

01.10.2024
Item No.
AD 5Saswata

W.P.A. 22206 of 2024

**M/s Mapex Infrastructure Pvt. Ltd. & Anr.
versus
The Additional Director, Directorate General of Goods &
Service Tax Intelligence, Kolkata Zonal Unit, Kolkata &
Ors.**

Mr. Ankit Kanodia
Ms. Megha Agarwal
Mr. Piyush Khaitan

...For the petitioners

Mr. Bhaskar Prosad Banerjee
Mr. Tapan Bhanja

...For the respondent no. 1

Mr. Uday Shankar Bhattacharya
Mr. Tapan Bhanja

...For the respondent nos. 2 and 3

Mr. Smarajit Roychowdhury
Mr. Prithu Dudhuria

...For the Union of India

Mr. Manika Roy
Ms. Shinjita Ray

...For the NHAI

1. Challenging a show cause notice dated 2nd August 2024 appearing at page 61 of the instant writ petition in respect of the tax period from July 2017 onwards till 2019-2020 issued under Section 74(1) of the WBGST / CGST Act, 2017 (hereinafter referred to as the “said Act”), the instant writ petition has been filed. The petitioner also assails, the validity of a circular number 150/06/2021 – GST dated 17th June 2021, (hereinafter referred to as the “said circular”), read with 43rd GST Council meeting held on 28th May 2021, as being contrary to the said Act.

2. The petitioners state that in connection with implementation of a project, namely four laning including strengthening of the existing two lane pavement of NH 2 from Panagarh (KM 517) to Palsit (KM 581.457) in the state of West Bengal by the National Highways Authority of India

(NHAI), M/S. Gamuda WCT joint venture (JV), Malaysia was selected as the successful bidder. The petitioners state that in terms of the Letter of Acceptance (LOA) between NHAI and the JV company, the JV company was required to promote and incorporate a limited liability company for execution of the build operation transfer (BOT), annuity project. In terms of the above the petitioner no.1, a Special Purpose Vehicle for the purpose of NH-2 project was incorporated under the Companies Act, 1956 and accordingly, the petitioners entered into a concession agreement with NHAI on 21st November 2001, for execution of the project on build operation transfer (annuity) basis.

3. According to the petitioners after introduction of the GST regime with effect from 1st July 2017, the petitioners received a total of Rs.277.50 crore as annuity payments between July 2017 to December 2019, before the project was handed over to NHAI. The petitioners claim that the services provided by way of access to a road or a bridge on payment of toll charges were always exempt from GST vide Entry 23A of Notification 12/2017 – Central tax (Rate) dated 28th June 2017. Having regard thereto, and considering the GST exemption introduced in respect of annuity on 23rd October 2017, the NHAI vide its policy circular no. 3.3.17, clarified GST will not be applicable on any payments made by NHAI, as such no payment was made against GST. According to the petitioners pursuant to the recommendations of the 43rd GST Council meeting dated 28th May 2021, the circular dated 17th June 2021, was introduced by the state respondent. The said circular dated 17th June 2021, clarified that entry no. 23A of the

notification number 12/2017 – CT (R) does not exempt GST on annuity (deferred payments) paid for construction of roads. Following the above Entry no. 23A of the exemption notification which exempted annuity payments for levy of GST was deleted vide notification no. 15/2022 – central tax (rate) dated 30th December 2022. It is in furtherance of the above the impugned show cause notice dated 2nd August 2024 was issued alleging your petitioners had supplied the services of construction of road to NHAI, and since the petitioner is otherwise not eligible for exemption, a demand of Rs.33,30,00,000 was proposed to be raised along with interest and penalty by invoking the extended period.

4. Mr. Kanodia, learned advocate appearing for the petitioners submits that no case for invocation of Section 74 of the said Act has been made out. There are other grounds of challenge which are canvassed in the petition. In the facts noted here in above he prays for stay of the show cause notice.

5. Mr. Banerjee, learned advocate appearing for the respondent no. 1 submits that at this stage only the show cause notice has been issued. The petitioners are yet to respond to the same. No case for stay of the show cause notice has been made out. As such, according to him, no interference is been called for by this Court.

6. Mr. Bhattacharya, learned advocate enters appearance on behalf of the respondent nos. 2 and 3. Mr. Roychowdhury, learned advocate enters appearance on behalf of the Union of India.

7. Heard the learned advocates appearing for the respective parties and considered the materials on record.

8. Ordinarily, in relation to a challenge to the show cause notice, no interference is called for. However, taking note of the fact that a jurisdictional issue has been raised, I am of the view that the matter may require further consideration. However, since, the parties submit that time to respond to the show cause notice has already expired, I am of the view that at this stage it would be prudent to permit the petitioners to respond to the show cause notice. Accordingly, time to respond to the show cause notice is extended till 4th November 2024.

9. It would be open to the proper officer to proceed with the adjudication upon giving an opportunity of hearing to the petitioners. Determination, if any, made by the proper officer shall abide by the result of the instant writ petition.

10. List this matter under the same heading for further consideration on **12th November 2024**.

11. Liberty to apply for further interim order on the returnable date.

(Raja Basu Chowdhury, J.)