

Goods and Services Tax

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Issues being faced by contractors for contracts entered prior to GST

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Construction companies are growing at a fast pace in India. The industry has registered the growth of 65% during Jan-June 2021 compared to the previous year despite the second wave of Corona hitting hardly the Indian economy. This growth could be attributed to the payments being released by the government to the contractors in the infrastructure space. Recently, one of the leading manufacturer & supplier of heavy construction machines stated that the construction equipment industry could grow up to 25% in 2021. In order to achieve this anticipated growth, strong and explicit tax laws are also needed to build in the confidence of these construction companies. Works contract have always been a matter of anonymity and suspicions in India. In current GST scenario, many things are sorted out unlike erstwhile VAT and Service Tax laws. Although this new tax regime has smooth lined many industries but there remains few ambiguities in the construction industry. In continuously changing GST system, various problems are encountered by contractors due to transition from old tax regime into new regime. Below are the key issues being faced by works contractors:

Works contract, supply of goods or service? : In pre-GST era the treatment of infrastructure contracts as ‘supply of goods’ or ‘provision of service’ contracts, or as a composite works contract was a litigious issue in case of contracts which involved supply of both goods and services. The Central laws provided exemptions and concessions under service tax with respect to goods procured for infrastructure projects. Each State had different law with respect to the said contracts. Several disputes at the Central and State levels emerged concerning classification of the contracts, valuation and jurisdiction of state on inter-state works contracts. Under GST, works contract in relation to immovable property has been treated as supply of services. However, chargeability of works contract in relation to moveable property depends upon which is the principal supply treating such contracts as composite supply. The new provisions have provided clarity to a great extent but have not been able to succeed in eliminating the ambiguity completely. To illustrate, In case of works related to moveable property, where the value of material is higher as compared to value of service provided, service being the principle supply, the tax liability may be much higher in case the rate of tax on goods is lower than the rate of tax on service. Further, such provision has kept alive the litigations on classification between immovable property and moveable property.

GST implication on work done in pre-GST but dispute settlement money being received in post GST: In construction industry, dispute between the employer and the contractor with respect to work done is very customary. And, most of the companies have detailed settlement process as part of their contractual agreements which is also a time consuming process. Thus, there arises a scenario that even though the work is completed in pre-GST regime, however money is being received in post GST regime. Now the question before the contractor is –whether GST shall be leviable on the said receipt of money or not? There can be cases where the work against which the money is being received was totally exempt/taxable at lower rate in pre-GST regime, however it is either taxable in GST or taxable at a higher rate. Where the money is being received against the work done in pre-GST era and which was exempt or chargeable to lower tax, to levy the tax/higher tax is not justifiable. There is ambiguity in law due to which the contractor is facing the issues. Further, the contractors dealing with government companies are more petrified due to the deduction of GST TDS by these companies while discharging the payment to them. There is always the risk that the department may challenge the contractors on account of non-disclosure of the said income under GST. There are few remedies available to tax payers in such cases like advance ruling or provisional assessment. However, these options itself have lots of issues like delayed responses, bench members not constituted in few states, lack of pre-defined procedures, etc. Legally, the advance ruling has to be pronounced within 90 days from the date of receipt of application. However practically, the applications since more than one year are pending to be even acknowledged online. Sometimes, the hearing takes place after rigorous follow ups. However, the order is not being issued timely. Sometimes, post hearing, the bench member gets transferred and again the entire procedure of hearing takes place. These issues hamper the tax payer confidence. Several times, the issue is still pending to be heard and by that time the money is received by the contractor and he is bound to take some decision based on his best judgement or expert advice to avoid interest and penalty. Further, since there is no clarity in law with respect to such case, different State authorities have different views thus leading the contractors who are working in various States into dilemma.

Project started in Pre GST era and completed after enactment of GST: In many cases especially the contracts continuing since pre-GST era with the government companies (the employer), the problem arises with respect to valuation. Various contracts had the change in legislation clause which state that impact due to change in legislation has to be borne by the employer or there has to be revision in contract price to give effect to such change in legislation. However, there is always a dispute at the value since there is no mechanism provided either in contract or in GST law for arriving at the value of such impact and is always a matter of dispute. There is a very draconian provision in GST on which few Employers seem to be playing on i.e. Anti-profiteering measure” which specifies that any additional benefit arising to the tax payer shall be passed on to the recipient by way of commensurate reduction in prices. The said provision doesn’t specify any methodology to compute this additional benefit and this has become a bone in the neck of every contractor. They need to prove to the Employer through detailed working and certificates from Chartered Accountants that the value has been arrived at correctly. Since, the contractor is liable to raise the invoices for the work done within a period of 30 days and pay GST thereon, hence, even though the dispute prevails with respect to value of work done, he needs to discharge liability on the value of work done based on certified work. However, there may be a scenario where the said value is finalised sometimes after a year or so when all the remedies lapse under the GST law for the contractor to get the additional GST deposited to the exchequer. And, the only remedy available to the contractor is go to High Court.

All the above stated problems still persist and have resulted into increased cost which has hampered the confidence of the foreign investors in India. This can be regained by removing underlying ambiguities and thus reducing litigations. Various High Court Judgements and State Government orders have been pronounced stating that the tax is the ultimate responsibility of the recipient of supply. There is a need to bring in some remedy to the genuine tax payers where the recipient doesn’t pay the tax amount to them or liberal laws with respect to refund in case of change in valuation due to matters under dispute and such laws may be subject to certain fetters to avoid any misapplication.

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