

W.P.(MD) Nos.14745 to 14747 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 24.07.2024

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.(MD)Nos.14745 to 14747 of 2023

and

**W.M.P.(MD)Nos.12435, 12436, 12438, 12440, 12439 and
12441 of 2023 and 2147 and 2173 of 2024**

M/s.K N R Srirangam Infra Pvt Ltd.,
Represented by its Director,
Shri Anshuman Gupta,
No.3, Thiagu Sarala Illam,
Bojarajan Nagar,
Mariamman School Road,
Samayapuram,
Trichy – 621 112.

... Petitioner in all the W.Ps.

Vs.

The State Tax Officer,
Lalgudi Assessment Circle,
Lalgudi,
Trichy District.

... Respondent in all the W.Ps.

Prayer in W.P.(MD)No.14745 of 2023:- Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari to call for the records relating to the impugned order No. 33AAHCK0151E1Z4/2019-20 dated 28.04.2023 passed by the respondent and to quash the same.



W.P.(MD) Nos.14745 to 14747 of 2023

Prayer in W.P.(MD)No.14746 of 2023:- Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari to call for the records relating to the impugned order bearing Reference No. 33AAHCK0151E1Z4/2020-21 dated 28.04.2023 passed by the respondent and to quash the same.

Prayer in W.P.(MD)No.14747 of 2023:- Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari to call for the records relating to the impugned order bearing Reference No. 33AAHCK0151E1Z4/2020-21 dated 28.04.2023 passed by the respondent and to quash the same.

For Petitioner in all the W.Ps. : Mr.G.Natarajan

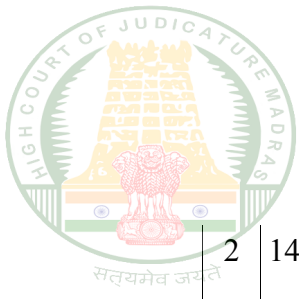
For Respondent in all the W.Ps. : Mr.J.K.Jeyaselan
Government Advocate

COMMON ORDER

By this common order, all these Writ Petitions are being disposed of.

2. In these Writ Petitions, the petitioner has challenged the following impugned Assessment Orders:-

Sl. No	W.P. (MD) No.	A.Y.	Impugned Assessment Order dated	Amount
1	14745/23	2019-20	28.04.2023	Tax : Rs.35,80,50,604/- Penalty : Rs.35,80,50,604/- Interest : Rs.20,14,03,464/- Rs.91,75,04,672/-



W.P.(MD) Nos.14745 to 14747 of 2023

2	14746/23	2020-21	28.04.2023	Tax : Rs.15,09,43,260/- Penalty : Rs.15,09,43,260/- Interest : Rs. 5,73,58,440/-	Rs.35,92,44,960/-
3	14747/23	2021-22	28.04.2023	Tax : Rs.22,29,35,400/- Penalty : Rs.22,29,35,400/- Interest : Rs. 4,40,29,740/-	Rs.48,99,00,540/-

3. It is case of the petitioner that the petitioner is providing services to the National Highways Department of India and that the considerations are received in two parcels. According to the petitioner, 40% of the consideration is received during the execution of work and remaining 60% of the consideration is received annually over the next 14 years.

4. It is submitted that the contention of the Department is that since the work has been substantially completed, the petitioner was liable to pay tax on the entire value of the work. It is submitted that such a stand is unjustified.

5. The learned counsel for the petitioner has placed reliance on a CBIC Circular No.221/15/2024-GST dated 26.06.2024 issued recently by the Central Board of Indirect Taxes [CBIT], wherein, issue as to the time of supply for the purpose of payment of tax for service under the Hybrid



W.P.(MD) Nos.14745 to 14747 of 2023

Annuity Model [HAM] was considered. It is submitted that under HAM

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of National Highways Authority of India (NHAI), the concessionaire has

to construct the new road and provide Operation and Maintenance service

which is generally spread over a period of 15-17 years and the payment of

the same is spread over the years. It has been clarified as under:-

"Under the Hybrid Annuity Model (HAM) of concession agreements, the highway development projects are under Design, Build, Operate and Transfer model (DBOT), wherein the concessionaire is required to undertake new construction of Highway, as well as the Operation and Maintenance (O&M) of Highways. The payment terms for the construction portion as well as the O&M portion of the contract are provided in the agreement between National Highways Authority of India (NHAI) and the concessionaire.

2.1 A HAM contract is a single contract for construction as well as operation and maintenance of the highway. The payment terms are so staggered that the concessionaire is held accountable for the repair and maintenance of the highway as well. The contract needs to be looked at holistically based on the services to be performed by the concessionaire and cannot be artificially split into two separate contracts for construction and operation and maintenance, based on the payment terms. The concessionaire is bound contractually to complete not only the construction of the highway but also to operate and maintain the same.

2.2 In HAM contract, the payment is made spread over the contract period in installments and payment for



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W.P.(MD) Nos.14745 to 14747 of 2023

each installment is to be made after specified periods, or on completion of an event, as specified in the contract. The same appears to be covered under the 'Continuous supply of services' as defined under section 2(33) of the CGST Act.

2.3 As per clause (a) of Section 13(2) of CGST Act, the time of supply in respect of a supply of services shall be the date of issue of Invoice, or date of receipt of payment, whichever is earlier, in cases where invoice is issued within the period prescribed under section 31 of CGST Act. Further, as per clause (b) of Section 13(2) of CGST Act, in cases where invoice is not issued within the period prescribed under section 31, the time of supply of service shall be date of provision of the service or date of receipt of payment, whichever is earlier. However, as per section 31(5) of CGST Act, in cases of continuous supply of services, where the payment is made periodically, either due on a specified date or is linked to the completion of an event, the invoice is required to be issued on or before the specified date or the date of completion of that event.

2.4 Accordingly, as per section 13(2) of CGST Act, read with section 31(5) of CGST Act, time of supply of services under HAM contract, including construction and O&M portion, should be the date of issuance of such invoice, or date of receipt of payment, whichever is earlier, if the invoice is issued on or before the specified date or the date of completion of the event specified in the contract, as applicable. However, in cases, where the invoice is not issued on or before the specified date or the date of completion of the event specified in the contract, as per clause (b) of section 13(2), time of supply should be the date of provision of the service, or date of receipt of payment, whichever is earlier. In case of continuous supply of services, the date of provision of service may be deemed as the due date of payment as per



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W.P.(MD) Nos.14745 to 14747 of 2023

the contract, as the invoice is required to be issued on or before the due date of payment as per the provisions of Section 31(5) of CGST Act.

3. In the light of above, it is clarified that the tax liability on the concessionaire under the HAM contract, including on the construction portion, would arise at the time of issuance of invoice, or receipt of payments, whichever is earlier, if the invoice is issued on or before the specified date or the date of completion of the event specified in the contract, as applicable. If invoices are not issued on or before the specified date or the date of completion of the event specified in the contract, tax liability would arise on the date of provision of the said service (i.e., the due date of payment as per the contract), or the date of receipt of the payment, whichever is earlier.

4. It is also clarified that as the installments/annuity payable by NHAI to the concessionaire also includes some interest component, the amount of such interest shall also be includible in the taxable value for the purpose of payment of tax on the said annuity/installment in view of the provisions of section 15(2)(d) of the CGST Act."

6. The above Circular was issued by the Central Board of Indirect Taxes and Customs pursuant to the decision taken by the GST Council in its 53rd Meeting on 22.06.2024. The petitioner's contract with its employer namely, the National Highways Authority of India under the Concession Agreement of April, 2018 contemplates payment of 40% of the Bid Cost in five installments. Clause 23.3.1 reads as under:-



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W.P.(MD) Nos.14745 to 14747 of 2023

"23.3 Payment of Bid Project Cost

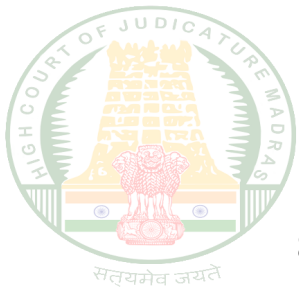
23.3.1 *40% (forty per cent) of the Bid Project Cost, adjusted for the Price Index Multiple, shall be due and payable to the Concessionaire in 5 (five) equal installments of 8% (eight per cent) each during the Construction Period in accordance with the provisions of Clause 23.4."*

7. Thus, during the construction period, the payment of 40% of the Bid Cost is staggered in five installments in Clause 23.4 as detailed below:-

"23.4 Payment during Construction Period

For the purpose of this Clause 23.4, the Payment Milestone for the Milestone for release of payment during Construction Period shall be as under:

- a) I (first) Payment Milestone - On achievement of 10% Physical Progress*
- b) II (second) Payment Milestone - On achievement of 30% Physical Progress*
- c) III (third) Payment Milestone - On achievement of 50% Physical Progress*
- d) IV (fourth) Payment Milestone - On achievement of 75% Physical Progress*
- e) V (fifth) Payment Milestone - On achievement of 90% Physical Progress"*



W.P.(MD) Nos.14745 to 14747 of 2023

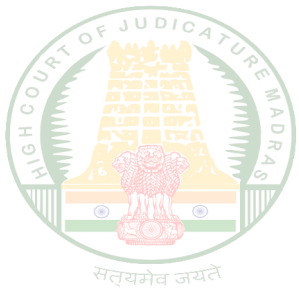
8. As far as the balance 60% of the payments are concerned, the petitioner is to receive payments in 30 Annuities as per Clause 23.6.3 of the above said Contract with the National Highways Authority of India.

Clause 23.6.3 reads as under:-

23.6. Annuity Payments during Operation Period

23.6.3. Each of the Annuity Payments due and payable during the years following the COD shall be as under:

Annuity following the COD	Percentage of Completion Cost remaining to be paid on COD
1 st Annuity	2.10%
2 nd Annuity	2.17%
3 rd Annuity	2.24%
4 th Annuity	2.31%
5 th Annuity	2.38%
6 th Annuity	2.45%
7 th Annuity	2.52%
8 th Annuity	2.60%
9 th Annuity	2.68%
10 th Annuity	2.76%
11 th Annuity	2.84%
12 th Annuity	2.93%
13 th Annuity	3.02%
14 th Annuity	3.11%
15 th Annuity	3.20%
16 th Annuity	3.30%
17 th Annuity	3.40%



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W.P.(MD) Nos.14745 to 14747 of 2023

18 th Annuity	3.50%
19 th Annuity	3.61%
20 th Annuity	3.72%
21 st Annuity	3.83%
22 nd Annuity	3.94%
23 rd Annuity	4.06%
24 th Annuity	4.18%
25 th Annuity	4.25%
26 th Annuity	4.25%
27 th Annuity	4.44%
28 th Annuity	4.71%
29 th Annuity	4.75%
30 th Annuity	4.75%

9. It is submitted that the issue has now been clarified in Paragraph 3 of CBIC Circular No.221/15/2024-GST dated 26.06.2024, the content of which has been extracted in Paragraph 5 of this order. It is therefore submitted that the cases can be remitted back to the respondent to re-examine the issue in the light of the above clarification.

10. It is further submitted that the argument of the respondent Department that the petitioner has booked income in its Profit and Loss Account and has also availed 100% input tax credit on the tax paid by the supplier [sub-contractor] to whom the petitioner had sub-contracted the work, is not at all relevant.



W.P.(MD) Nos.14745 to 14747 of 2023

WEB COPY 11. It is submitted that input tax credit has to be availed in accordance with Rule 16, as the service of the sub-contractor was received and the credit has to be availed in a time bound manner in terms of Section 16(4) of the respective GST Enactments.

12. As far the treatment of the income accrued based on the work completed in the Profit and Loss Account is concerned, it is submitted that it is in accordance with the accounting standards of the Institute of Chartered Account of India and therefore, merely, because 60% of the amount to be received in 30 Annuities has been shown as exempted in the returns would not amount that the petitioner has evaded tax. It is submitted that as and when the petitioner will raise invoice based on the milestones for the 30 Annuities as per Clause 23.6.3, tax will be paid by the petitioner.

13. On the other hand, the learned Government Advocate for the respondent would draw attention to Paragraphs 6 and 9 of the counter affidavit, which read as under:-

"6. It is respectfully submitted that the



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W.P.(MD) Nos.14745 to 14747 of 2023

Assessing Officer, after verifying the records/documents produced/furnished, GSTR 1, GSTR 3B returns filed by them and GSTR 2A auto populated in respect of their concern, found out that the assesses have not correctly reported the taxable turnover of works contract receipts up to 40% of the completed works for which the sub-contractor have issued completion bill for a value of Rs. 664,62,77,344/- up to January 2022 i.e for 89% of the works contract as certified by the Independent Engineer. The work order was issued on 10.5.2018 and the agreed upon completion of the contract is 730 days from the date of contract i.e. 10.5.2020. The Assessee have thus to report all amounts received from NHAI for towards the project cost. It was therefore proved that the claim of exemption by the assessee for a turnover of Rs.298,37,55,027/- was suppression of taxable turnover by wilful misstatement of facts as defined under Sec.74 of the TNGST and CGST Act 2017.

9. It is submitted that the Assessing Officer have found that the assesses have reported a turnover of Rs.208,94,72,648/- only and claiming exemption on the supply of works completed for Rs.2983755027/- for which the Turnkey Project contractor have issued Tax invoice and collected output tax, which tax is taken by the assesse as input tax for 2019-20. The assesses have not reported works contract completed for which the Turnkey project contract have issued Tax invoice. There is no proposal to levy tax on annuities in the year 2019-20. The only proposal is to disallow the claim of exemption on works contract completed and supply made to the recipient. Time of supply in the case of services is determined as per Section 13 of the TNGST and CGST Acts 2017 read with Sec.31, is the earliest of the following



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W.P.(MD) Nos.14745 to 14747 of 2023

a) *The date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under 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 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.*

According to Section 13(2) of the CGST Act 2017, the time of supply is the date of provision of service, if the invoice is not issued to NHAI within the period prescribed under Section provision of service, if the invoice is not issued to NHAI within the period prescribed under Section 31 of the Act. The assesses were also informed by notice dated 6.2.23 to file documentary evidence to prove the claim of exemption. The Assesses have not filed any documentary evidence to prove the claim of exemption. An opportunity of personal hearing was granted for appearance on 15.2.23. The assesses even then have not filed documentary evidence to prove the claim of exemption. The Assessing Officer have therefore held that the claim of wrong exemption established the suppression of taxable turnover on non-declaration of facts and willful misstatement of facts as defined under Sec.74 of the TNGST and CGST Acts 2017. The Assesses have not paid the tax with interest and penalty equal to twenty five percent of tax within thirty days of issue of show cause notice. The Assessing Officer have therefore passed orders disallowing the claim of exemption on a turnover of Rs.2983755027/- with interest at 18% under Sec.50(1) of the Acts and levy of penalty under Sec.74(9) of the Acts."



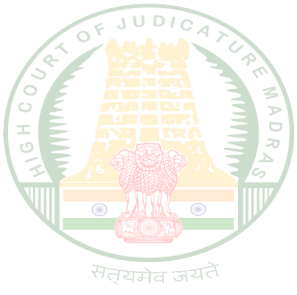
W.P.(MD) Nos.14745 to 14747 of 2023

14. Having considered the submissions made by the learned counsel

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for the petitioner and the learned Government Advocate for the respondent, I am of the view that the impugned orders are to be set aside and the cases are remitted back to the respondent to re-examine the issue in the light of the clarification issued by the Central Board of Indirect Taxes and Customs vide Circular No.221/15/2024-GST, dated 26.06.2024, pursuant to the recommendation of the GST Council in its 53rd Meeting held on 22.06.2024.

15. *Prima facie*, the petitioner is not liable to pay tax if no invoice is raised by the petitioner on the NHAI. As and when the petitioner either raises invoice for payment of the amount in 30 Annuities *qua* balance 60% or receives amounts in Annuities, the petitioner would be liable to pay tax. Merely because, the petitioner has sub-contracted the work and completed the work in advance for receiving the payments in the form of Annuity over a period of 15 years would not either disentitle the petitioner to avail input tax credit on the tax charged by the sub-contractor on the petitioner or to draw an inference that the petitioner was indeed liable to pay tax on the entire value of the contract with NHAI, even though the petitioner has neither raised any invoice nor received the payment.



W.P.(MD) Nos.14745 to 14747 of 2023

16. Therefore, the impugned orders are set aside and the cases are

remitted back to the respondent to re-examine the issue in the light of the above observations and in the light of Circular No.221/15/2024-GST, dated 26.06.2024.

17. This exercise shall be carried out by the respondent as expeditiously as possible, preferably within a period of three months from the date of receipt of a copy of this order. Needless to state the petitioner shall be heard before final orders are passed.

18. These Writ Petitions stand disposed of with the above observation. No costs. Consequently, connected Miscellaneous Petitions are closed.

Index : Yes/ No
Neutral Citation: Yes / No
Speaking Order / Non-Speaking Order
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24.07.2024

To

The State Tax Officer,
Lalgudi Assessment Circle,
Lalgudi,
Trichy District.



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W.P.(MD) Nos.14745 to 14747 of 2023

C.SARAVANAN, J.

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Common order in
W.P.(MD) Nos.14745 to 14747 of 2023

24.07.2024