

**ONUS TO PAY FRESH TAX OR INCREASE
IN RATE OF GST IN SUPPLY OF GOODS–
OR SERVICES.**

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In day to day life, invariably Agreements are entered into with the Principal who are Government or Government Department or Public Sector Companies or Autonomous Bodies or Municipal Bodies on the one hand and Contractor/Supplier on the other hand for the supply either goods or services or both. On many occasions, the Contract is silent about the payability of new tax, levy, duty or cess which may either be imposed for the first time or there may be increase in the rate of tax, duty levy or there could be situation where ITC on some items could be restricted. The question then arises, though the Contractor may include the amount of tax, duty or cess in their Invoices or Running Account Bills in respect of taxable supplies so made, whether aforesaid Authorities shall be liable to pay such tax, duty or cess (as a recipient of goods or services) in respect of Invoices received from supplier of goods or services.

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2: In order to find answer, we may have to examine the provisions of Section 64A of Sales of Goods Act, 1930, which, inter-alia, says that unless there is agreement to the contrary, the consumer/recipient of goods or services has to bear the liability of the tax. Section 64A is based on rule of equity. Service tax/GST, being an indirect tax, it is possible that it may be passed on.

3: In the series of judgments, Division Bench of Madras High Court MANU/TN/0216/1977 in the case of Sundaresivaran v. Sri Krishna Refineries has observed "In contracts of sale of goods, if during the working or performance of the same, Customs or Excise Duty or Tax on the sale or purchase of goods is imposed by any law, Section. 64A(a) provides that the seller/supplier may add such increase to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax and he shall be entitled to be paid and to sue for and recover such addition. This statutory entitlement vested in the seller to claim the increase in excise duty, as this case, in case such a duty takes effect during the course of the working of the contract is, in our view, a right which is per se enforceable.

4: The Supreme Court in Rashtriya Ispat Nigam Ltd. Vs. M/s. Dewan Chand Ram Saran MANU/SC/0327/2012 held as under:-

"Service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an Assessee can certainly enter into a contract to shift its liability of service tax upon service receiver. Though the Appellant became the Assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the Assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. There is nothing in law to prevent the Appellant from entering into an agreement with the Respondent that the burden of any tax arising out of obligations of the Respondent under the contract would be borne by the Respondent."

5: The Supreme Court, Numaligarh Refinery Ltd. vs. Daelim Industries Co. Ltd., MANU/SC/3629/2007 while interpreting Section 64A of Sales of Goods Act, held that whether a party i.e. Contractor, is entitled to be paid such tax or such increase has to be ascertained from the intention of the parties to the contract and unless a

different intention appears from the terms of the contract in the case of imposition or increase in the tax, duty or cess after the making of a contract, the party i.e. contractor shall be entitled to be paid such taxes or such increase.

6: The Section 64A of the Sale of Goods Act, 1930 reads as under:-

"64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.- (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time-

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes, namely;-

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.

7: The Section 64A clearly says that unless a different intention appears from the terms of the contract, in case of fresh imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. In this connection, the intention of the parties has to be ascertained.

8: In *Vimal Chand Ghevarchand Jain &Ors. vs. Ramakant Eknath Jajoo* MANU/SC/0441/2009, the Supreme Court reiterated the principle of construction of a commercial contract by looking at the document as a whole and construing it in its entirety.

9: In a landmark judgment, the Division Bench of Delhi High Court in *Satya Developers Pvt. Ltd. vs. Pearey Lal Bhawan Association* MANU/DE/3076/2015 has observed as under:-

31. Thus a contract has to be construed by looking at the document as a whole and the meaning of the document has to be what the parties intended to give to the document. keeping the background in mind and conclusion that flouts business commonsense must yield unless expressly stated. In the present case, it will also have to borne in mind whether the parties intend to include taxes which were not contemplated at the time of the agreement as indubitably the agreements between the parties in the three suits were entered into prior to the Finance Act, 2007 coming into force w.e.f. June 01, 2007.

As regards the lease deed and the agreement of maintenance of common services and facilities between Satya and PLBA Clause 5 of the lease deed as noted above provides that the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, L&DO and or Government, Local Authority etc. By use of the words "Lessor shall continue to pay" it is evident that the parties contemplated the existing taxes, levies or charges and not future or new taxes, duty, levy

or cess. Even as per the agreement of maintenance of common service facilities though the same has no application to the service tax, however, still the said clause II(1) cannot be said to exclude HDFC Bank from paying future service tax.

10: The Division Bench of Delhi High Court in *Raghubir Saran Charitable Trust vs. Puma Sports India Pvt. Ltd.* MANU/DE/1321/2013

has observed as under:-

Thus, the ratio is that the service tax was a species of levy which the parties clearly did not envisage while entering into their arrangement and it is the service which is taxed and the levy is an indirect one which necessarily means that the user has to bear it.

11: In *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*; MANU/SC/3629/2007, the countervailing duty imposed vide Customs Tariff (Amendment) Act, 1994 and the agreement inter se the parties specifically provided that the contractor would pay all taxes and duties including customs duties. Thus, there was specific provision made qua custom duties apart from the fact that the duty though non-existent at the time of submission of the bid, had come into force prior to the finalization of the contract.

12: The Patna High Court in *Gujrat Apolo Equipments Limited vs. The State of Bihar*: MANU/BH/1178/2008 has observed “ On behalf of State, it is submitted that the contractual price was inclusive of tax. In my view, that makes little difference as inclusive of tax pre-supposes tax as leviable on the day when contract is entered. In case of new levy or fresh levy or increase in tax or duty or levy is neither anticipated nor visualized but when it happens, the answer lies in Section 64A of the Sales of Goods Act. The court further held that the principles as enshrined in Section 64A of the Sales of Goods Act which clearly stipulates that unless a different intention appears from the terms of the contract in event of any tax

of the nature described in sub-section (2) which includes Excise Duty being increased or decreased after making the contract without stipulation as to the payment of tax if such tax is increased thereafter, the same has to be reimbursed by the party.

13: The Delhi High Court in Himpex Private Limited vs. National Fertilizers Limited : MANU/DE/0561/2002 has observed “it is settled law that a party can agree to any term which may be repugnant to any statutory provision. For instance Section 64A of Sales of Goods Act provides that any statutory increase in sales tax is payable by the recipient of goods or services, as and when it is made. However, the parties may, in the contract so executed, agree for bearing such increase either by supplier or buyer.

13: To summarize, if in the agreement, there is a provision that the Contractor shall be entitled to all existing duty or tax or cess, then in that event, Contractor shall not be entitled to claim any tax, duty or cess, which may imposed (after execution of agreement) or any increase in the rate of thereafter. However, if the agreement clearly says that the Contractor shall be entitled to all existing tax, duties or cess or tax, duty or cess and/or as may be imposed thereafter including any increase in the rate of tax, duty or cess, then, contractor shall not be entitled to any fresh levy, duty or tax or cess. Ideally, the Contractor should, as far as possible, insist upon the inclusion in the Agreement or Letter of Award or Letter of Intent, the following clause.

The Contractor shall be entitled to be reimbursed all existing duty, tax, levy or cess and any other duty, tax, levy and/or cessas may be imposed for the first time after execution of the agreement or any statutory increase in rate of tax or variation in the calculation of Input Tax Credit whereby outflow of tax, levy, duty or cess may stand increased
