

[2023] 149 taxmann.com 132 (Andhra Pradesh)/[2023] 97 GST 1080 (Andhra Pradesh)/[2023] 73 GSTL 604 (Andhra Pradesh)[24-03-2023]

GST : Where question arose as to whether assessee outsourcing employees was liable to GST only on service charge received or on EPF and ESI paid by contractee under Government order (GOM), since due to old age and ill health assessee could not avail opportunity of personal hearing, matter was to be readjudicated

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[2023] 149 taxmann.com 132 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Reddy Enterprises

v.

State of Andhra Pradesh*

U. DURGA PRASAD RAO AND V. GOPALA KRISHNA RAO, JJ.

W.P. NO. 1433 OF 2023

MARCH 24, 2023

Valuation - Manpower supply - Natural justice - Petitioner-proprietary concern was engaged in outsourcing employees to State Beverages Corporation and Mineral Development Corporation - In addition to remuneration towards wages, contractee had agreed to pay specified amounts as contribution towards EPF, ESI in terms of relevant Government order - Contractee had agreed to pay service charges to petitioner at rate 2.17 per cent - Petitioner collected EPF and ESI and paid to respective authorities - Form GST DRC-01A was issued under section 74(5) of APGST Act as per which, GST was calculated on entire value or payment received by petitioner, though, as per petitioner liability was only on service charges being paid and received by petitioner - According to revenue, GST would be charged on total consideration of service charges, EPF and ESI - Revenue issued show cause notice and some opportunity was extended to petitioner for personal hearing - However, petitioner could not avail said opportunity in view of her old age and ill health - Having regard to a high tax amount of Rs. 56 crore and nature of contention raised by petitioner, authority ought to have extended some more opportunity to petitioner for personal hearing - [Section 15, read with section 2(31) of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017 - Article 226 of the Constitution of India] [Para 10] [In favour of assessee/Matter remanded]

ORDER

U. Durga Prasad Rao, J. - The challenge in this writ petition is to the proceedings dated 10-11-2022 *vide* reference No. ZD370922009810G under section 74(5) of APGST Act, 2017 directing the petitioner to pay Rs. 56,95,19,461/- towards differential tax, interest and penalty for evasion of the due tax as illegal and arbitrary.

2. Petitioner's case briefly is thus:

- (a) Petitioner is a proprietary concern engaged in outsourcing employees to A.P. State Beverages Corporation/4th respondent and A.P. Mineral Development Corporation/5th respondent in various categories. The petitioner obtained GST registration and has been filing monthly returns as stipulated in GSTR 3B and paying the tax.
- (b) Petitioner entered into agreements with respondents 4 and 5 to outsource the employees of various

categories. In addition to the remuneration towards wages, the contractee has *inter alia* agreed to pay the specified amounts as contribution towards EPF, ESI in terms of G.O.Ms.No.151 (Fin-HR-I) Planning & Policy, dated 8-8-2016. In addition to above mandatory payment, the contractee has agreed to pay service charges to the petitioner @ 2.17%.

- (c) As per Section 9 of the APGST Act, the petitioner is liable to pay GST on receipt of the service charges alone. The petitioner is no way concerned with any other payment. The petitioner collects EPF and ESI from the Government and pays to the respective authorities. While so, the dispute is on account of Form GST DRC-01A which was issued under section 74(5) of APGST Act as per which, the GST was calculated on the entire value or payment received by the petitioner, though the liability of the petitioner under GST law is only on the service charges being paid and received by the petitioner.
- (d) The petitioner is only an agent of respondents 4 and 5 for outsourcing of manpower for which, as an agent, the petitioner gets service charges at an agreed percentage. Hence the 3rd respondent has no legal foundation to impose tax, interest and penalty U/s 74(5) of the APGST Act. The impugned order is shorn of details. The petitioner has submitted a representation dated 19-9-2022 stating that taxable value reported in GSTR-3B returns relate to the service charges paid to her and over and above the said service charges, there is no tax liability under APGST Act, 2017.
- (e) The 3rd respondent issued show cause notice along with the statement of dues in DRC-01 on 23-9-2022, for which the petitioner submitted response dated 22-10-2022 contending that the levy of GST for provision of services may be restricted only to the consideration for the services provided and payments made to the employees outsourced to respondents 4 and 5 towards wages, ESI and EPF shall not form part of taxable turnover. However, the 3rd respondent passed impugned Assessment Order. Hence the writ petition.

3. Briefly the averments in the counter filed by 3rd respondent are thus:

- (a) Admittedly, the petitioner is engaged in the business of Man power supply services to respondents 4 & 5 and others. The 3rd respondent passed the Assessment Order dated 10-11-2022 under section 74 of the APGST Act, 2017 levying tax of Rs. 23,79,26,090/-, penalty equal to tax, and interest of Rs. 5,36,10,496/- which is being impugned in the present writ petition. The contention of the petitioner that the 3rd respondent levied tax on amounts received by the petitioner other than service charges and imposed interest and penalty equivalent to the tax without any legal foundation is incorrect.
- (b) The petitioner is a registered tax payer *vide* GSTN 37AKAPM1969NIZM and filed stipulated monthly returns in GSTR 3B reporting therein the taxable value and paying tax accordingly. The petitioner entered into agreement with the respondents 4 and 5 for providing services of outsourcing of employees in various categories and admittedly he is receiving total amount including service charges, EPF, ESI as per the guidelines laid down in G.O.Ms.No.151 dated 8-8-2016. However, the said G.O. has nothing to do with the GST payable by the petitioner for computation of taxable value of the supply. In this regard, the contention of the petitioner that under section 9 of the APGST Act, the GST is limited to the service charges alone received by the petitioner and the amounts received towards EPF, ESI etc. cannot be included is not correct. On the other hand, as per Section 15(2) of the AGPST Act, 2017, the value of supply includes taxes, duties, cesses, fees and charges levied under any law for the time being in force other than the APGST Act, 2017 and CGST Act. Further, as per Section 2(31), the term "consideration" in relation to the supply of goods or services or both includes, any payment made or to be made whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by a recipient or by any other person but shall not include any subsidy given by the Central or State Government. In view of above legal position, the payment received for supply of taxable service shall be treated as "consideration" and GST shall be charged on the total consideration. The above provisions do not specifically mention that the GST shall be charged on service charges alone. The payment of employee's or employer's share in EPF and ESI is a statutory obligation cast upon the petitioner under the EPF Act and ESI Act, but such liability will not have any bearing on the computation of taxable supply under the APGST Act.
- (c) In addition to above, a perusal of invoices raised by the petitioner shows that the petitioner has

charged GST on the total value of the supply and has not restricted the GST to his services charge portion alone.

- (d) The contention of the petitioner that the tax liability plus interest and penalty were fixed without any legal foundation is baseless. The Adjudicating Authority issued intimation of tax liability in DRC 01A on 29-7-2022 and show cause notice in DRC 01 was issued on 23-9-2022 fixing personal hearing dates on 2-9-2022 and 6-10-2022. Thus, the Adjudicating Authority has followed due procedure as contemplated under the provisions of the Act and principles of natural justice while finalizing the orders in DRC 07. The vast difference between turnover reported in GSTR 3B and turnover assessed in DRC 07 was due to the turnovers adopted for assessment as per books of accounts maintained by the petitioner and information received from respective departments. The variation in taxable turnovers was tabulated month-wise in DRC 01 itself. Hence, the contention that there was no legal foundation for fixation of the tax liability is not correct.
- (e) The contention of the petitioner that the wages provided to the employees and statutory payments of EPF and ESI, etc., will not fall within the ambit of the GST is not correct. In the context of the APGST Act, 2017, the petitioner is the service provider and the recipients are the Government corporations and as such there is no employer and employee relation between the petitioner and respective corporations. The salaries, wages are being provided by the petitioner herself and EPF, ESI etc are also paid by her. The supply being taxed is supply of manpower services by the petitioner to various corporations. In the course of providing the services, the petitioner may incur various expenditures like salaries and other related obligations. However, the supply made by the petitioner does not fall under the ambit of employee-employer relationship as mentioned in Schedule III of the Act and is not eligible for any exemption.
- (f) The petitioner has raised invoices to the service recipients and charged full tax @ 18% GST on each invoice. The contention of the petitioner that they have reported gross considerations inadvertently in GSTR 1 is not correct. On the other hand, it shows the understanding of the petitioner that the total consideration received is liable to GST, as the short payment of tax was determined as per the provisions of Section 74. The said provision carries with it the applicable penalty and interest. Accordingly, the tax penalty and interest are proposed and are confirmed by following due procedure. The petitioner while charging GST @ 18% on total invoice value, but at the same time paying tax on lesser value only to the extent of service charges is a clear violation of the law leading to unjust enrichment and therefore, the petitioner cannot turn round and claim that the impugned order is illegal. Hence, the writ petition may be dismissed.

4. Heard arguments of learned Senior Counsel Sri M.V.K. Murthy representing Sri M.V.J.K. Kumar, learned counsel for the petitioner and learned Government Pleader for Commercial Taxes-I representing 3rd respondent.

5. Learned Senior Counsel Sri M.V.K. Murthy, argued at length that the components *i.e.*, wages, ESI and EPF, will not form part of the value of the taxable supply of the services for the reason, the wages were paid to the respective employees and the amounts were paid towards ESI and EPF to discharge the statutory obligation and the petitioner has not retained those amounts with her and therefore they do not form part of the consideration received by the petitioner for the services rendered to the recipients *i.e.*, respondents 4 and 5. He would vehemently argue that the net service charges collected by the petitioner alone form part of the consideration which is exigible to GST. He would also argue that since the petitioner is an agent on behalf of respondents 4 and 5, the amounts covered by wages, ESI and EPF were paid by the petitioner as an agent of respondents 4 and 5 and hence those amounts cannot be added to the service charges received by the petitioner. Learned senior counsel would strenuously argue that in the reply dated 22-10-2022 submitted to the show cause notice the petitioner has clearly raised the above objection and contended that the authority has no legal sanctity to assess the petitioner to tax. However, the 3rd respondent without considering the objections of the petitioner in a right perspective and without affording an opportunity of hearing, passed the impugned order. Learned counsel would submit that the petitioner is an old lady aged 75 years and she could not respond immediately through her authorized representative to submit arguments on behalf of the petitioner. Learned counsel thus prayed to *set aside* the impugned order dated 10-11-2022 and remit the matter to the 3rd respondent to hear the petitioner's objections and pass appropriate order afresh.

6. *Per contra*, learned Government Pleader while opposing the writ petition would firstly contend that the writ petition is not maintainable and liable to be dismissed in limini as the petitioner has efficacious and alternative

remedy to file appeal against the impugned Assessment Order. Next, he argued that as per Section 15(2) of A.P.G.S.T. Act, the components like wages, statutory taxes etc., shall form part of value of taxable supply and therefore it is preposterous for the petitioner to contend that only the net amount *i.e.*, Service Charges paid to the petitioner alone is liable for GST. Learned Government Pleader vehemently argued that in fact the petitioner has collected GST on the total amount received by her from respondents 4 and 5, which is evident from the explanation dated 22-10-2022 submitted by her. However, she paid the GST only on the net Service Charges received by her by retaining major portion of the GST collected from respondents 4 and 5. Hence the petitioner is guilty of undue enrichment. In that view, the writ petition is not maintainable. He further argued that petitioner cannot contend that she is a mere agent of respondents 4 and 5 and that the wages, EPF, ESI etc., were paid by her to their employees on their behalf and therefore those amounts cannot be taken into consideration to compute the value of taxable supply. Conversely he would argue that there is no employer employee relationship between respondents 4 and 5 on one hand and petitioner and her manpower. He would emphasise that it is a case of pure supply of services of manpower by the petitioner on receiving the monetary consideration. Therefore, the entire value of the services shall be treated as a taxable supply. It is altogether a different aspect that, from out of the consideration received by the petitioner, she has to meet the expenses like wages, statutory deductions like ESI and EPF. He thus prayed to dismiss the petition.

7. The point for consideration is, whether there are merits in the Writ Petition to allow?

8. POINT: We gave our anxious consideration to the above respective submissions. Admittedly the 3rd respondent issued show cause notice dated 23-9-2022 U/s 74(1) of A.P.G.S.T. Act, 2017 fixing the tax due with interest and penalty of Rs. 52,48,58,430/- and instructed the petitioner to submit reply within 15 days of receipt of notice. It is a further admitted fact that, as against the show cause notice, the petitioner filed her objections dated 22-10-2022 contending that GST is taxable only on the Services to recipients but not on the ESI, EPF and wages etc. In the said objections, the petitioner also mentioned that the earlier letter submitted by her on 19-9-2022 may be treated as withdrawn. Now the grievance of the petitioner is that without considering the objections dated 22-10-2022 and without providing an opportunity of hearing to the petitioner, the 3rd respondent passed the impugned Assessment Order dated 10-11-2022 fixing the tax liability, thereby, the petitioner who is an old aged lady of 75 years lost her valuable opportunity to put forth her case. The respondent denied the aforesaid contention and argued that due opportunity was given to the petitioner and thereafter only the impugned order was passed.

9. In this context, we perused the impugned order dated 10-11-2022, wherein it is mentioned, as against the show cause notice dated 23-9-2022, the petitioner submitted a letter of objection dated 22-10-2022 raising her objection that the tax proposed on the wages, ESI and EPF etc., should be excluded from the taxable turnover. In the impugned order, it is further stated that the objection of the petitioner cannot be considered in view of Section 15(2) of A.P.G.S.T. Act, 2017. It is further mentioned that the petitioner was provided opportunity of hearing on 6-10-2022, 11-10-2022, 24-10-2022 and 9-12-2022. For the notice date 1-11-2022, the petitioner filed a letter seeking one week time to attend due her ill health. Again in respect of the scheduled hearing dated 24-10-2022, the petitioner filed a letter dated 22-10-2022. Subsequently also the petitioner filed a letter stating that due to ill health she was unable to attend personally and that she filed a Writ Petition before the High Court of Andhra Pradesh questioning the best judgment orders passed by the Jurisdictional Authority for the tax period from May 2021 to September 2021. Thereupon, as per the communication received from the Joint Commissioner (ST) Vijayawada-II Division, leaving the tax period of May 2021 to September 2021, the assessment is confined under the present impugned order for the remaining period *i.e.*, April 2021 and from October 2021 to March 2022. Accordingly, the impugned Assessment Order was passed fixing a total tax liability including interest and penalty at Rs. 56,95,19,461/-.

10. In our considered view, no doubt the 3rd respondent has extended some opportunity to the petitioner for personal hearing. However, the fact remains that the petitioner could not avail the said opportunity in view of her old age as she being aged 75 years and also due to her ill health. Having regard to a high tax amount plus interest and penalty proposed to be laid and nature of the contention raised by the petitioner, the 3rd respondent ought to have extended some more opportunity to the petitioner for personal hearing. Therefore, without going into the merits of petitioner's case, we are of the considered opinion that a direction shall be issued to the 3rd respondent to afford a personal hearing to the petitioner and pass Assessment Order afresh in accordance with law on suitable terms.

11. Accordingly, without reference to the merits of the petitioner's case, the impugned Assessment Order dated 10-11-2022 passed by the 3rd respondent is *set aside* on the condition of petitioner depositing 50% of tax component of Rs. 23,79,26,090/- as mentioned in the impugned order dated 10-11-2022 within six (6)

weeks from the date of receipt of a copy of this order and upon such deposit, the 3rd respondent shall fix a date for personal hearing of the petitioner with regard to her objections to the proposed assessment and after hearing the petitioner, pass an appropriate Assessment Order in accordance with the governing law and rules expeditiously. In case, the petitioner fails to make the deposit as mentioned *supra*, this order shall be deemed cancel.

Accordingly, this Writ Petition is disposed of. No costs.

As a sequel, interlocutory applications pending, if any, shall stand closed.

KARTIK

*Partly in favour of assessee.