2020 INSC 414

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2516 OF 2020
(Arising out of SLP (Civil) No. 32044 of 2011)

STATE OF ORISSA …APPELLANT(S)

Vs.

M/S B. ENGINEERS & BUILDERS LTD. & ORS. …RESPONDENT(S)

JUDGMENT

Dinesh Maheshwari, J.

1. Before entering into the subject matter, we may notice at the outset that this petition for special leave to appeal is barred by limitation by a period of 274 days. Though objections have been raised on behalf of the contesting respondent against the prayer for condonation of delay but, the record shows that notices on the application seeking condonation of delay as also on the petition for leave to appeal were issued way back on 18.11.2011 and for a long time, the matter remained pending while awaiting service on the respondents. Ultimately, after completion of service, we had heard learned counsel for the contesting parties on

merits. Having regard to the circumstances of the case and after having heard the contesting parties on merits, we find no reason to close the matter only on the ground of delay. Accordingly, delay in filing is condoned.

1.1. Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 05.08.2008 as passed by the Orissa High Court at Cuttack in W.P. (C) No. 8857 of 2003, whereby the High Court accepted the claim of the respondent No. 1 of present appeal[1], for reimbursement of the amount of sales tax levied in respect of the works contracts executed by it. The High Court also directed the Opposite Parties to grant appropriate reimbursement as claimed by the writ petitioner in terms of Clause 45.2 of the General Conditions of Contract[2] under the National Competitive Bidding Contract[3] while quashing the clarification Circular dated 07.11.2001 issued by the Government of Orissa in its Department of Water Resources.

2.1. The appellant State of Orissa has challenged the order so passed by the High Court while essentially raising the questions concerning the nature and implication of the sales tax, levied in relation to the works contracts executed by the writ petitioner, under the Orissa Sales Tax Act, 1947[4] as amended in terms of the Constitution (Forty-sixth Amendment)

1 Hereinafter also referred to as 'the writ petitioner' or 'the contractor company'.
2 'GCC' for short
3 'NCB' for short
4 Hereinafter also referred to as 'the Act of 1947'

Act, 1982[5]; and concerning the operation and import of the relevant stipulations in the contracts in question.

3. The factual and background aspects of the matter, being not of much dispute and confined to a narrow compass, may be noticed, in brief, as follows:

3.1. The respondent No. 1 of this appeal, said to be a company of engineers and builders, who had been engaged in undertaking various works contracts, responded to the tenders floated by the respondent Nos. 6 to 18 (various offices of the Government of Orissa) and, on being determined as the lowest tenderer, was awarded the contracts from time to time.

3.2. It is not in dispute that the aforesaid contracts awarded to the respondent No. 1 carried the stipulations regarding taxes in Clause 45 of GCC. The claim of the respondent No. 1 for reimbursement of sales tax had been essentially based on Clause 45.2 of GCC, which carried the stipulation that any Central or State sales tax and other taxes on completed items of works (excluding penalty), as may be levied and paid by the contractor shall be reimbursed by the employer on proof of payment (and) on production of assessment certificate.

3.3. The sales tax regime in the State of Orissa is primarily governed by the Act of 1947. By way of the Orissa Sales Tax (Amendment) Act, 1984 and the Orissa Sales Tax (Amendment) Act, 1985[6], the

5 Hereinafter also referred to as 'the forty-sixth amendment'

6 These amendments were introduced after the forty-sixth amendment of the Constitution whereby, Clause (29-A) was inserted to Article 366 and it was, *inter alia*, provided that the expression "tax on the sale or purchase of goods" includes a tax on the transfer of property in goods involved in the

amendments were brought about in the Act of 1947 with effect from 07.04.1984 whereby, *inter alia*, the definition of expression “Works contract” was inserted; the definition of the expression “Sale” was expanded so as to include therein the transfer of property in goods involved in the execution of a works contract; and specific meaning was also assigned to the expression “taxable turnover” in respect of a works contract for the purpose of the rate of tax payable by a dealer. The rate of tax payable by a dealer on the “taxable turnover” in respect of “works contract” was fixed at 4%.

3.4. On 04.11.1986, the Government of Orissa, in its Department of Irrigation and Power, issued a Circular to the effect that in case of works contract executed on or after 07.04.1984, containing the specific clause for reimbursement of sales tax, the Department of Irrigation and Power would be liable for reimbursement of the amount of sales tax actually paid by the concerned contractor on production of necessary documentary evidence. Pursuant to these observations and directions, reimbursement of the sales tax paid by the contractor company in respect of assessment years 1995-1996 to 1997-1998 was allowed.

3.5. Later on, the State Government issued a notification under Section 5 of the Act of 1947 whereby, the rate of tax payable by a dealer on the taxable turnover in respect of the works contract was increased to 8%. Thereafter, by way of the orders of assessment for the years 1998-1999 to 2000-2001, the Assessing Authority levied sales tax @ 8% on the

execution of a works contract.

taxable turnover in respect of the works contracts executed by the contractor company. With reference to such assessments, the contractor company claimed reimbursement of the sales tax paid in respect of the works contracts executed by it.

3.6. However, in the meantime, the Government of Orissa, in its Department of Water Resources, issued another Circular dated 27.01.2000 to the Engineers-incharge of various offices and projects that the question as to whether sales tax deducted from the bills of the contractor and paid to the sales tax officer will be again reimbursed to the contractor whose quoted price was inclusive of all taxes as per Clause 13.3 of the Instructions to Bidders[7], was under active consideration; and it was directed that no reimbursement of sales tax be made under Clause 45.2 of GCC until clarification was communicated in that regard.

3.7. Thereafter, on 07.11.2001, the State Government, in its Department of Water Resources, issued the impugned Circular, said to be a clarificatory one, stating that a completed item of works, for which the contractor had entered into an agreement with the department, was either an immovable property or a works contract and in either case, was not exigible to sales tax; and therefore, the question of payment of sales tax on such immovable property or works contract and consequential reimbursement by the department as per Clause 45.2 of the General Conditions of Contract, or similar provision in other contracts, did not arise. Accordingly, the State Government instructed its Engineers-

7 'ITB' for short

incharge not to reimburse the sales tax levied on cement, steel etc.; and also directed for recovery of the amount from the contractor wherever any such amount of sales tax had been reimbursed. These directions of the Government were followed up by another Circular dated 19.06.2002 to the same effect.

3.8. In view of the aforementioned Circulars dated 07.11.2001 and 19.06.2002, its claim, for reimbursement of the sales tax paid, being in jeopardy and rather, the proposition for recovery of the amount already reimbursed looming large, the contractor company preferred the writ petition leading to this appeal, while seeking the following reliefs: –

> "(i) Issue a Rule Nisi Calling upon the Opposite Parties to show cause as to why the alleged clarification dated 07.11.2001 under Annexure-1, and the subsequent direction for recovery of the amount earlier reimbursed, vide letter dated 19.6.2002 under Annexure-3 ought not to be declared illegal, invalid and non-est in the eyes of law;
>
> And
>
> (ii) issue a further Rule Nisi Calling upon the Opp. Parties to show cause as to why the reimbursement claims made by the petitioner under Annexure-5 series may not be granted with a period stipulated by this Hon'ble Court;
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> And
>
> (iii) in the event the Opp. Parties fail to show cause or show insufficient cause make the said Rule Nisi absolute and issue an appropriate writ of Mandamus or a writ of certiorari in line with the aforesaid Rule Nisi;
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> And/or
>
> (iv) further be pleased to direct either of the Opp. Parties i.e., the contracting parties (Opp. Parties 6-18) or the Sales-tax Authorities (Opp. Parties 3-5) to effect reimbursement or refund along with interest from the date of deposit of tax;
>
> And

(v) to pass any other writ/writs, order/orders as this Hon'ble Court may deem just and proper."

4. The High Court in its impugned order dated 05.08.2008, examined the contentions of the parties and granted the prayers of the writ petitioner while observing and holding, *inter alia*, as under:-

"8…… The petitioner now claims reimbursement of tax paid by it on actual turnover of the works contract and not on the tax paid by it on the materials procured by it, which have gone into for the purpose of execution of the works contract. The further admitted fact that O.Ps. 6 to 18 have, in fact, deducted the sales tax at source from the bills raised by the petitioner from time to time in due progress of the work and the same have in turn been deposited with the Sales Tax Department.

**** **** ****

10. Now Annexure-1, which is sought to be quashed, is a clarification but not in supersession of Annexure-10, as it is projected by the State Government. The said clarification cannot take away the effect of the statutory provision. The orders of assessment in Annexure-4 series indicate that after deducting the labour charges, services charges, amount of tax paid, materials used in the execution of works contract, from the gross turn over of the assessment year, the balance has been put to tax by the Sales Tax Authority. The tax, as we find, has been imposed in the light of the decision in Gannon Dunkerly (supra).

From the discussion made above, the irresistible conclusion is that the sales tax has been levied in the orders of assessment in respect of the amount received pertaining to items of work completed during the financial year. The clarification in Annexure-1, which unilaterally takes away the claim of the petitioner for reimbursement, is contrary to Clause-45.2 of the General Conditions of the Contract and Section 5 (2) (AA) of the Orissa Sales Tax Act as well as the decision of the apex Court in Gannon Dunkerly (supra). Accordingly, the clarification letter dated 7.11.2001 (Annexure-1) issued by the Financial Adviser-cum-Additional Secretary to Government, Department of Water Resources is quashed and the O.Ps. are directed to grant appropriate

> reimbursement in terms of Clause-45.2 of the General Conditions of Contract, as claimed by the petitioner."

5. Assailing the order so passed by the High Court, learned senior counsel for the appellant has strenuously argued that the impugned order is contrary to the facts of the case as also the principles of law applicable and hence, deserves to be set aside.

5.1. The learned senior counsel for the appellant has referred to Clause (29-A) of Article 366 of the Constitution of India; and the principles enunciated by this Court in the cases of ***Builders' Association of India and Ors. v. Union of India and Ors.:*** **(1989) 2 SCC 645** and ***Gannon Dunkerley and Co. and Ors. v. State of Rajasthan and Ors.:*** **(1993) 1 SCC 364** to submit that by the forty-sixth amendment of Constitution, a fiction was created for treating the works contract as deemed sale on which, sales tax would be leviable but, only on the value of goods which went into the execution of any works contract.

5.2. Further, with reference to the definitions of "sale", "goods" and "works contract" as contained in the Act of 1947 as also Section 5(2)(AA) thereof and the relevant clauses governing the contracts in question, the learned counsel has submitted that any payment against the monthly running bill to the contractor does not constitute payment for any "completed item of work"; and the only meaning of the nomenclature "completed item of work" is the completion of the works contract as such. Learned counsel would maintain that sales tax is not leviable on the "completed item of work" in a works contract but, the contractor is bound

to pay sales tax on “taxable turnover” which, for the purpose of sales tax, could only be on the value of goods utilised in completion of the works contract.

5.3. The learned senior counsel has elaborated on the aforesaid aspects with the submissions that every amount of sales tax on the “taxable turnover”, which is required to be paid by the contractor, is achieved either by deduction of such amount of sales tax from the monthly running bills by the employer for deposit of the same with the Sales Tax Department or by way of payment by the contractor directly to the Sales Tax Department. According to the learned counsel, where the amount payable as sales tax by the contractor is deducted by the employer at the time of making payment of monthly running bills and is deposited by the employer with the Sales Tax Department, there would not arise any question of making any reimbursement of the amount so deducted and paid to the Sales Tax Department back to the contractor because the liability to pay sales tax on the value of material/goods utilised in any works contract is that of the contractor; and the claim for its reimbursement is entirely impermissible.

5.4. The learned senior counsel for the appellant has strenuously argued that the High Court has failed to examine the import and effect of Clause 13.3 of the Instructions to Bidders and Clause 45.1 of the General Conditions of Contract which make it clear that the bid price quoted by the contractor is inclusive of all duties, taxes and other levies, including

royalties on all materials to be used in performance of the works contract. Hence, according to the learned counsel, when sales tax on the goods/materials forms a part of contract price, the claim for reimbursement has rightly been denied by the Government.

5.5. As regards Clause 45.2 of the General Conditions of Contract, the learned counsel would re-emphasise that thereunder, reimbursement is permissible when there is any sales tax levied on a “completed item of work” but in the context of a works contract in a construction project, there is no sales tax on the “completed item of work” which is an immovable property. The learned counsel would submit that earlier, the Circular dated 04.11.1986 came to be issued on an erroneous understanding of Clause 45.2 in relation to works contract but subsequently, clarificatory Circulars dated 07.11.2001 and 19.06.2002 were issued, stating the correct position of law that the said Clause 45.2 applied only to the sales tax on “completed item of work”; and the sales tax levied in terms of Section 5(2)(AA) of the Act of 1947 was not reimbursable and had to be borne by the contractor in view of clear stipulation in Clause 45.1 of the General Conditions of Contract. According to the learned counsel, reliance on the Circular dated 04.11.1986 on behalf of the respondent No. 1 is entirely misplaced and the said Circular, by no means, could be construed as that of amending the contractual terms as also the liability of the contractor in terms of Section 5(2)(AA) of the Act of 1947.

6. *Per contra*, learned senior counsel for the contractor company (the respondent No. 1 herein) has duly supported the order impugned with reference to the reasonings therein.

6.1. Learned senior counsel for the contractor company has contended that the argument made on behalf of the appellant, that the deduction in the running bills had only been of the sales tax payable on various items, is contrary to the record because the deductions were made on a deemed sale on turnover basis and not item-wise and such a recovery of sales tax is squarely covered by Clause 45.2 of GCC whereunder, the contractor company is entitled to the claimed reimbursement.

6.2. The learned senior counsel has again referred to the decision of this Court in the case of ***Gannon Dunkerley*** (supra) and the provisions contained in Section 5 (2) (AA) of the Act of 1947 as also the said Clause 45.2 of GCC and the Circular dated 04.11.1986 to submit that deduction of sales tax on turnover basis pre-supposes the existence of sale and therefore, the contractor company is entitled to the reimbursement as claimed. According to the learned counsel, the Circular dated 07.11.2001 had been directly against the statutory provisions as also the contractual stipulations and the same has rightly been disapproved by the High Court. The learned counsel has also referred to various decisions including that in the case of ***State of U.P. and Ors. v. P.N.C. Construction C. Ltd. and Ors.:*** **(2007) 7 SCC 320**.

7. We have heard learned counsel for the parties at sufficient length and have examined the record with reference to the law applicable.

8. Having regard to the issues raised, appropriate it would be to take note of the relevant provisions of law; the referred conditions governing the contractual relations of the parties; and the referred Circulars issued by the Government of Orissa.

8.1. By way of the Constitution (Forty-sixth Amendment) Act, 1982, Clause (29-A) came to be inserted to Article 366 of the Constitution of India, providing for inclusive definition of the expression "tax on the sale or purchase of goods" in relation to various transactions and dealings. As regards "works contract", the said expression came to be assigned the meaning in sub-clause (*b*) thereof, which reads as under:-

> "(29-A) "tax on the sale or purchase of goods" includes-
>
> (*a*)… … …
>
> *(b)* a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> *(c)* to (f) … … …"

8.1.1. The constitutional validity of the aforementioned provisions by which the legislatures of the States were empowered to levy sales tax on certain transactions described in sub-clauses (*a*) to (*f*) of Clause (29-A) of Article 366 of the Constitution as also the question, as to whether the power of the State legislature to levy tax on the transfer of property in goods involved in the execution of works contracts is subject to the restrictions and conditions contained in Article 286 of the Constitution,

were considered and decided by the Constitution Bench of this Court in the case of ***Builders' Association*** (supra). Therein, while upholding the constitutional validity of the aforementioned provisions, the Constitution Bench explained the unique features of a composite contract relating to work and materials; and expounded on the meaning, effect and amplitude as also contours of the provisions pertaining to the taxing power of the States in relation to works contract in the following words: -

> **"38.** In Benjamin's *Sale of Goods* (3rd Edn.) in para 43 at p. 36 it is stated thus:
>
> > "*Chattel to be affixed to land or another chattel*.— Where work is to be done on the land of the employer or on a chattel belonging to him, which involves the use or affixing of materials belonging to the person employed, the contract will ordinarily be one for work and materials, the property in the latter passing to the employer by accession and not under any contract of sale. Sometimes, however, there may instead be a sale of an article with an additional and subsidiary agreement to affix it. The property then passes before the article is affixed, by virtue of the contract of sale itself or an appropriation made under it."
>
> **39.** In view of the foregoing statements with regard to the passing of the property in goods which are involved in works contract and the legal fiction created by clause (29-A) of Article 366 of the Constitution it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property.
>
> **40.** We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under Entry 54 of the State List. The

> 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (*b*) of Article 366(29-A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of Entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29-A) of Article 366 is to be found only in Entry 54 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of *Bengal Immunity Co. Ltd. [AIR 1955 SC 661* in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under Entry 54 of the State List."
>
> (emphasis supplied)

8.1.2. In the case of ***Gannon Dunkerley*** (supra), while dealing with the scope of the legislative power of State under Entry 54 of the State List contained in Seventh Schedule to the Constitution, particularly in the context of inter-State trade or commerce, another Constitution Bench of this Court found no reason to reopen the issues covered by the decision in ***Builders' Association*** case (supra) and held on the limitations of the powers of State legislature as under:-

> "31…..the legislative power conferred under Entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which takes place in the course of import or export of goods. In view of the aforesaid limitations imposed by the Constitution on the legislative power of the States under Entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorising the imposition of a tax on transfer of property in goods involved in

the execution of a works contract, with the aid of sub-clause (*b*) of clause (29-A) of Article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export.

**** **** ****

41. It must, therefore, be held that while enacting a law imposing a tax on sale or purchase of goods under Entry 54 of the State List read with sub-clause (*b*) of clause (29-A) of Article 366 of the Constitution, it is not permissible for the State Legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of inter-State trade or commerce under Section 3 of the Central Sales Tax Act or an outside sale under Section 4 of the Central Sales Tax Act or sale in the course of import or export under Section 5 of the Central Sales Tax Act. So also it is not permissible for the State Legislature to impose a tax on goods declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act except in accordance with the restrictions and conditions contained in Section 15 of the Central Sales Tax Act."

8.1.3. In the said case of ***Gannon Dunkerley***, the Constitution Bench explained the purport and effect of the legal fiction introduced by sub-clause (*b*) of Clause (29-A) of Article 366 of the Constitution and also enunciated the principles for its operation as follows: -

"36. If the legal fiction introduced by Article 366(29-A)(b) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services.

**** **** ****

47……..The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover—

(*a*) Labour charges for execution of the works;

(*b*) amount paid to a sub-contractor for labour and services;

(*c*) charges for planning, designing and architect's fees;

(*d*) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(*e*) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

(*f*) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

(*g*) other similar expenses relatable to supply of labour and services;

(*h*) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor."

(emphasis supplied)

8.1.4. The salient features of the legal fiction introduced by sub-clause (*b*) of Clause (29-A) of Article 366 of the Constitution and the co-related concept of "value addition" came to be succinctly explained by this Court in the case of ***P.N.C. Construction Co.*** (supra) in the following words: -

"21. "Value addition" is an important concept which has arisen after the Forty-sixth Amendment to the Constitution. Prior to the said Amendment this Court had taken the view in *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd* [AIR 1958 SC 560] that "works contract" was an indivisible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales tax. To overcome the effect of the said decision, the concept of "deemed sale" was introduced by Parliament by introducing sub-clause (*b*) of Clause 29-A in Article 366 of the Constitution which states that the tax on sale or purchase of goods would include a tax on transfer of property in goods involved in the execution of works contract. The emphasis is on the expression "transfer of property in goods (whether goods as such or in *some other form*)". Therefore, after the Forty-sixth Amendment to the Constitution, the works contract which was an indivisible contract is, by a legal fiction, divided into two parts—one for sale of goods and the

other for supply of labour and services. Therefore, after the Forty-sixth Amendment, it became possible for the States to levy sales tax on the value of the goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods supplied in a building contract. This is where the concept of "value addition" comes in. It is on account of the Forty-sixth Amendment to the Constitution that the State Government is empowered to levy sales tax on the contract value which earlier was not possible."

(emphasis supplied)

8*.2.* Having thus noticed the source of power of the State legislature to levy sales tax in relation to the works contract but only on the value of the goods/materials involved therein, we may also take note of the relevant amended provisions of the Orissa Sales Tax Act, 1947, which read as under:-

"**Section 2(g)** "Sale" means with all its grammatical variations and cognate expression, any transfer of property in goods for cash or deferred, payment or other valuable consideration and includes,--

(i) … … …

(ii) (ii) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) to (vi) … … …

Section 2(jj)- "Works Contract" includes any agreement for carrying out, for cash or deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any moveable or immoveable property.

S.5(2)(AA)- Notwithstanding anything contained in sub-section (2)(A), "taxable turnover" in respect of:

(i) 'works contract' shall be deemed to be the gross value received or receivable by dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of this contract… … …"

8.3. As noticed, the claim for reimbursement made by the contractor company is based on Clause 45.2 of GCC whereas this claim is being resisted by the appellant State with reference to Clause 13.3 of ITB and Clause 45.1 of GCC. The referred clauses, as placed before us for consideration, read as under: -

> **Clause 13.3 of ITB**
>
> "13.3 All duties, taxes and other levies including royalty payable by the contractor under the contract or for any other cause shall be included in the rates, price and total bid price submitted by the bidder."
>
> **Clauses 45.1 and 45.2 of GCC**
>
> "45.1 The rates quoted by the contractor shall be deemed to be inclusive of the sales and other taxes including royalties on all materials that the contractor will have to purchase for performance of this contract.
>
> 45.2 Any Central or State Sales Tax and other taxes on completed items of works of this contract as may be levied excluding penalty levied for Contractor's fault and paid by the Contractor shall be reimbursed by the Employer to the Contractor on proof of payment on production of assessment certificate on every financial year. During the course of contract period, deductions of sales tax on works contract turnover at the source, shall be made from each bill at such rate and conditions as may be required under the provisions of Orissa Sales Tax Act and Rules."(*sic*)

8.4. Now, the three Circulars issued by the Government of Orissa in regard to the acceptance and then denial of the claim for reimbursement of sales tax in works contract, which form the part of controversy herein, may also be noticed.

8.4.1. In its initial Circular dated 04.11.1986, the State Government issued directions and guidance for such reimbursement of sales tax in

relation to the existing work contracts; and also directed that any such clause for reimbursement be not included in future contracts.. This Circular dated 04.11.1986 reads as under:-

"Government of Orissa
Irrigation and Power Department
48154/Dated 4th No November, 1986

No. FA-1-11/86

From

Shri P.K. Das
Financial Adviser-cum-
Joint Secretary to Government

To

The Engineer-in-Chief, Irrigation, Orissa/Chief Engineer, Delta and Flood Control/ Chief Engineer, Medium Irrigation-I/Chief Engineer, Medium Irrigation-II/Chief Engineer, Rengali, Gohira and Samkoi Projects/ Chief Engineer, Rengali Irrigation Project, Samal/ Chief Engineer, Mahanadi Birupa Barrage Project/Chief Engineer, Upper Kolab Project, Bariniput/Chief Engineer, Potteru Irrigation Project/Chief Engineer, Electricity-cum-Chief Engineer, Electrical Projects, Orissa/General Manager, Upper Indravati Project/Chief Engineer (Ele.) Upper Kolab Hydro Ele. Project.

Sub: RE-IMBURSEMENT OF SALES TAX ON WORKS CONTRACTS

Sir,

1. I am directed to say that in accordance with the Orissa Sales Tax (Amendment) Act, 1984 read with Orissa Sales Tax (Amendment) Ordinance, 1985, Sales Tax has become payable on the turn over of Works Contracts with effect from 07.04.1984.

2. Under the Law, Sales Tax is payable by the concerned contractor/dealer, and not by this Department. Yet, a question arose as to whether this Department was legally liable to reimburse the amount of sale tax actually paid or payable by the Contractor/dealers in so far as the contracts relating to this Department are concerned. After due consideration of the legal aspects of the problem, the following instructions are issued for information and guidance of all concerned.

(i) In case of Works- Contracts executed on or after 07.04.1984 which contained specific clauses for reimbursement of Sales Tax, this Department is liable to reimburse the amount of sale tax actually paid by the concerned contractor on production of necessary documentary evidence in token of making such payment, after obtaining an undertaking from the concerned contractor to the following effect:-

If the Contractor prefers or has preferred appeal/revision before the concerned appellate authority under the Sales Tax Law for remission of the Sales Tax dues paid by him and said appeal/revision results in any reduction of such dues, the differential amount, the amount of Sales Tax reimbursed and the amount of Sales Tax reimbursed and the amount of Sales Tax payable as decided on appeal/revision will be refunded back to Government by the Contractor.

(ii) Similar reimbursement will also be permissible and in the same manner as indicated in Sl. (i) above in case of contracts executed prior to 07.04.1984 where the work was in progress beyond that date, which contained specific clause for such reimbursement.

(iii) The amount of penalty levied if any, under the Sales Tax Law on any count and paid by the Contractor-dealer shall not be reimbursed by the Department to the concerned Contractor.

(iv) No clause either for reimbursement for Sales Tax or payment of such Tax by the department to the Contractor should be inserted in the Notice Inviting Tenders or Tender document and no tender containing any clause or condition to the above effect should be accepted.

3. I am to request that the above guideline may be brought to the notice of all concerned.

4. If any amount of Sales Tax has been reimbursed/paid to any Contractor in any case, not in conformity with the guidelines as noted vide paragraph-2 above, a proposal should be furnished to this Department seeking Government approval to that effect, furnishing full facts and figures on that score, clearly indicating the extent and manner of deviation from any of the guidelines as noted above Sls. (i) to (iv) of Paragraph-2

above. This may please be treated as urgent and the proposal(s) should be submitted to Government in all such cases by 30.11.1986 at latest. If there is no need for furnishing any proposal on the above score, a Nil report should be submitted by the aforesaid target date.

5. Receipt of the letter may please be acknowledged by return of post.

Yours faithfully
Sd/- 04.11.1986
FA-cum-Joint Secretary to Govt."

8.4.2. However, in the Circular dated 27.01.2000, the State Government asked the Engineers-incharge to await its decision on the queries raised on the issue pertaining to such reimbursement of the amount of sales tax in relation to the works contracts. This Circular dated 27.01.2000 reads as under:-

"Government of Orissa
Department of Water Resources

No. IIT-RVN-11/2000-5295 Dated: 27.01.2000

From

Shri N. Behera,

FA-cum-Addl. Secretary to Government

To

The Engineer-in-Chief, Water Resources/
Engineer-in-Chief, Planning & Designs/
Engineer-in-Chief, Rengali Irrigation Project/
All the Chief Engineers & Basin Manages/
All the Chief Engineers/
All the Chief Construction Engineers/
Director, Ground Water Survey and Investigation

Sub: Reimbursement of Sales Tax on Works contract.

Sir,

I am directed to say that clause 13.3 of ITB of the NCB bid document approved by World Bank stipulates that “All duties, taxes and other levies including royalty payable by the contractor under the contract or for any other cause shall be included in the rates, prices and total bid price submitted by the Bidder.”

The clause 45.2 at G.C.C. of the said document stipulates that “Any Central or State Sales Tax and other Taxes on completed item of work of this contract as may be levied excluding penalty levied for contractor’s default and paid by the contractors shall be reimbursed by the employer to the contractor on proof of payment. During the course of contract period deduction of Sales Tax on works contract turn over at the sources shall be made from each bill at such rate and conditions as may be required under the provision of Orissa Sales Tax Act and Rules.”

Some Chief Engineers have sought for clarification as to whether Sales Tax deducted from the bills of the contractor and paid to the sales tax officer will be again reimbursed to the contractor whose quoted price is inclusive of all taxes as per clause 13.3 of ITB. In some cases, A. G. Audit has raised objection against such reimbursement. This is under active consideration of govt. for issuing necessary clarification.

Therefore, you are hereby instructed that no reimbursement of sales tax should be made under clause 45.2 of G. C. C. of NCB agreements for World Bank works and works covered under similar contracts till clarification is communicated by Government.

This may please be brought to the notice of all Subordinate Officers under your control.

Receipt of the letter may please be acknowledged.

Yours faithfully
Sd/-
FA-cum-Addl. Secretary to Government”

8.4.3. Thereafter, by the impugned Circular dated 07.11.2001, the State Government purportedly came out with the clarification but, in effect, issued directions squarely opposite to those contained in the earlier Circular dated 04.11.1986, while asserting that no such claim for

reimbursement of the amount of sales tax pertaining to works contract was admissible. This Circular dated 07.11.2001 reads as under: -

"Government of Orissa
Department of Water Resources

No. IIT RVN. 11/2000-42711/UR Dated 07.11.2001

From

Shri B. Pradhan,
FA-cum-Addl. Secretary to Government.

To

The Engineer in Chief, Water Resources/
Engineer in Chief, Planning and Designs/
Engineer in Chief, Rengali Irrigation Project/
All the Chief Engineers and Basin Manager/
All the Chief Engineers/
All the Chief Construction Engineer/
Director, Ground Water Survey and Investigation.

Sub: Clarification on reimbursement of sales tax in respect of works contracts

Sir,

In continuation of this Department letter no.5295 dt.5295 dt.27.01.2000 on the subject mentioned above, I am directed to say that as per Orissa Sales Tax Act transfer of property in execution of works contracts (Whether as goods or in some other form) is subject to levy of Sales Tax. When a building, a bridge, a road, a canal, a plant etc., is constructed, the ingredients like cement, iron & steel, bricks, stones etc. involved in execution of the contract are subject to levy of sales tax. The completed item i.e., a bridge, a building, a road, or a canal, as the case may be, is not subjected to levy of sales tax because after construction these become immovable property not susceptible to transfer of property for the purpose of sales tax assessment.

As per clause 13.3 of I.T.B. of the NCB bid document read with clause 45.1 of the general conditions of the contract the rates quoted by the contractor shall be deemed to be inclusive of sales and other taxes including royalties on all materials that the contractor will have to purchase for performance of the contract.

Clause 45.2 of the G.C.C. speaks that any Central or State Sales Tax and other taxes on completed items of work of the contract as may be levied, excluding penalty levied for contractors default and paid by the contractor shall be reimbursed by the employer to the contractor on proof of payment. It is clarified that a completed item of work for which the contractor has entered into agreement with the department is either immovable property or a works contract and in either case is not exigible to sales tax. Therefore, the question of payment of sales tax on such immovable property and consequential reimbursement of the sales tax by the department as per clause 45.2 of the G.C.C. or similar provision existing in other contracts does not arise. A contractor may, however, have to pay sales tax as assessed by the sales tax officer on items which go into construction of the work. This tax is not reimbursable since the contractor is expected to have built it into his rates.

In view of the above, you are hereby instructed not to reimburse sales tax levied on cement, steel etc., misinterpreting clause 45.2 of the G.C.C. of N.C.B. agreement for World Bank assisted works and the works covered under other agreement containing similar clause. Besides if any amount of sales tax has already been reimbursed, immediate steps should be taken for recovery of the amount from the contractors.

This has been concurred in by Finance Department in their U.O.R.No.3896/ SF. Dt. 24.09.2001.

Yours faithfully,
Sd/-
Financial Adviser-cum-Addl. Secretary to Government”

9. Now, while taking up the points arising for determination, we may usefully summarise the relevant aspects pertaining to this case.

9.1. It is evident that the contractor company (respondent No. 1 herein) seeks to assert its right to claim reimbursement of the amount of sales tax levied in respect of the works contracts executed by it on the strength of the stipulations contained in Clause 45.2 of GCC of NCB bid documents. On the other hand, the appellant State seeks to resist the right so claimed by the contractor company with reference to the principles enunciated in the cited decisions that after the forty-sixth amendment and insertion of sub-clause (*b*) of Clause (29-A) to Article 366, the State could levy sales tax on the price of goods and materials used in works contract as if there was a sale of such goods and materials and then, on two-fold assertions on that basis: one, that in the context of a works contract, there is no sales tax on the "completed item of work" which is an immovable property and, therefore, question of any reimbursement does not arise; and second, that in works contract, the contractor may have to pay sales tax assessed on the items which go into the construction but, such amount of sales tax is not reimbursable because the contractor is supposed to have provided for the same in its rates, as envisaged by Clauses 13.3 of ITB and 45.1 of GCC.

9.2. So far as the basic factual aspects are concerned, it is not in dispute that the respondent No. 1 indeed undertook execution of various works contracts with the respective offices of the appellant State of Orissa. It remains indisputable that in relation to such contracts, Clause 13.3 of ITB stipulated that all duties, taxes and other levies including

royalties payable by the contractor were to be included in the bid price and Clause 45.1 of GCC specifically provided that the rates quoted by the contractor shall be deemed to be inclusive of the sales and other taxes including royalties on all materials that the contractor was to purchase for performance of the contract. However, and at the same time, it is also indisputable that as per Clause 45.2 of GCC, any Central or State Sales Tax and other taxes on “completed items of works” of the contract as might be levied upon, and paid by, the contractor (excluding penalty levied for contractor’s fault) were to be reimbursed to the contractor on proof of payment and assessment. This Clause 45.2 further envisaged that during the course of contract period, deductions of sales tax on “works contract turnover” was to be made at the source, from each bill as per the rate and conditions prescribed under the provisions of Act of 1947. It is also not in dispute that in the course of execution of such contracts, various running bill payments were made to the respondent No. 1 and while making such payments, deductions were indeed made towards the amount of sales tax; and such deducted amount of sales tax was deposited with the Sales Tax Department of the Government of Orissa. Further, it is also borne out that reimbursement of the sales tax so levied upon, and paid by, the respondent No. 1 in respect of the assessments for the years 1995-1996 to 1997-1998 was allowed; but such claim for reimbursement by the respondent No. 1 in respect of the assessments for the years 1998-1999 to 2000-2001 was declined.

9.3. As noticed, after the amendments were brought about in the Act of 1947 for levying sales tax on works contract with effect from 07.04.1984, the Circular dated 04.11.1986 was issued by the Government of Orissa to the effect that in case of works contract executed on or after 07.04.1984, containing the specific clause for reimbursement of sales tax, the Department of Irrigation and Power would be liable for reimbursement of the amount of sales tax actually paid by the concerned contractor on production of necessary documentary evidence. The aforementioned reimbursements were allowed to the respondent No. 1 pursuant to these observations and directions in the Circular dated 04.11.1986. However, by way of the subsequent Circular dated 07.11.2001, the Government of Orissa came out with total volte-face on its opinion in relation to the claim for reimbursement of sales tax paid by the contractors while stating that a "completed item of work" in relation to a works contract was not exigible to sales tax and, as regards the sales tax on the items which go into the work, the contractor is expected to have included the same in the rates. It was, therefore, observed that the question of reimbursement as per Clause 45.2 of GCC or similar provision in other contracts did not arise.

9.4. The High Court, in its impugned order dated 05.08.2008, has rejected the contentions of the appellant State and has disapproved the aforesaid Circular dated 07.11.2001 essentially with reference to the fact that the claim for reimbursement was being made of the tax that was levied on the turnover of the works contracts and not of the tax paid by

the contractor on the materials procured by it. The High Court has also found that the sales tax was levied after necessary deductions and in accordance with the decision in ***Gannon Dunkerley*** (supra) for which, the contractor was entitled to claim reimbursement under Clause 45.2 of GCC and that the clarification Circular dated 07.11.2001 cannot take away the effect of statutory provisions.

10. Having taken all the relevant aspects in comprehension and having examined the matter in its totality, we are clearly of the view that the High Court has rightly allowed the writ petition filed by the respondent No. 1 and no case for interference in this appeal is made out.

11. Before proceeding further, we may at once observe that so far as the aforesaid Circulars are concerned, neither of them could be decisive of the issues at hand. As noticed, in the Circular dated 04.11.1986, the State Government expressed the view that the reimbursement in question was required to be allowed in terms of Clause 45.2 of GCC but later on, in the Circular dated 07.11.2001, the State Government took a diametrically opposite view to say that such reimbursement was not to be allowed in relation to the works contract. Obviously, the said Circulars had been based on the given day understanding of the State Government on the operation of the relevant provisions of law and the terms of contract. Such vacillating understanding on the part of the State Government cannot be determinative of the contractual obligations of the parties, which are required to be decided with reference to the principles of law applicable

and on true construction of the terms of contract. Therefore, we would ignore the said Circulars while dealing with the principal issues involved in this matter but shall refer to them at a later and appropriate stage.

12. Reverting to the core issues, it remains rather indisputable that as per Clause 45.2 of GCC, the amount of sales tax on completed items of works of the contract, as might have been levied upon, and paid by, the contractor, except the penalty levied for contractor's own fault, was to be reimbursed to the contractor on proof of payment and assessment. It was also provided in Clause 45.2 itself that, during the course of contract period, deductions of sales tax on works contract turnover would be made from the running bills at the prescribed rates and conditions. As noticed, it is not in dispute that while making payment of various running bills in the course of execution of contracts by the respondent No. 1, deductions were indeed made towards the amount of sales tax and such deducted amount of sales tax was deposited with the Sales Tax Department of the Government of Orissa. Such deductions and deposits with Sales Tax Department had clearly been in accordance with the stipulation contained in the second part of Clause 45.2 *ibid.* However, and even after making deductions in terms of the second part of Clause 45.2, the appellant State seeks to deny the operation of first part of this Clause 45.2 (whereby the contractor is entitled to reimbursement of the amount of sales tax) on the grounds that: (a) the reimbursement is envisaged of the sales tax levied on the "completed item of work" but, in works contract, such "completed

item" is not exigible to sales tax and hence, the question of reimbursement does not arise; and (b) that as per Clause 45.1 of GCC read with Clause 13.3 of ITB, the contractor is deemed to have provided for the leviable amount of sales tax on goods/materials in its rates and hence, the contractor cannot claim any reimbursement thereof. The question is as to whether such contentions of the appellant against the operation of first part of Clause 45.2 of GCC could be countenanced? In our view, the answer could only be in the negative.

13. Taking up the main plank of the case of the appellant about the nature, extent and implication of the levy of sales tax in relation to a works contract, it could be usefully recapitulated that in view of the forty–sixth amendment to the Constitution of India, Clause (29-A) came to be inserted to Article 366; and, by virtue of sub-clause (*b*) thereof, it became permissible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. In other words, after the forty-sixth amendment to the Constitution, the works contract is divided into two parts by a legal fiction: one for sale of goods/materials and other for supply of labour/services; and it is possible for the States to levy sales tax on the value of goods/materials involved in such works contract. These features have been expounded and explained by this Court in the referred cases of ***Builders' Association, Gannon Dunkerley*** and ***P.N.C. Construction Co.*** (supra) and need no further enlargement.

13.1. As regards the relevant provisions of the State enactment, it is at once clear that after the aforesaid forty-sixth amendment to the Constitution, the State of Orissa also proceeded to carry out the necessary amendment to the Act of 1947 and provided for levy of sales tax in relation to a works contract*, inter alia*, by expanding the definition of "Sale" so as to include therein the transfer of property in goods involved in the execution of a works contract; and by specifying that "taxable turnover" in respect of works contract shall be deemed to be the gross value received or receivable by dealer for carrying out such contract less the amount of labour and service charges incurred in execution of the contract. On their essence and intent, what turns out of these amended provisions of the Act of 1947 is that in relation to a works contract, there would be deemed to be the sale of goods involved in execution thereof; and sales tax would be leviable on the taxable turnover (and not on the gross turnover) of such works contract.

13.2. As noticed, it has been the consistent case of the respondent No. 1 that in the running bill payments, the amount of sales tax was deducted and the same was deposited with the Sales Tax Department. It has also been the consistent case of the respondent No. 1 that in the referred orders of assessment, sales tax was levied on the applicable rates on the "taxable turnover" in respect of the works contracts executed by it and the claim for reimbursement was made of the amount of sales tax so levied and paid. The High Court has also recorded a categorical finding that

after deducting the labour charges, service charges and the tax paid from the gross turnover, the balance had been put to tax by the Assessing Authority. These assertions of the respondent No. 1 as also the findings of the High Court are not the subject matter of dispute. That being the position, it is but evident that in relation to the works contracts executed by the respondent No. 1, the appellant and its offices have indeed levied the sales tax on the taxable turnover that was arrived at after due deduction of labour/service charges, in conformity with Section 5(2)(AA) of the Act of 1947. There had neither been any levy of the sales tax on the entire turnover of the works contracts nor any such levy could have been effected because, as noticed, the taxing event of sale in a works contract is confined to the use of the goods/materials in execution of the contract.

14. While the aforesaid legal and factual aspects remain more or less indisputable, what the appellant seeks to contend is that the reimbursement envisaged by the first part of Clause 45.2 of GCC is of the tax levied on the “completed item of work” but in a works contract, sales tax is not levied on the completed item of work because such completed item in a works contract becomes an immovable property. Such a contention of the appellant remains wholly untenable in view of the scheme of levy of sales tax in a works contract as also the scheme of reimbursement envisaged by Clause 45.2 of GCC.

14.1. Contextually read, it is but apparent that the expression "completed item of work" in Clause 45.2 *ibid.,* signifies the intent that reimbursement would be permissible only after execution of a particular item of work has been completed and accomplished. In other words, this expression is clearly intended to contradistinguish the cases where any item of work remains incomplete and yet any claim for reimbursement of the sales tax levied is sought for. This expression cannot be read to mean as if signifying the levy of sales tax itself on the completed item of work because such reading of this expression would be totally disjunct from the context and would be entirely detached from the real intent.

14.2. Viewed from another angle, it would appear that if the contention on the part of the appellant as regards interpretation of the first part of Clause 45.2 is accepted, it would practically result in holding that the said Clause 45.2 is not at all applicable to a works contract. Such a result cannot be countenanced for two major reasons: First, that if such a clause was not to be applied to the works contract, there was no reason to have retained the same in relation to the works contracts awarded to the respondent No. 1. When such a stipulation forms the part of contract, it would be rather preposterous to say that the same would stand but would not operate. Secondly, and more significantly, in the second part of this very Clause 45.2, it has specifically been provided that *deductions of sales tax on works contract turnover at source shall be made from each bill*. It is not far to seek, and is rather evident on a bare reading of Clause

45.2 in its entirety, that it is to apply in relation to the sales tax on works contract too. As noticed, the second part of Clause 45.2 had indeed been applied and enforced by the appellant and its offices by regularly making deduction of the amount of sales tax in the running payments of the respondent no. 1 and by regularly depositing the same with the Sales Tax Department. It would again be preposterous, nay absurd, to say that the second part of Clause 45.2 entitling the appellant and its offices to make deduction of sales tax on works contract turnover at source could be enforced but when it comes to reimbursement, the first part of this very Clause 45.2 would not apply to a works contract.

14.3. Viewed from any angle, we are satisfied that heavy reliance on behalf of the appellant on the expression “completed item of work”, as occurring in the first part of Clause 45.2, is entirely misplaced. The only implication of this expression is that a claim for reimbursement of sales tax cannot be made in relation to a particular work or item whose execution is pending or is in progress and has not been completed. So far the levy of sales tax in relation to a works contract is concerned, the same is on “taxable turnover” and not on the entire turnover. It follows necessarily that the claim for reimbursement could only be made of the amount of sales tax that had been levied; and had been paid by the contractor. Hence, the suggestion as if the expression “completed item of work” refers to the end-product of a works contract is without any

substance. The contentions urged in that regard are required to be, and are, rejected.

15. We may now take up the other line of argument on behalf of the appellant that as per Clause 45.1 of GCC read with Clause 13.3 of ITB, the contractor is deemed to have provided for the leviable amount of sales tax on goods/materials in its rates and hence, the contractor cannot claim any reimbursement thereof.

15.1. It remains trite that the terms of contract bind the parties thereto and unless there be any case of ambiguity or violation of law, ordinarily, the terms of contract, revealing the intent of parties, are required to be given effect to. The submission on the part of the appellant, that first part of Clause 45.2 of GCC would not operate because of Clause 45.1 of GCC read with Clause 13.3 of ITB, remains entirely baseless and appears to be of a desperate attempt to wriggle out of the contractual obligations. Even when the contractors were given instructions in the said Clause 13.3 of ITB to include all duties taxes and other levies in the bid price and even when the said Clause 45.1 of GCC provided that the rates quoted by the contractor shall be deemed to be inclusive of the taxes and royalties on all the materials which were to be procured for performance of the contract, it was yet provided in the first part of Clause 45.2 of GCC that the sales tax and other taxes on completed items of work, as may be levied upon, and paid by, the contractor shall be reimbursed to the contractor on proof of payment/on production of assessment certificate. It

is, therefore, crystal clear that even when the contract provided that the rates quoted by the contractor shall be deemed to be inclusive of sales and other taxes and royalties on the materials, it was agreed to between the parties that sales tax and other taxes under completed items of work, as paid by the contractor were to be reimbursed.

15.2. It would at once appear that if the contention on the part of the appellant on the operation of Clauses 13.3 of ITB and 45.1 of GCC is accepted in the manner that when the rates quoted by the contractor are inclusive of the taxes on the goods/materials to be used in performance of the contract, reimbursement of the sales tax levied upon, and paid by, the contractor is not to be allowed, it would practically result in rendering the first part of Clause 45.2 otiose and redundant. Neither that had been the intent of the parties nor could the terms of contract be construed in this manner.

15.3. In our view, the implication and effect of Clauses 13.3 of ITB and 45.1 of GCC had only been that while making the bid and quoting the rates, the contractor was supposed to include the taxes, duties, royalties etc. payable by it over the materials to be procured and utilised in performance of the contract and hence, while raising the bills, the contractor was not entitled to claim any amount towards any such tax/duty/royalty paid by it on the materials purchased for performance of the contract. These clauses, i.e., Clause 13.3 of ITB and 45.1 of GCC, which prohibit the contractor from demanding taxes, duties, royalties etc.

on the materials procured by it for performance of the contract do not, and cannot, conversely operate over the sales tax which is levied upon the contractor and which is primarily recovered with deductions from the running bill payments. In other words, in our view, on a plain reading of the aforesaid relevant terms of the contract, it is clear that while the contractor cannot claim any payment towards the taxes/duties/royalties etc. on the goods/materials purchased by it for performance of the contract but that does not disentitle the contractor from claiming reimbursement of the sales tax levied upon it by the employer, of course after proof of payment/assessment. It is also pertinent to mention that the respondent No.1 only claimed reimbursement of the sales tax paid by it on the turnover of the works contract and not of any tax or duty or royalty paid by it on the material procured for the purpose of execution of the works contract. Therefore, the contentions urged on behalf of the appellant on the operation of Clauses 13.3 of ITB and 45.1 of GCC over the claim of the contractor also deserve to be, and are, rejected.

16. To summarise the discussion in the preceding paragraphs, we are clearly of the view that by virtue of Clause 45.2 of GCC, the contractor company is rightfully entitled to claim reimbursement of the amount of sales tax levied on the taxable turnover of the works contracts executed by it. *A fortiori*, the grounds on which the appellant seeks to resist the claim of the contractor company for such reimbursement, i.e., with reference to the expression “completed item of work” in the said Clause

45.2 and with reference to the stipulations contained in Clauses 13.3 of ITB and 45.1 of GCC, are wholly untenable and the appellant and its contracting offices are under obligation to honour the claim so made by the contractor company.

17. Before finally concluding on this matter, we are inclined to make a few comments as regards the Circulars issued by the State Government pertaining to the subject of reimbursement of sales tax in works contracts. While noticing that diametrically opposite views were expressed by the State Government in the two main Circulars dated 04.11.1986 and 07.11.2001, we had observed in the earlier part of this judgment that the said Circulars were based on the given day understanding of the State Government but such vacillating understanding of the State Government was not determinative of the matter; and hence, we had ignored the said Circulars while dealing with the principal issues involved in this matter, but had also indicated that we shall refer to the said Circulars at a later and appropriate stage.

17.1. The basic reason for which we feel impelled to refer to these Circulars now and at this concluding stage is borne out of the contents of the Circular dated 04.11.1986, which was issued by the State Government closely following the amendment of the Act of 1947 with insertion of the provisions aimed at facilitating the levy of sales tax on the goods involved in a works contract. Being aware of its obligation in terms

of the said Clause 45.2 of GCC (or similar clause/s in other contracts), the instructions were issued by the State Government in the said Circular dated 04.11.1986 for: (a) making reimbursement of the amount of sales tax actually paid by the contractor on production of necessary documentary evidence of such payment; (b) not making reimbursement against the amount of penalty, if any, levied upon the contractor; and (c) obtaining undertaking from the contractor to refund the excess amount of reimbursement, in case of reduction of its liability towards sales tax in appeal or revision [*vide* sub-paragraphs (i) to (iii) of paragraph 2 of the Circular dated 04.11.1986]. However, the significant feature is that in the second set of instructions in this very Circular, as contained in sub-paragraph (iv) of paragraph 2 thereof, the Engineers-incharge were instructed that no such clause for reimbursement of sales tax or payment of such tax by the department to the contractor be inserted in the Notice Inviting Tenders or Tender document; and no tender containing any clause or condition to that effect be accepted. The said second set of instructions in sub-paragraph (iv) of paragraph 2 of this Circular was, obviously, meant for future contracts, but, its contrast with the first set of instructions in the preceding sub-paragraphs fortifies the conclusion that the State Government was fully conscious of its obligation to make reimbursement in relation to the existing contracts which carried such reimbursement clause/s.

17.2. As to what stipulations, terms and conditions are to form the part of contract remains a matter essentially in the domain of the contracting parties (of course, subject to the applicable requirements of law) and no comments as regards future contracts are requisite herein but, on a comprehensive reading of the Circular dated 04.11.1986, it is evident that the State Government was fully conscious of its obligation towards reimbursement under the existing terms of contracts and hence, issued directions for due discharge of such obligation with necessary safeguards and, at the same time, provided that henceforth, neither such a clause be inserted in the contract documents nor any tender containing such a clause or condition be accepted.

17.3. Evidently, the doubts at the later stage, as indicated in the Circular dated 27.01.2000, and converse decision against the obligation of reimbursement, as stated in the Circular dated 07.11.2001, had only been of unwarranted attempts to wriggle out of the contractual obligations with rather perverse construction of the plain terms of the existing contracts. Be that as it may, the propositions in the said ill-advised Circular dated 07.11.2001 stand disapproved with the conclusions reached by us hereinbefore. We say no more.

18. In the result, this appeal fails and is, therefore, dismissed with no

order as to costs. Pending interlocutory applications also stand disposed of.

……J.
(A.M.KHANWILKAR)

……J.
(INDIRA BANERJEE)

……J.
(DINESH MAHESHWARI)

New Delhi,
Dated: 5th June, 2020.