8. Aggrieved by the Assessment Order, the Petitioner filed an appeal before first Appellate Authority under section 107 of AP GST Act, 2017, by pre-depositing 10% of the GST.

9. In appeal before the first Appellate Authority, Petitioner contended that supplies made by them do not fall under the scope of Works Contract Service since the activity undertaken by them in erection and commissioning of the solar equipment, was for the limited purpose of operation efficiency and does not render the same immovable and, if required, the equipment can be dismantled and reassembled at some other place. Petitioner also contended that merely because part of the activity involves civil works, the total supply cannot be assumed to be works contract service, since the plant is not immovable in nature. The activity rendered is a composite supply consisting of supply of goods, where the predominance is that of goods, thereby the principal supply is deemed to be the supply for levy of GST. However, the First Appellate Authority rejected the contention of the Petitioner and confirmed the GST liability and imposed penalty of 10% of tax amount.

10. Thereafter, the 2nd respondent *vide* DRC-09 dated 23-10-2020 issued a recovery of tax confirmed in the Appeal though a period of three months is allowed, for initiating the recovery proceedings in terms of section 78 of APGST Act, 2017. Challenging the same, the present writ petition came to be filed before this Court mainly on the ground that only seven days was given to the petitioner to pay the dues.

11. It is the contention of the Petitioner that the impugned order is not legal and proper and is in violation of principles of natural justice, as the impugned order communicated is without any preamble intimating the method and procedure.

12. The finding of the Appellate Authority that the supplies effected by the Appellant are not composite supplies, but works contract services which are immovable in nature, is incorrect. Placing reliance on "Explanation in Sl. No. 234 of Notification No. 01/2017-CT(Rate) dated 28-6-2017 and Sl. No. 38 of Notification No. 11/2017-CT(Rate)", the Petitioner contends that the turnkey project of solar power plant is not treated as immovable property, as the value of supply of goods and services is differentiated through deeming provision.

13. The learned Counsel for the Petitioner relies upon the decisions of Hon'ble Apex Court in *Sirpur Paper Mills Ltd. v. CCE* [1997 taxmann.com 265 \(SC\)](#); *CCE v. Solid & Correct Engineering Works* [2010] 5 SCC 122; *Sri Velayuthaswamy Spinning Mills (P.) Ltd. v. Inspector General of Registration* Manu/TN/0164/2013: 2013 (2) CTC 551; *Vodafone Mobile Services Ltd. v. CST* [\[2018\] 100 taxmann.com 245 \(Delhi\)](#); *I.G.E. (India) Ltd. v. CCE* [1990 taxmann.com 492 \(CEGAT - New Delhi\) \(SB\)](#) in support of his plea.

14. A Counter came to be filed by the 2nd Respondent disputing the claim made. It is contended that a perusal of the 'Engineering Procurement and Construction Agreement', would indicate that, the Petitioner was engaged in supply of services under Works Contract to Solar Power Plant Developers under EPC contracts, involving supply of services and goods which fall under Works Contract. The business "General Construction Services of Power Plants and its related infrastructure" is liable to GST at 18%.

15. The Respondent also contended that in view of explanation inserted against S.No.234 in the Notification No. 24/2018- Central Tax (Rate), dated 31st December 2018, the turnovers reported by the Petitioner for tax periods from November, 2017 to September, 2018 are liable to levy of GST at 18%, as the amendment came into force with effect from 1-1-2019 and same has no retrospective effect.

16. It is also the contention of the Respondent that, the predominant nature of the EPC contract executed by the Petitioner is the Development of Solar Park assigned for the said purpose in running condition having a life to generate solar power for a period of 25 years, to design, engineer, civil, land development, inter connection, fixing, testing, etc. In the entire works contract, the supply of solar power panels are one of the components and there are more essential items other than solar panels and hence it cannot be considered that the principle supply is Solar Power Generating System in the composite contract. It was further contended that, from their self-declaration in the stock transfer invoices, the "Solar Power Generating System" is chargeable at 18%.

17. The Solar Power Generating System supplied with fixtures cannot be moved as a movable item and it is nothing but development of 'immovable property' and contract undoubtedly come under 'works contract' as per the provision of section 2(119) of the AP GST Act, 2017.

18. Respondents also contend that, the judgments relied upon by Petitioner do not apply to present case and further contended that 'Asphalt Drum/Hot Mix plants' which were subject matter of dispute in those cases cannot be compared with the Solar Power Generation Plant, as 'Asphalt Drum/Hot Mix plants' are installed at particular site till the completion of particular work and on completion of work, they will be shifted to another site for another work. Whereas in the present work, the plant is established such a way that same has to be worked without any shift for a period of 25 years.

19. The learned Government Pleader for Commercial Taxes placed reliance on a ruling given by the Andhra Pradesh State Authorities for 'Advance Ruling' in the case of *McNally Bharat Engineering Company Ltd.*, In re [\[2019\] 111 taxmann.com 501 \(AAR - AP\)](#), wherein it was held that, Solar PV Power Project can be treated as Composite Supply, as defined at section 2 of CGST Act, 2017 and APGST Act, 2017, and it is treated as 'supply of service' in terms of Serial No. 6, Schedule II of CGST Act, 2017 and APGST Act, 2017. The supply cannot be classified under Sl. No. 234 of Schedule I of the Notification No. 1 of 2017 and the rate of 5% is not applicable, as it is classified under Heading 9954, Entry No. (ii) of S. No. 3 of the table of Notification No. 11/2017, dated 28-6-2017, as amended from time-to-time and in view of corresponding Notification under APGST Act, 2017, the applicable rate of tax is 18%.

20. An Additional Affidavit came to be filed by the Petitioner, wherein, it is averred that the petitioners are supplying solar power plant equipment and providing the supply of the service-erection and commissioning of the said plant. As the supplies are bundled with each other, the supply effected by the Petitioner is a composite supply and the supply which predominates in value is liable to be treated as principal supply, as per section 8(a) of the CGST Act, 2017/APGST Act, 2017. As the value of supply of Petitioner is 92% of the contract value, the GST at the rate of 5% is applicable to supply of goods on total value of supply.

21. It is also contended that the Respondent wrongly held the supplies made by the petitioner as 'works contract' falling under entry 9954 in entry no (ii) of S.No.3 of table Notification No. 11/2017 and the explanation rendered under Notification No. 11/2018, dated 31-12-2018, but failed to consider the point as to why the transaction shall not be treated to be one falling within S.No.234 of Schedule-I of Notification No.1/2017 dated 28-6-2017.

22. At this stage, it would be appropriate to extract the relevant portion of the order impugned passed by the 1st respondent appellate authority, which is as under:-

"In the present case, the contract entered by the appellant is composite supply of works contract as defined at section 2(119) of CGST Act '2017' and is treated as supply of service in terms of serial no. 6, Schedule II of GST Act, 2017. It falls under heading 9954, entry no. (ii) of S.No.3 of the table of notification no. 11/2017 - Central Tax (Rate), Dated - 28th June 2017 as amended from time to time and the applicable rate of tax 18% (9% under Central tax and 9% State tax).

Amendments of the GST rate *vide* notification No. 24/2018 Central Tax (Rate) dated:31-12-2018 and notification No. 27/2018, Central Tax (Rate) date:31-12-2018, amending earlier notifications No. 01/2017, Central tax (Rate) dated:28-6-2017 and notification No. 11/2017, Central Tax (Rate) dated:28-6-2017 respectively, which came into force from 1-1-2019, added clarity to the rate of taxation of the Solar Power Plant Projects as such. Against S.No.234 in column 3 of the notification No. 24/2018 Central Tax (Rate) dated: 31-12-2018 following explanation is inserted.

Explanation: if the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S.No.38 of the table mentioned in the notification No.11/2017-Central Tax (Rate), dated: 28-6-2017 (G.S.R.690(E)), the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent of the gross consideration charged for all such supplies, and the remaining thirty per cent of the gross consideration charged shall be deemed as value of the said taxable service.

In view of the above the turnovers reported by the appellant for the earlier tax periods from November 2017 to September, 2018 are liable to levy GST at 18% only as the above amendment came into force with effect from 1-1-2019. The amendment has no retrospective effect."

23. However, a perusal of Circular No. 163/19/2021-GST dated 6-10-2021 issued by the Department of Revenue, Ministry of Finance, Government of India, which is now placed on record, would show that GST Council has given clarity on specified Renewable Energy Projects that GST can be paid in terms of 70:30 ratio, for the goods and services, for the period 1st July, 2017 to 31st December, 2018, in the same manner prescribed for the period on or after 1-1-2019, as per the explanation in the Notification No. 24/2018 dated 31st December, 2018. The relevant portion of the said Circular is as under:-

"13.3 The GST Council has now decided to clarify that GST on such specified Renewable Energy Projects can be paid in terms of the 70:30 ratio for goods and services, respectively, for the period of 1st July, 2017 to 31st December, 2018, in the same manner as has been prescribed for the period on or after 1st January, 2019, as per the explanation in the Notification No. 24/2018 dated 31st December, 2018. However, it is specified that, no refunds will be granted if GST already paid is more than the amount determined using this mechanism."

24. In view of the Circular No. 163/19/2021-GST, dated 6-10-2021, we deem it appropriate to remand the matter back to the 1st respondent/Appellate Authority to consider the issue afresh in terms of the above Circular.

25. Hence, the order under challenge is *set aside* and the matter is remanded back to the first respondent/appellate authority, for fresh consideration in accordance with law as early as possible preferably within a period of six (6) weeks from the date of receipt of the order. The petitioner is permitted to raise all objections before the appellate authority. The authorities are restrained from taking any coercive steps, for a period of eight (8) weeks from the date of receipt of the order. Further, if matter could not be disposed of within the time fixed, the petitioner shall make application seeking appropriate interim orders before the authorities concerned, in which event, the same shall be deal with in accordance with law at the earliest. Accordingly, the writ petition is disposed of. There shall be no order as to costs.

Consequently, miscellaneous petitions, if any, pending shall stand closed.

*Partly in favour of assessee.

Partly in favour of assessee