

AFR

Court No. - 18

Case :- WRIT - C No. - 6620 of 2021

Petitioner :- Bharti Airtel Ltd. Thru. D.G.M. Purna Pratap Dwivedi

Respondent :- State Of U.P. Thru. Secy. Tax And Registration Lko.
and Ors.

Counsel for Petitioner :- Manju Lata Mishra, Ashish Mishra

Counsel for Respondent :- C.S.C.

Hon'ble Pankaj Bhatia,J.

1. Supplementary Affidavit filed by the petitioner is taken on record.
2. Heard Sri Ashish Mishra, the counsel for the petitioner and the learned Standing Counsel, who appears for the respondents.
3. The present petition has been filed challenging the order dated 17.10.2018 purportedly to be passed in exercise of the power under Section 129 of the CGST Act as well as the order dated 31.10.2020 passed by the respondent no.4 whereby the appeal preferred by the petitioner has been dismissed.
4. The counsel for the petitioner states that as the Tribunal contemplated under the Act has not been constituted, as such, the petitioner is availing the remedy under Article 226 of the Constitution of India and the same is being entertained in view of the admitted position that the Tribunal contemplated under the Act has not been constituted till date.
5. The facts, in brief, are that the petitioner company is a company incorporated under the Companies Act and has a warehouse situate at Lucknow as well as at Haryana Gurgaon. The company for the purposes of transportation of the goods from Lucknow to Haryana hired a transporter for transporting the said goods on which a bilty tax invoice and Part-A of the e-way bill were generated and are contained in Annexure no.1. It is stated

that the petitioner paid the tax as were required under the IGST Act, however, on account of an inadvertence Part-B of the e-way bill was not generated prior to the commencement of the transport of goods. It is on record that the driver commenced the journey on 24.09.2018 at 9.30 pm from the warehouse of the petitioner company and was intercepted on 25.09.2018 at 4.43 am.

6. The case of the petitioner's company is that although the Part-B of the e-way bill was not generated, the same was attributable to the transporter, however, before the goods were actually seized, the e-way bill was generated at about 7.34 am in the morning on the next date i.e. 25.09.2018. It is stated that despite the fact that the petitioner had uploaded the Part-B of the e-way bill at about 7.34 am, the respondents authorities proceeded to pass a detention order on 29.09.2018 mainly on the ground that till 4.43 am on 25.09.2018, the Part-B of the e-way bill had not been generated.
7. The counsel for the petitioner has drawn my attention to the inspection memo of the vehicle in question which was carried out on 29.09.2018 at about 5.47 pm.
8. As the goods were not being released, the petitioner approached this court by filing a Writ Petition Misc. Bench No.33276 of 2018, which was disposed off on 16.11.2018 directing the release of the goods on the petitioner furnishing the security in terms of section 129 read with section 67 of the CGST Act 2017. It is stated that in terms of the said order, the goods were released on the petitioner furnishing a bank guarantee to the respondents on 07.12.2018 amounting to Rs.1,25,49,539/-.
9. It is stated that prior to the release of the goods, a show cause

notice was issued to the petitioner company on 29.09.2018, which is contained in Annexure no.9 whereby the petitioner was called upon to show cause as to why the proposed tax and the penalty may not be levied against the petitioner. The said show cause notice was issued under section 129 (3) read with section 20 of the CGST Act. The petitioner submitted a detailed reply to the show cause notice and prayed that the show cause notice be dropped mainly on the ground that the tax was duly paid as was required under the Act and the Part-B of the e-way bill was also uploaded prior to the passing of the detention order. It is claimed that despite the submission of the reply, the department without considering the same imposed a tax liability of Rs.62,74,769.40 and levied an equal penalty of Rs.62,74,769.40 by means of an order dated 17.10.2018 as contained in Annexure no.12.

10. It is argued that the petitioner was never served with a copy of the order dated 17.10.2018, as such, the petitioner could not prefer the appeal within the prescribed time as a result whereof the respondent has threatened to encash the bank guarantee and to avoid the same, the petitioner deposited the amount as was determined against the petitioner in view of the order dated 17.10.2018. The petitioner thereafter preferred an appeal no.3 of 2019 which too has been dismissed by means of the order dated 31.10.2020.
11. The counsel for the petitioner argues that the appeal has been wrongly dismissed mainly agreeing with the findings recorded by the assessing authority which in turn had passed the order against the petitioner solely placing reliance on the judgment of the High Court of Madhya Pradesh which was passed placing reliance on the judgment in the case of *VSL Alloys*

***(India) Pvt. Ltd. vs. State of U.P and others reported in 2018
(67) NTN-DX 1.***

12. The contention of the counsel for the petitioner is that the order imposing tax liability as well as the appellate order are bad in law and contrary to the mandate of the provisions of the CGST Act. He argues that from the plain reading of the section 129 of the Act, it is clear that on the goods being detained, the same are to be released on the owner of the goods or any other person coming forward and offering to pay the amount as indicated in clause-a, clause-b and clause-c of Section 129(1) of the Act. He argues that to determine the amount which is liable to be paid under clause-a, clause-b and clause-c of Section 129 (1), the proper officer is empowered to specify the penalty payable. He argues that although the proper officer is empowered to specify the penalty which should be paid or offered to be paid under clause-a, clause-b or clause-c of Section 129(1) of the Act, there is no power to determine the penalty payable which can be done only in terms of the mandate of Section 122 of the CGST Act.
13. He further argues that admittedly no proceedings for determination of the penalty or for determination of the tax outstanding have been initiated either under section 73 or 74 of the CGST Act or under section 122 of the CGST Act. He further argues that in any event there was never any dispute that the tax which is required to be paid for transport of the goods was not paid and thus, the demand as well as the imposition of the penalty is neither justified nor proper exercise of the power. He further argues that no proceedings under section 73, 74 or 75 of the Act have also been initiated against the petitioner for determination of the tax liability.

Thus, in short the submission of the counsel for the petitioner is that in terms of the mandate of section 129, the proper officer is neither authorized nor justified in determining the tax or imposing the penalty as has been done by means of the impugned orders and thus, the impugned orders are liable to be set aside and the amount deposited by the petitioner is liable to be refunded.

14. The Standing Counsel, on the other hand, argues that admittedly Part-B of the e-way bill was not uploaded by the petitioner prior to the commencement of the transport, which is a mandatory requirement under Rule 138 of the Rules framed under the Act and once it is admitted by the petitioner that Part-B of the e-way bill was not uploaded, no error can be found with the orders passed by the authority in exercising of the power under section 129 of the Act. He further argues that a duty is cast upon the petitioner to have uploaded Part-B of the e-way bill, which has not been discharged. In light of the said, he argues that the petition lacks merit and is liable to be dismissed.
15. The counsel for the petitioner has placed reliance on the judgment passed by this Court in Writ Tax No.763 of 2018 decided on 09.5.2018 (Modern Traders vs. State of U.P.) ; the judgment in Writ Tax No.344 of 2018 decided on 07.02.2020 (Skipper Limited vs. Union of India); the judgment in Writ Tax No.360 of 2020 decided on 17.12.2020 (Metenere Ltd. vs. Union of India and others).
16. The Standing Counsel, on the other hand, places reliance on the judgment of the M.P. High Court in the case of Gati Kintetsu Express Ltd. vs. Commercial Tax of M.P. and others decided on 05.7.2018 reported at (2018) 56 GSTR 114. He

also places reliance on the judgment of the Madras High Court in Writ Petition No.1431 of 2020 (M/s Ideal Movers Private Limited vs. The State Tax Officer (ENF), Roving Squad, Vellore) decided on 24.01.2020. In the light of the said, it is ultimately argued that the writ petition is liable to be allowed.

17. Considering the submissions made at the bar, it is essential to see the mandatory provisions and scheme of the CGST Act which cover the issue in question particularly Sections 73, 74 and 75 read with section 122 and 129 and the Rule 138 of the CGST Rules.
18. CGST Act is provided into 21 Chapters. Chapter III of the said Act provides for levy and collection of the tax. Chapter IV concerns with the time and value of the supply. Chapter X of the Act provides for liability of the payment of tax. Chapter XV of the Act in question, with which we are concern, provides for manner and demands or recovery.
19. Section 73 of the Act provides for determination of tax which is not paid or short paid or erroneously refunded or on account of wrong availment inputs tax credit for any reason other than fraud or any wilful misstatement or suppression of facts. Section 73 is quoted herein below :

73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts.— (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not

pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

20. Section 74 of the said Act confers power of determination of tax not paid or short paid or erroneously refunded or in case of wrongful availment of input tax credit availed or utilized by the reasons of fraud or any wilful misstatement or suppression of facts. Section 74 is quoted herein below :

74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful-misstatement or suppression of facts.—

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section

(1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from

such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.—For the purposes of section 73 and this section,—

(i) the expression “all proceedings in respect of the said notice” shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression “suppression” shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

21. Thus, Sections 73 and 74 deal with situations of determination of tax in case of non-payment simplicitor or for the reasons of fraud or wilful misstatement or suppression of facts respectively.
22. Chapter XIX of the said Act provides for offences and

penalties. Section 122 of the Act provides for the quantum of penalty leviable in the event of a taxable person falling on the grounds mentioned under section 122(1) clause (i) to clause (xxi). The quantum of penalty is also specified under section 122 (1) of the Act. Section 122(1) is quoted herein below :

122. Penalty for certain offences.— *(1) Where a taxable person who—*

(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;

(ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

Shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

23. In the same Chapter, there is a procedure prescribed under section 129 which is invocable in respect of the goods and conveyances in transit. Section 129 is quoted herein below :

"129. Detention, seizure and release of goods and conveyances in transit.—(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,—

(a) on payment of penalty equal to two hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such penalty;

(b) on payment of penalty equal to the fifty per cent of the value of the goods or two hundred percent of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five percent of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) ***

(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying penalty payable, and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty under clause (a) or clause (b) of sub-section (1).

(4) No penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub-section (1) within fifteen days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):

Provided that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) or one lakh rupees, whichever is less:

Provided further that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer."

24. Thus, in the Act in question, the power of inspection, search and seizure can be carried out under Chapter XIV or in case of goods in transit under section 129. Section 129, on the plain reading, can be equated with an alternative dispute redressal mechanism and provides an opportunity to the owner of the goods or any other person to pay amounts as specified under section 129 (1)(a) or (b) or (c) of the said Act.

25. On a plain reading of clause 129(1)(a) of the Act, which provides for payment of penalty equal to 200% of the tax payable on such goods or penalty equal to 50% of the value of the goods, further incorporates provisions for determination of quantum of penalty under section 129(3). Thus, under the scheme of the Act, the procedure for determination of tax and penalty is contained in Chapter XV read with section 122, 123, 125, 126, 127 and 128 of the Act and a parallel procedure is prescribed under section 129 of the Act in case of goods, which are in transit.
26. Section 129, can be invoked by the department with regard to the goods in transit and the goods can be released only in the event the owner of the goods comes forward for payment of penalty as specified in clause (a) or (b) or (c) of Section 129 (1) of the Act and on payment of the said amount, the intent is to give quietus to the litigation.
27. The question that arises here is that what happened the owner of the goods or the person does not volunteer to pay the penalty as prescribed under clause (a), (b), (c) of Section 129 (1) of the Act. In the said case, the department is will equipped to initiate proceedings by taking recourse to Section 73, 74, 75 of the Act read with section 122 for determination of tax and the penalty leviable which, subject to the appeal would govern the issues in between the department and the assessee.
28. In the present case, the department has proceeded to determine the tax liability as well as penalty only under the provisions of Section 129 of the Act, which is not contemplated or intended. On a plain reading of Section 129, there is no provision under section 129 for determination of tax due, which can be done only by taking recourse to the provisions of Section 73 or 74 of

the CGST Act, as the case may be.

29. As the proceedings have been initiated and concluded only under section 129 and the owner of the goods has not come forward for payment of such penalty as has been determined, the entire action of determining the tax and penalty under section 129(1) as has been done by means of the impugned order and upheld in the appellate proceedings, impugned before this Court, I have no hesitation in holding that the order passed on 17.10.2018 and as upheld by the order dated 31.10.2020 are not legally substitutable and are accordingly set aside. The amount paid by the petitioner for release of the goods shall be refunded to the petitioner with all expedition preferably within a period of two months from today.
30. With the said observations, the writ petition is allowed.

Order Date :- 19.10.2022

VNP/-