

No responsibility of tendering authority to mention HSN code while inviting tenders - Supreme Court

30 August 2022



Summary

The Supreme Court (SC) has overruled the order passed by the Allahabad High Court (HC) wherein the tendering authority (purchaser) was mandated to mention the relevant Harmonised System of Nomenclature (HSN) code in tenders. The SC held that it is the responsibility of the supplier/bidder to find out the relevant HSN code. The Apex court took the relevant provisions of the Goods and Services Tax (GST) law and clauses of the tender document into consideration and asserted that the appellant had made it clear in the tender that it will have no liability to pay tax if the bidder has wrongly quoted a lower rate. The Apex Court ruled that if the order of the HC is to be sustained, the appellant would have to resort to the prolonged proceedings of advance ruling, where the appellant had no liability to pay the tax.

Facts of the case

- The appellant¹ had published notice for inviting e-tender (NIT) for procurement of turbo wheel impeller balance assembly (the product). The bidders were directed to specify the percentage of local content of the material being offered, in accordance with the Make in India policy. The ranking bidders classified the product² liable to GST at 5% whereas the respondent (writ petitioner³) classified the goods liable to GST @18%⁴.
- The writ petitioner contended that the NIT and the bid documents did not mention the applicable HSN code, which has disrupted the preservation of the level playing field. Further, the appellant should have provided clarity and certainty about the tax rate and the HSN code, to ensure equal treatment between the tenderers.
- The appellant submitted that the liability to pay the tax is on the successful bidder. Further, the GST Act casts the burden on the bidders to file return and pay tax, then the jurisdictional officer relevant to the supplier can make a proper classification. The appellants, as a purchaser, cannot be expected to find out the HSN Code.
- The respondent had filed the writ petition⁵ before the Allahabad HC. The HC had held that stating HSN code in the tender document itself shall resolve all disputes relating to fairness and transparency in the process of selection of bidder. Thus, the HC passed the order in favour of the respondent and directed the appellant to mention HSN and GST rate in the NIT/ bid document.
- The appellant, aggrieved of the HC order, filed the present appeal before the Apex Court.

SC observations and ruling⁶:

- **Scope of writ of mandamus issued by HC:** A writ of mandamus or a direction

¹ Diesel Locomotive Works

² under CTH 86

³ Bharat Forge Ltd and Another

⁴ under CTH 84

⁵ Writ C No. - 17620 of 2019, Order dated 18 December 2020

⁶ Civil Appeal No.5294 of 2022, decision dated 16 August 2022

in the nature thereof is very wide in scope. It is to be issued wherever there is a public duty and a failure to perform and the courts will not be bound by the technicalities. Further, there must be a public duty, which may arise from a statute, or it can be imposed by common charter, common law, custom or even contract. The SC affirmed the view of the HC that the tendering authority ensuring a level playing field in awarding the contract is traceable to Article 19(1)(g) of the Constitution of India.

- **Responsibility of the supplier to quote correct HSN code and GST rate:** The SC, upon conjoint reading of relevant clauses⁷ of tender, noted that liability to make correct classification of HSN and discharge GST is of supplier. The appellant, as a purchaser, made it clear that it will have no liability to shoulder, in case the payment of tax, if it is found that the bidder has wrongly quoted lower tax. The tender provides a clear duty on the bidder to acquaint themselves with all the applicable taxes. Further, the terms of the bid cannot be said to be afflicted with the vice of legal uncertainty.
- **Circular does not mandate the purchaser to mention HSN:** Upon reading the Railway Board's communication⁸ in a holistic manner, the SC viewed that it is the responsibility of the bidder to quote the correct HSN number and the corresponding GST rate. The purchaser may incorporate HSN in the tender, however it is not mandatory.
- **View taken by the HC creates considerable impediments:** The SC stated that since the appellant was not obliged to find out the correct HSN for the product to be procured,

unnecessarily following the cumbersome and elaborated process of the advance ruling by the appellant is impractical. Further, Section 168 provides power to the Board to issue orders/directions/instructions to the officers, however it does not expressly provide for right to any person to seek a direction. This section is essentially meant for officers to seek orders, instructions, or directions besides the Board itself on its own passing orders, in the interest of maintaining uniformity in the implementation of the act.

- **Make in India policy does not make it mandatory to quote HSN in tender document:** The SC, in view of the Make in India policy, cannot hold that there is duty to appellant to declare the HSN code in the tender to make them quote the rate accordingly.

⁷ Clause 2.8.6, 2.7.6, 2.9.2

⁸ Dated 5 September 2017

Our comments

Earlier, the Allahabad HC noted that the total price of the offer including the GST price is used to determine intense ranking in the selection of the bidder. Thus, the HC directed the appellant to seek necessary clarification from the GST authorities in relation to the applicable HSN code and further mention it in bid documents to ensure uniformity to all bidders.

However, the Apex Court quashed the decision of the HC and clarified that the appellant/tendering authority has no statutory duty to mention the HSN code on the tender. Rather, it is the responsibility of the supplier/bidder to mention the correct HSN code and the GST rates. This clarification may help in resolving similar doubts in the tenders/bid process.

There could be a scenario where inadvertently the bidder might quote a lower GST rate while submitting the bid documents, which may impact the selection of bidder if price inclusive of GST is considered as base for selection. However, in light of this ruling, since it is the responsibility of the bidder to identify correct GST rate and HSN code, the bidders need to submit the documents with correct details. This will help the tendering authority in the selection of the bidder based on the lowest price in response to a bid invitation.

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