

THE HIGH COURT OF SIKKIM : GANGTOK

(CIVIL EXTRAORDINARY JURISDICTION)

DATED : 3rd APRIL, 2017

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

W.P (C) No. 01 of 2017

Petitioner : M/s Nektor Engineers & Project Consultants,
A registered Partnership firm
Having its office at B 104 Silicon Valley,
Shivranjani Cross Roads, Satellite,
Ahmedabad, Gujarat -380 015,
Represented by its duly authorized Partner,
Shri Krishn Rameshbhai Pethani,
S/o Ramesh Bhai Pethani,
R/o A 704 Silicon Valley,
Shivranjani Cross Roads, Satellite,
Ahmedabad, Gujarat -380 015,

versus

Respondents : 1. Union of India,
Represented by the Secretary,
Ministry of Urban Development,
Maulana Azad Road,
Nirman Bhawan,
New Delhi- 110 011

2. Central Public Works Department
Maulana Azad Road,
Nirman Bhawan,
New Delhi- 110 011
Represented by the Director General,
Maulana Azad Road,
Nirman Bhawan,
New Delhi- 110 011

3. The Chief Engineer, IBBZ-II,
Central Public Works Department,
Nirman Bhawan,
Paribahan Nagar,
Matigara,
Siliguri- 734 010

4. The Executive Engineer
Border Road Project Division – II
Central Public Works Department,
1st floor, Post Office Building,
Chungthang,
North Sikkim

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Appearance

Mr. A.K Upadhyaya, Sr. Advocate with Mr. Debojit Senapati, Ms. Aruna Chhetri and Ms. Hemlata Sharma, Advocates for the Petitioner.

Mr. Karma Thinlay, Central Government Counsel for the Respondents No. 1, 2, 3 and 4.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Aggrieved by the action of the Respondent No. 4, in issuing Show Cause bearing No. 54 (II) BRPD-II/2016/229, dated 06.10.2016, and cancelling the work awarded to the Petitioner, being NIT No. 01/CE/IBBZ-II-SLG/2016/17 (**hereinafter "NIT 01"**) namely consultancy services for preparation of Detailed Project Report (DPR) for additional High altitude roads under Phase-II in the State of Sikkim, using satellite imagery, vide its impugned letter bearing no. 54(11)/EE/BRPD-II/2016/282 dated 08.12.2016, the Petitioner seeks issuance of a Writ, in the nature of *mandamus*, *certiorari* or any other appropriate writ direction or Order of like nature.

2. The facts averred are that, the Petitioner a registered Partnership Firm with its Office located at Ahmedabad, Gujarat is engaged in providing consultancy services in the field of Civil and Structural Engineering including Architectural design and specialty Engineering Services and has over the years provided such service to various clients, including the Central Public Works Department and other Governmental

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Organizations. The Petitioner being eligible, having executed four works of similar class during the required period, participated in the NIT 01 floated by the Respondent no. 4, for online percentage bids on two bid system, for the aforesaid work of Consultancy Services. The last time and date for submission of bid was 3.00 P.M on 21.06.2016.

3. After considering his bids, the Respondents found the Petitioner competent to execute the work and accordingly, issued letter dated 27.07.2016 informing the Petitioner of the acceptance of his bid and requested him to furnish Performance Security Guarantee, which was duly complied with on 04.08.2016.

4. In the meanwhile, the Petitioner received a letter from the Respondent No. 04 dated 01.08.2016 stating therein that the TDS certificate issued by M/s Vraj and Vaj constructions in favour of the Petitioner's Company for the year 2009-10 revealed that the payment of tax shown to be deducted at source was under Section 194 C which relates to Contractors, @ 1% only, while Tax Deduction for Consultancy services is 10%. That, as the present bid of the Petitioner had been approved on the basis of the said Consultancy works, he was requested to submit proof of balance tax deposited in the Income Tax Department during the final settlement of Tax liabilities. This was followed by letter dated 05.08.2016 calling upon the Petitioner to submit such proof within five days i.e. by 10.08.2016, failing which action would be initiated against him

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in terms of the letter of transmittal signed by the Petitioner while submitting the eligibility bid document.

5. Refuting the above allegations, the petitioner's stand was that merely because TDS was deducted under Section 194 C of the Income Tax Act, 1961 by the party making payment, would not alter the nature of the work from Consultancy to that of Contractor nor would it permit classification of the work, to one in the nature of a Contractor as sought to be alleged by the Respondent No. 4. The Petitioner sought to clarify vide his response dated 08.08.2016 to the Respondent No. 4, that it does not have any say under which section of the Act payment is deducted by the payer at the end of every financial year, nevertheless the actual Tax payable by the payee, (i.e. the Petitioner) on the Income of the entire year is paid after taking into account TDS deducted by the respective payers. It was further averred that notwithstanding the rate at which TDS was deducted by M/s Vraj and Vaj constructions, the full tax liability for the year was paid by the Petitioner. In response thereof the Respondent no. 4 vide letter dated 12.08.2016 requested the Petitioner to contact the Asst. Engineer, Border Road, Project Sub -Division I, Lachung, North Sikkim, requiring the Petitioner to complete the formal Agreement within 15 days from the date of the letter and to commence the work, the same being time bound. The Petitioner took steps accordingly and submitted a report pertaining to Stage I of the work and the reconnaissance survey, for approval of the Respondents on 26.09.2016, along

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with the first running bill, both are however pending. Subsequent thereto, correspondence ensued between the parties from 12.09.2016 to 27.09.2016 with regard to the work in question.

6. While awaiting the approval, the Petitioner was served with the impugned Show Cause dated 06.10.2016 by Respondent No. 4 to the effect that a communication was received from the office of the Income Tax officer, (ITO) Ahmedabad, Gujarat who had clarified that the Petitioner had shown Contract receipt under Section 194 C of the Act, of Rs. 97,98,383/- received from M/s Vraj and Vaj Constructions for A.Y. 2010-11. That the assessee had shown the nature of business code as 0505 Contractors (others) and not Consultant. Hence, the TDS made by the deductor was for Contract work. The Respondent No. 4 enquired of the Petitioner as to how shortfall of such tax over and above TDS is to be paid by the petitioner's firm if their business was of a Contractor as reported by the ITO. The Petitioner was directed to show cause within 10 days of the notice as to why action should not be initiated against him. As per the Petitioner, Copy of the Report of the I.T.O was allegedly deliberately withheld from him by the Respondent No. 4 preventing him from preparing an effective reply, consequently the petitioner vide, letter dated 10.10.2016, requested for it. In the interim fearing adverse action, for non filing of response, the Petitioner filed his reply on 15.10.2016 interalia reminding the Respondents that the Petitioner was still awaiting copy of the ITO's Report and reiterated this vide letter dated 16.10.2016. Being aggrieved by the non furnishing of the

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I.T.O's Report by the Respondent No. 4, despite repeated requests, the Petitioner approached this Court by filing Writ Petition (C) No. 51 of 2016 which was disposed of on 09.11.2016 on the undertaking of the Respondent to furnish the document to the Petitioner, duly affording the Petitioner three weeks time to file reply to the Show Cause. On the same day the letter of the I.T.O was furnished to the Petitioner but on 19.11.2016, Respondent no. 4 issued a letter alleging commission of breach by the Petitioner in the execution of the work, to which, response was filed by the Petitioner on 23.11.2016 and thereafter correspondence was exchanged on this point between the Respondent No. 4 and the Petitioner vide communication dated 03.12.2016 and 05.12.2016 respectively.

7. Meanwhile on receipt of a copy of the letter of the Income Tax officer, an additional reply to the show cause was filed on 28.11.2016 by the Petitioner. However, on 08.12.2016 the Respondent no. 4 issued the impugned letter cancelling the work awarded after considering his reply dated 15.10.2016 and 28.11.2016 to the Show Cause, on grounds that the Petitioner had misled the department by furnishing false information.

8. The Petitioner contends that the said letter is wholly perverse and contrary to the provisions of law and that the impugned NIT No. 01/CE/IBBZ/II/SLG/2016-17 (recall) issued by the Executive Engineer, Border Road, Project Division, Chungthang, North Sikkim is bad in law, hence the above prayers.

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9. Along with the writ petition an application was also filed to stay the operation of the impugned cancellation letter dated 08.12.2016 and to restrain the Respondent Authorities from opening/ awarding the work being NIT NO. 01/CE/IBBZ/II/SLG/2016-17 (recall). The 2nd Bid was kept in abeyance vide order of this Court dated 05.01.2017.

10. The Respondents by a joint counter affidavit contended that while participating in the Tender process along with two others, the Petitioner had submitted four similar work certificates executed by him during the last two years including a certificate issued by M/s Vraj and Vaj Constructions dated 25.01.2009 and 15.03.2010. After evaluating the bid documents the work was awarded to the Petitioner. That in the interim a complaint dated 30.07.2016 was received from one Ramesh Pandey RTI activist from Jaipur, interalia alleging that the Firm M/s Vraj and Vaj Constructions was a very small firm carrying out constructions as a contractor. The Respondent No. 4 issued a letter on 01.08.2016, to the Petitioner requesting him to submit proof of balance tax deposited to the Income Tax department along with reminder on 05.08.2016. In the meanwhile, the Respondents issued three letters to the Income Tax authorities at Ahmedabad, Gujarat, vide, letter dated 05.08.2016, 26.08.2016 and 02.09.2016 requesting information about the nature of business of the Petitioner for works amounting to Rs. 97,98,382/- for the year 2009-10, done for M/s Vraj and Vaj constructions and whether the Petitioner had submitted the

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balance tax under Section 194 J during the final settlement for the year 2009-10. A letter dated 12.08.2016 was issued to the Petitioner to commence the work it being of strategic importance and considering that at the time of bidding he had undertaken that the information furnished by him was found incorrect his Company would be debarred and enlistment cancelled.

11. The Income Tax officer, Ahmedabad Gujarat responded vide a letter dated 29.09.2016 indicating therein that the Petitioner had shown himself as a Contractor under Section 194 C of the Income Tax Act while executing the aforesaid works with M/s Vraj and Vaj Constructions for the assessment year 2010-2011 and the TDS was shown to be only 1%. As per the Respondents, the Petitioner while submitting the return for the work in question should have mentioned the nature of business as "consultancy services" under Code 0703 but had instead shown it under business Code 0505 which relates to "*Contractors (others)*", as per the Income Tax Rules. Thus, the Petitioner had misled and misrepresented that he had provided consultancy services for M/s Vraj And Vaj, when in-fact he had worked as a Contractor in view of the Tax Deduction made. The Respondent No. 4 considering the replies to the show cause filed by the petitioner and having deliberated the matter with the Superintending Engineer and Chief Engineer wrote to them about the final decision for cancellation of the Contract and thereafter issued the impugned letter dated 08.12.2016. Consequently, on 19.12.2016 the Respondent recalled and

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floated a fresh NIT being NIT No. 1/CE/IBBZ-II/SLG/2016-17 in the CPWD Website with the same terms and conditions duly publishing the NIT in all leading newspapers on 20.12.2016, but the Petitioner failed to participate. Consequently, the Writ Petition is liable to be rejected.

12. In its Rejoinder affidavit, the Petitioner added that the Complaint made against the Petitioner, is apparently by a trade competitor, whom the Respondents seek to favour. That, when the Petitioner had infact completed consultancy works, it was incorrect and impermissible to terminate the work awarded to him on grounds of Tax deductions apart from debarring him from participating in further tender process. That, the work awarded to him had no clause to the effect that it was subject to verification of allegations, which would have cautioned him to await completion of any enquiry made by the Respondents. That, although this Court vide, its order dated 09.11.2016, in W.P (C) No. 51 of 2016 had afforded three weeks time to the petitioner to file the response which would have been on 01.12.2016, but before the expiry of the said period, the Executive Engineer informed the Superintending Engineer vide letter dated 28.11.2016 of the approval of the competent authority to cancel the work awarded to the Petitioner, thereby willfully flouting the orders of this Court without assigning any reason for rejection of the petitioner's show cause.

13. I have heard the learned Counsel at length and carefully perused the pleadings and all appended documents.

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14. What, therefore, arises for consideration of this Court is whether the Petitioner was offering consultancy services and, if so, was the Respondent No.4 justified in issuing the impugned show cause dated 06.10.2016 and impugned letter dated 08.12.2016, followed by a fresh NIT for the same works, on 19.12.2016.

15. The constant refrain of the Petitioner is that he had provided consultancy services to M/s Vraj & Vaj Constructions and mere deduction of tax under Section 194C of the Income Tax Act, 1961, instead of Section 194J of the Income Tax Act, 1961 would not change the nature of the services provided from that of Consultancy to one of a Contractor, nor is it permissible on such basis to classify his services as that of a Contractor. Connected to this argument was the contention that in any event, balance tax is to be made good by him at the end of the financial year, as he is devoid of any control as to the Section under which payment has been deducted by the payer i.e. M/s Vraj & Vaj Constructions. In the instant case notwithstanding the rate at which TDS was deducted by M/s Vraj & Vaj Constructions, the full tax liability for the year was paid by the Petitioner.

16. In this context before embarking on examining the contents of the letter issued by the Income Tax Officer dated 29.09.2016, addressed to the Respondent, it may be recapitulated here that the Respondent No.4 canvassed before this Court that the Consultancy works being NIT No. 01 was

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awarded to the Petitioner based on the certificate issued by M/s Vraj & Vaj Constructions (Annexure R-4) on the Company having certified that services provided by the Petitioner was for Consultancy works. It emerges that on receipt of communication from the RTI Activist, the Respondent No. 4 initiated an enquiry by issuing letters dated 05.08.2016 (Annexure R-7), 26.08.2016 (Annexure R-8) and 02.09.2016 (Annexure R-9) to various authorities of the Income Tax at Ahmedabad, Gujarat.

17. Accordingly, on 29.09.2016, the Income Tax Officer, Ward - 3 (3)(3), Ahmedabad, responded to the queries put forth in the letters by stating, *inter alia*, as follows;

"..... Section 194C of the I T Act 1961, says that" *Any person responsible for paying any sum to any resident contractor for carrying out any work (including supply of labour for carrying out any work) under a contract in pursuance of a contract between contractor and person specified shall deduct in context at the time of such payment thereof in cash or by issue of a check or draft or by any other mode or its credit to contractor's account or any other account, by whatever name called whichever happens earlier shall deduct TDS on Payment to contractors @ 1% u/s. 194 C of the I T Act.*

In this case, the assessee has shown contract receipt u/s. 194 C of the Act of Rs.97,98,382/- received from M/s Vraj & Vaj Constructions u/s. 194C for A Y 200-11. Hence, the TDS made u/s. in his return of income for A Y 2010-11. The assessee has shown nature of business code 0505- Contractors-other. Further, as per records of A Y 2010-11, it is reveals that the scrutiny assessment has not been made in this year.. Further you have not provided complete details of work/contract agreement; hence, the nature of business is not verifiable. However, the TDS matter is dealt with the TDS section of Dept. and you may pursue for further details/inquiry.

Questions answer (ii)

The final tax payment settlement is depending on gross taxable income and the rate prevailing for the concerned A Ys and not on nature of works receipt. In this case, the assessee filed its return of income for A Y 2010-11 on 24.09.2010 showing taxable income of Rs.99,210 and total tax paid Rs.30,656/- and no other tax remain payable.

....."

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In other words, the response of the I.T.O indicates that the TDS for the assessment year 2010-11 the assessee had shown the nature of business code 0505 Contractor [other] and not as Consultancy.

18. The argument on this aspect forwarded by the Petitioner was that the letter dated 29.09.2016 reveals that the Respondent No.4 had not provided the concerned officers with complete details of the work agreement. Be that as it may, pursuant to the above information from the Income Tax Officer, Show Cause was issued to the Petitioner dated 06.10.2016 (Annexure P-23), informing therein that the Petitioner had been requested by the Respondent No. 4 vide letter dated 05.08.2016 to submit proof of balance tax deposited to the Income Tax Department, as the Petitioners bid had been approved on the basis of Consultancy works. That the Petitioner had responded on 08.08.2016 to the effect that short fall of tax over and above TDS is to be paid by their firm. That now as the Income Tax Officer had informed the Respondent No.4 vide his letter that the Income Tax deducted was for contract works and not for consultancy, *".....Then how shortfall of such tax over and above TDS is to be paid by your firm if your nature of business is contractor as reported by Income Tax Department. Therefore, I hereby give you notice to show within 10 days of the receipt of this notice to may satisfaction why action should not be initiated for the above noted work as per the terms and conditions of the Agreement....."*

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The Petitioner, it appears, failed to submit any proof on this count, viz; to indicate that additional tax was paid by him to make good any shortfall, despite the opportunity afforded to him by the Respondent No. 4.

19. The response of the Income Tax Officer indicates that as the assessee filed its return of income for the annual year 2010-11 on 24.09.2010 showing taxable income of Rs.99,210/- and total tax paid Rs.30,656/- and no other tax remained payable. Thus, a perusal of the letter reveals that not only was no tax payable to the Income Tax Office in view of the return of income shown by the assessee, as a Contractor, but the Petitioner also failed to substantiate his argument that the full tax liability for the year i.e. for Consultancy services, was made good by him, by filing any document in this regard to fortify his claim. In fact, the Petitioner made a feeble attempt at justifying the above deduction of tax @ of 1% by stating that it had come to his knowledge that the department itself and more particularly BRPD-II, Chungthang, had been deducting Income Tax under Section 194C i.e. @ 2% for consultancy works, similar to the work for which NIT No.01 had been issued and not under Section 194J @ 10%. This statement however is a bald, statement not buttressed by any document and is therefore, not acceptable before any Court of law.

20. Thus, what transpires from the above is that the consultancy works were awarded to the Petitioner by the Respondents on the basis of the Certificate of M/s Vraj & Vaj

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Constructions. To gauge whether the Petitioner had indeed provided consultancy works in view of the letter of the ITO informing to the contrary, as no other documents were forthcoming from the Petitioner, the Respondent No.4 had to fall back on the income tax deducted at source. The correspondence discussed hereinabove clarifies that the TDS was for contract works and not for consultancy services.

21. I also find that apart from the Agreement documents between M/s Vraj and Vaj Constructions and the Certificate issued by the said Company, no other documents have been furnished to establish that the Petitioner offers consultancy services. In such a situation, it has to be stated that obviously tax would be deducted on the basis of the Income and if the income of the Petitioner was only as a contractor then deductions so made would be for contract works and not for consultancy work. Added to this is the fact that although the Petitioner alleges that all balance tax was paid, the letter of the Income Tax reveals no such fact, in as much it has been stated therein that "in this case the assessee filed its return of income for A.Y. 2010-11 on 24.09.2010 showing income of Rs. 99,210/- and total tax paid Rs. 30,656/- and no any (sic) other tax remain payable." This fortifies that the services provided by the Petitioner to M/s Vraj & Vaj Constructions was in the capacity of contractor and not consultant. In view of the discussions above, I am of the considered opinion that the conclusion of the Respondent No.4 on this count is not erroneous.

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22. The next argument raised by the Petitioner was that the Respondent No.4 had a predetermined mind to cancel the work of the Petitioner and hence, issued the letter dated 28.08.2016. To assess whether the statement is correct or not we may revert back to the fact that this Court vide its Order dated 09.11.2016 had directed the Respondent to furnish the I.T.O's letter to the Petitioner and that the Petitioner be granted three weeks' time to file its response and thereafter appropriate action be taken in accordance with law. It is not disputed that the Petitioner was furnished with the letter sought by him on 09.11.2016 itself. The three weeks time for filing of response was to expire on 01.12.2016. Before 01.12.2016 the Petitioner submitted his additional response on 28.11.2016 to the above Show Cause, *inter alia*, as follows;

".....

Subject: Additional reply to show cause issued vide letter bearing No.:54(11)/EE/BRPD-II/2016/229 dated 06.10.2016 in pursuance to the direction passed by the Hon'ble High Court of Sikkim in W.P. (C) No.51/2016 vide order dated 9.11.2016."

....."

Thus, it is categorical that the above response was the additional reply to the Show Cause dated 06.10.2016, this reply having been preceded by the reply dated 15.10.2016. The reply of 28.11.2016 does not indicate that another reply would follow. The decision of the Respondents is also dated 28.11.2016. Merely because the additional reply and the correspondence pertaining to the decision of the Respondent No. 4 are both dated 28.11.2016, it cannot be assumed, without proof, that the

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reply of the Petitioner dated 28.11.2016 was not considered before a final decision was taken. It is not the Petitioner's case that he verified that the communication of the Respondent no. 4 dated 28.11.2016 emanated before his response of the same date reached them, affording them no opportunity of considering his response. Merely because three weeks time was allowed to file response does not mean that even after response is filed Respondents are obliged to wait further. That apart, consideration is to be taken of the fact that the impugned letter was only issued on 8.12.2016, much after 01.12.2016, hence the allegations that the order of this Court was flouted has no legs to stand, nor can it be said that the Respondents had a predetermined mind to cancel the work awarded to the Petitioner, which to my mind appears to be a baseless unsubstantiated allegation made by the Petitioner.

23. As a consequence of all the discussions hereinabove, I find that there is no merit in the Writ Petition, which accordingly stands dismissed.

24. Resultant, stay of the 2nd Bid granted vide order of this Court dated 05.01.2017, also stands vacated.

25. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Judge
03-04-2017

Approved for reporting : **Yes**

Internet : **Yes**