

## GST implementation being a “change in law” qualify as a force majeure event

The Hon’ble Delhi High Court in *National Highways Authority of India v. Sahakar Global Ltd. [O.M.P. (COMM) No. 486 of 2020 decided on September 29, 2020]*, dismissed the petition and refused to interfere with the arbitral award passed by the Arbitrator to pay the compensation for loss generated in revenue triggered by the reduced toll collection due to implementation of GST and held that, the date of implementation of GST was not known and could not be speculated by anybody. It is a ‘change in law’ qualifying as a force majeure event.

### Facts:-

The National Highways Authority of India (“**the Petitioner**”) invited bids from entities interested in undertaking toll collection from users. The bid by Sahakar Global Ltd. (“**the Respondent**”) was accepted by the Petitioner. The parties entered into a contract agreement was entered on June 30, 2017 and accordingly the project site was duly handed over to the Respondent on July 2, 2017.

However, two days prior to the execution of the agreement i.e., on June 28, 2017, *Notification No. 9/2017-Central Tax* was issued stating that the Central Goods and Services Tax Act, 2017 (“**CGST Act**”) would come into effect from July 1, 2017, due to which, there was a heavy fall in the traffic volume of the commercial transport vehicles and user fee collection on the highway owing to the implementation of Goods and Services Tax (“**GST**”). The reduction in toll collections rendered the Respondent unable to deposit weekly remittances on time and it tried to plead its case with the Petitioner in order to revisit their agreement pertaining to toll collections or seek grant of leniency.

Subsequently, the Respondent, citing implementation of GST as a force majeure event covered under the contract agreement, submitted a statement of the losses suffered by it until July 9, 2017. The Petitioner refused to accept the Respondent’s claims and denied that the implementation of GST was a force majeure event and shortfall in toll collection was a business risk associated with the work, and the Respondent was required to forthwith deposit the outstanding toll collections with penal interest.

The Respondent invoked arbitration wherein, the Learned Arbitrator held that implementation of the GST was indeed a force majeure event whereunder it accepted GST w.e.f. July 1, 2017 as a ‘change in law’ falling under the ambit of force majeure as envisaged in the contract agreement and the Petitioner was liable to pay compensation for loss generated in revenue triggered by reduced toll collections due to implementation of GST. Aggrieved by which, the Petitioner has filed the present petition

### **Petitioner's Contention:-**

It was contended by the Petitioner that:

- The Respondent was well aware of the legal position which was to prevail on July 1, 2017 regarding the implementation of GST and the consequences thereof at the time of signing the contract.

### **Respondent's Contention:-**

It was contended by the Respondent that:

- Once the Petitioner itself declared, by way of its public circular dated March 16, 2018 the implementation of GST as an event that would qualify as a 'force majeure' event, it could not turn around and hold the Respondent to a different standard for evoking the force majeure clause.

### **Issue:-**

Whether the implementation of the GST could be construed as a 'change in law' to qualify as a force majeure event under the contract agreement?

### **Held:-**

The Hon'ble Delhi High Court in ***O.M.P. (COMM) No. 486 of 2020 dated September 29, 2020*** has held as under:

- Observed that, implementation of GST ushered a change in the country's sales tax regime and constitutes a 'change in law'.
- Further observed that, in the first place, once the Petitioner released a public circular dated March 16, 2018 deeming the implementation of GST as a 'change in law' qualifying as a force majeure event, there is no reason to deprive the Respondent of the benefit of this declaration. Secondly, even if the Petitioner wished to rebut the Respondent's contentions on this ground, it was the Petitioner's duty to provide the Learned Arbitrator with a transparent and complete picture of the flow of traffic and toll collections arising therefrom, instead of providing data containing inflated figures owing to exclusion of non-tollable vehicles.

- Noted that, a perusal of the findings show that the Petitioner's sole caveat in the circular that the toll contractors had been unable to prove their claims, stood resolved when the Learned Arbitrator not only delved into the specifics of the Respondent's claims, but also meticulously combed through the specific project inputs provided by the Respondent to conclude that it had suffered material losses in toll revenue owing to the implementation of GST.
- Rejected the Petitioner's claim that the Respondent was aware that they had knowledge of the date on which GST would be implemented on the date of submission of the bid was entirely unsupported and presumptuous. It was rightly held that once the earlier date of April 1, 2017 of GST implementation was postponed by the Government of India, the next date of implementation was not known or could not be speculated by anybody.
- Rejected the Petitioner's contention that the Respondent's consent to execute the contract agreement ought to be construed as an acquiescence on its part to bear the consequences of the implementation of GST. Dismissed the petition and refused to interfere with the well-considered findings of the Learned Arbitrator and held that, the conclusion of the Learned Arbitrator is, in the facts of the present case, the only possible one in law.

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