

**HIGH COURT OF TRIPURA
AGARTALA**

W.P.(C) No.103 of 2017

Nayak Infrastructure Pvt. Ltd.,

a private limited company incorporated under the Companies Act, 1956 and having its registered office at Swarupananda Road, Lumding in the district of Nagaon, Assam and its head office at 2nd Floor Kamakhya Commercial, C.K. Road, Panbazar, Guwahati-1 in the district of Kamrup Assam, represented by authorized representative, Shri Mithun Dhar, son of Shri Amal Bhushan Dhar, residing at Agartala, Tripura

----Petitioner(s)

Versus

1. The State of Tripura,

represented by the Commissioner, Department of Taxes, Agartala, Tripura

2. The Commissioner of Taxes,

Department of Taxes, Government of Tripura, Agartala, Tripura

3. The Superintendent of Taxes,

Sales Tax Office, Agartala, Tripura (West)

4. The Chief Engineer/Con/8 N.F. Railway,

Maligaon, Guwahati, Assam

5. The F.A. & Chief Accounting Officer,

Construction, N.F. Railway, Maligaon, Guwahati, Assam

6. The Deputy Chief Engineer/Construction,

N.F. Railway, Agartala सत्यमेव जयते

7. The Executive Engineer (CON),

N.F. Railway, Agartala

-----Respondent(s)

Connected With

W.P.(C) No.104 of 2017

Nayak Infrastructure Pvt. Ltd.,

a private limited company incorporated under the Companies Act, 1956 and having its registered office at Swarupananda Road, Lumding in the district of Nagaon, Assam and its head office at 2nd Floor Kamakhya Commercial, C.K. Road, Panbazar, Guwahati-1 in the district of Kamrup Assam, represented by authorized representative, Shri Mithun Dhar, son of Shri Amal Bhushan Dhar, residing at Agartala, Tripura

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- 1. The State of Tripura,**
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Agartala, Tripura
- 2. The Commissioner of Taxes,**
Department of Taxes, Government of Tripura, Agartala,
Tripura
- 3. The Superintendent of Taxes,**
Sales Tax Office, Agartala, Tripura (West)
- 4. The Chief Engineer/Con/8 N.F. Railway,**
Maligaon, Guwahati, Assam
- 5. The F.A. & Chief Accounting Officer,**
Construction, N.F. Railway, Maligaon, Guwahati, Assam
- 6. The Deputy Chief Engineer/Construction,**
N.F. Railway, Agartala
- 7. The Executive Engineer (CON),**
N.F. Railway, Agartala

-----Respondent(s)

For Petitioner(s) : Mr. G.N. Sahewalla, Sr. Adv.
Mr. D. Senapati, Adv.
Mr. S. Bhattacharjee, Adv.

For Respondent(s) : Mr. A.K. Bhowmik, Advocate General
Mr. A. Nandi, Adv.

HON'BLE THE CHIEF JUSTICE MR. AJAY RASTOGI
HON'BLE MR. JUSTICE S. TALAPATRA

Order

25/09/2018
(S. Talapatra J.)

These writ petitions, being W.P.(C) No.103 of 2018 (Nayak Infrastructure Pvt. Ltd. vs. The State of Tripura & Ors.) and W.P.(C) No.104 of 2018 (Nayak Infrastructure Pvt. Ltd. vs. The State of Tripura & Ors.) are combined for disposal by a common

order inasmuch as the controversy as unfolded in these writ petitions is in the backdrop of the identical fact. That apart, the petitioner has asserted that the fundamental controversy is covered by a decision of this court in **Biplab Kr. Ghosh Vs. Union of India**, reported in **(2014) 1 TLR 245**, where this court has observed that, the Assessing Officer while considering the value of the transfer of property in goods in a works contract meaning the taxable turnover must allow all deductions which flow from the judgment in **M/s Gannon Dunkerley and Co. & Ors. vs. State of Rajasthan & Ors.**, reported in **(1993) 1 SCC 364**. Even if the reference is made to Rule 7A of the TVAT Rules but as it has been settled in **Biplab Kr. Ghosh** (supra) that Rule 7A of the said Rules shall be prospective in nature and will not have retrospective effect, no challenge is projected in these writ petitions.

2. The petitioner in response to the tender floated by the Northeast Frontier Railway in respect of Earthwork to make formation, for station and goods circulating area, approach roads, ground soil improvement work by providing sand piles and sand capping etc., construction of 3 Nos. minor bridge on pile foundation (R.C. Slab bridge), approach roads, protection work, making of RCC drains and other ancillary works at Udaipur station yard in connection with construction of Agartala-Sabroom New Railway Line Project, hereinafter referred to as 'the work', had submitted its valid tender. Since the petitioner was found

eligible, the NF Railway had issued the work order bearing No. 362/CON/AGTL-Sabroom/EMB/2013/09(RT-1) dated 06.01.2015 in favour of the petitioner for the said work. During execution of the said work some variation has taken place and as such a subsidiary agreement, being No.SCA-2 was entered into. The said work order and the subsidiary agreement are the subject matter of the writ petition, being W.P.(C) No.104/2017.

3. In the similar mode, in response to the tender floated by the NF Railway in respect of Earthwork to make formation and cutting to form embankment and construction of minor bridges including ROBs and RUBs from Km. 93.00 to Km. 103.00 (Km. 0 at Agartala) in connection with Agartala-Sabroom New BG Line Project, hereinafter also referred to as 'the work', the petitioner submitted its valid tender. Since the petitioner was found eligible, the NF Railway had issued the work order bearing No.362/CON/AGTL-Sabroom/EMB/2013/11 dated 06.06.2014 in favour of the petitioner for the said work. During execution of the said work, since the quantities prescribed have undergone some variation a subsidiary agreement, being CON/AGTL-Sabroom/1889 dated 01.01.2015 was entered into. The work order and subsidiary agreement are the subject-matter of the writ petition, being W.P.(C) No.103/2017.

4. The petitioner has asserted that the nature of works entrusted upon the petitioner to be executed mostly involve

labour components and the materials purchased by the petitioner, which are used for construction, formation and various associated works. The petitioner has further averred that the Value Added Tax (VAT) has been paid on the materials at the time of their purchase by the petitioner. According to the petitioner, the work order is indivisible in nature and the value of the works contract includes the cost of materials, labour charges and other charges, which also include the profit to be earned by the petitioner. As per the terms and conditions of the contract, the quoted rates shall be deemed to include all taxes leviable by the Central and State Governments at the prevailing rates.

5. The petitioner started executing those work contracts and submitted its bill to the railway authority time to time but the railway authorities have deducted the VAT at source from the gross value of the bills under the provisions of Tripura Value Added Tax Act, 2004. Since the gross value of the bills include certain transaction and works on which no tax under the TVAT Act, 2004 is payable, the petitioner being highly aggrieved by the said action has approached this court by filing these writ petitions.

6. In terms of the TVAT Act, 2004, the works contract has been made taxable. Section 2(32) of the Act provides that 'taxable turnover' means the turnover on which a dealer is liable to pay tax and 'turnover' is defined in Section 2(35) of the Act.

Section 4(3) of the Act provides deduction of tax at source on account of works contract. Further Rule 7(1) of the Tripura Value Added Tax Rules, 2005, hereinafter referred to as '*the Rules*' provides the mode in which the deduction of tax at source on account of works contract can be made.

7. Section 4(3) of the Act provides that every person responsible for paying any sum to any person on account of works contract and right to use any goods for any purpose, shall at the time of credit of such sum to the account of that person or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, deduct such amount towards VAT (not being more than the total tax payable by the dealer) as may be prescribed.

8. Rule 7(1) of the Rules provides that every person responsible for making payment to any person for discharge of any liability on account of valuable consideration payable for the transfer of property in goods in pursuance of the works contract shall at the time of making such payment to the contractor either in cash or in any other manner, deduct VAT at the rate as notified by the Government from time to time of '*the gross amount*' of the bill towards tax payable in respect of all types of works under section 4(3) of the Act on account of such works contract.

9. Whether is it the gross amount of the bills or the taxable components where no tax has been paid will be the basis of the deduction of tax at source at the prescribed rate? Similar challenge has been negotiated by this court in **Biplab Kr. Ghosh** (supra), where this court has held in terms of **M/s Gannon Dunkerley and Co.** (supra) that, TVAT Act or the Rules is in no way invalid or unconstitutional. The only direction this court has issued is that the Assessing Officer while considering the value of the transfer of property in goods in a works contract meaning the taxable turnover must allow all deductions which flow from the judgment in **M/s Gannon Dunkerley and Co.** (supra) and that Rule 7A of the TVAT Rules shall be prospective and will not have retrospective operation. However, it has been clarified in the judgment that the statement as such, shall, by any stretch, not mean that the contractor does not require to produce any accounts. It has been held clearly that if he fails to produce any accounts or the accounts produced by him are not worthy of credence, then the Assessing Officer shall be entitled to make assessment of the deductions to which the dealer is entitled to on best judgment basis.

10. Mr. G.N. Sahewalla, learned senior counsel appearing for the petitioner has submitted that the respondents No.4-7 are deducting tax at the source while making payment of the bills to the petitioner on the total value of the bills in connection with the work order dated 06.06.2014 and the work order dated

06.01.2015 read with the subsidiary/supplementary agreements without giving deductions on account of labour component or deductions provided by the TVAT Act and deductions as held to be allowed by **M/s Gannon Dunkerley and Co.** (supra). Such arbitrary act of the respondents No.4-7 is highly detrimental and the petitioner needs protection.

11. The respondents by filing the reply has stated that sub-rule (1) of Rule 7 of the Rules clearly provides that every person responsible for making payment to any person for discharge of any liability on account of valuable consideration payable for the transfer of property in goods (whether in goods or in any other form) in pursuance of the works contract shall at the time of making such payment to the contractor either in cash or in any manner, deduct VAT at the rate as notified by the Government from time to time of 'the gross amount of the bill' towards tax payable in respect of all types of works under section 4(3) of the Act. Further, sub-rule (8) of Rule 7 has laid down how to manage the sum as deducted. The sum so deducted is provisional payment of tax which shall be adjusted at the time of assessment under Section 29 or 30 or 31 of the Act, as the case may be. The respondents have further asserted that the judgment of **Biplab Kr. Ghosh** (supra) has been taken care of, for purpose of deduction.

It is clear from the reply filed by the respondents that the deduction in terms of Section 4(3) of the Act has been made on the gross amount of the bills.

12. Now, the solitary question that falls for consideration, whether the deduction can be made on the total value of the bills while making payment? Even the deduction has not been allowed on account of labour charges. Other deductions provided under the TVAT Act or the Rules made thereunder or under the CST Act while making payment by the respondents No.4 to 7. Even the deduction as held to be allowed by the apex court in **M/s Gannon Dunkerley and Co.** (supra) has not been provided. It would be apposite to refer that the constitutionality of Section 7(1) of the Rule was challenged in **Biplab Kr. Ghosh** (supra). But, this court has settled that challenge by holding that as far as TVAT Act is concerned Section 5(2)(c) is specifically applicable to labour, services and other like charges subject to such condition as may be prescribed. This shall mean that under the TVAT Act, the dealer shall satisfy the Assessing Officer that the deduction are permissible in accordance with the direction laid down in **M/s Gannon Dunkerley and Co.** (supra). For purpose of reference, the proposition of law in respect of deduction as reflected in **M/s Gannon Dunkerley and Co.** (supra) may be referred to. In para 47 of **M/s Gannon Dunkerley and Co.** (supra), the apex court has observed as under:

47. Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which are entire and indivisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works [item No.(i)], amounts paid to a sub-contractor for labour and services [item No.(ii)], charges for planning, designing and architect's fees [item No.(iii)], charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract [item No.(iv)], and the cost of consumables such as water, electricity, fuel etc. which are consumed in the process of execution of a works contract [item No.(v)] and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in item No.(vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No.(vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of item No.(viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to

supply of labour and services will have to be excluded. This means that in respect of charges mentioned in item nos.(vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amount so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. 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]

13. It has been further held in **M/s Gannon Dunkerley and Co.** (supra) that apart from the deduction referred in para 47 of the report, it will be necessary to exclude from the value of

the works contract the value of the goods which are not taxable under Sections 3, 4 and 5 of the Central Sales Tax Act and goods covered under Sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempted from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making those deductions and exclusions from the value of the works contract.

14. **M/s Gannon Dunkerley and Co.** (supra) has dwelled on several aspects of works contracts including the return. So far the deduction is concerned it has been clearly laid down that the charges for labour and services are required to be deducted from the value of the works contract which would cover-

- (i) labour charges for execution of the works;
- (ii) amount paid to a sub-contractor for labour and services;
- (iii) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- (iv) charges for planning, designing and architect's fees;
- (v) cost of consumable used in execution of the works contract;
- (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

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

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

15. As ancillary to that, whether such deduction be made while deduction of tax at source at the time of payment by the person who is responsible for paying any sum to any person on account of works contract and right to use any goods for any purpose? When the tax is not exigible for deductions as above, the persons making payment cannot deduct tax at source for those components for adjustment on assessment. Thus, the deduction made by the respondents No.4-7 on the value of the works contract or the bills is declared arbitrary and in defiance of the law as settled in **M/s Gannon Dunkerley and Co.** (supra). However, those respondents have the competence to deduct tax at source on the remainder [the components on which deduction is permissible]. If those respondents find any difficulty they may refer to the taxing authority for clarification.

16. In the premises, it is declared that the petitioner in both the writ petitions is entitled to deduction of certain components as laid down in **M/s Gannon Dunkerley and Co.** (supra) and as clarified above. Further, it is declared that the Assessing Officer shall allow the deduction in terms of **M/s Gannon Dunkerley and Co.** (supra) and, under Section 5 of

