AFR

Court No. - 6

Case :- WRIT TAX No. - 31 of 2021

Petitioner :- M/S Maa Mahamaya Alloys Pvt. Ltd.
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Aloke Kumar
Counsel for Respondent :- C.S.C.

Hon'ble Pankaj Bhatia,J.

1. Heard Sri Aloke Kumar, learned Counsel for the petitioner and learned Standing Counsel.

2. The present petition has been filed challenging the order dated 29.01.2019 whereby tax of Rs.26,10,000/- has been assessed to be payable by the petitioner and penalty of Rs.26,10,000/- and further fine of Rs.25,000/-, total Rs.52,54,000/- has been assessed against the petitioner as well as the appellate order dated 15.06.2020 whereby the appeal preferred by the petitioner was partly allowed.

3. The facts in brief are that the petitioner is a Company duly registered under the GST Act. It is stated that the material purchased by the petitioner are duly reflected on the portal of the department including the GSTR-3B. It is alleged that on 29.09.2018, the Deputy Commissioner, (SIB), Commercial Tax, Mirzapur Division, Mirzapur in purported exercise of powers under Section 67(1) and 67(2) of the GST Act inspected the registered business premises and drew a Panchanama on 29.09.2018 (Annexure No.1). On the same day, a seizure memo was also prepared, which is contained as Annexure No.2 to the writ petition.

4. It is argued that the petitioner was compelled to deposit an amount of Rs.52,20,000/- for getting the seized goods released. Thereafter, the petitioner was served with summons on 29.09.2018 and the petitioner

was called upon to produce the records relating to the purchase for the year 2017-18 and 2018-19. The petitioner was once again issued summons under Section 70 of the Act on 27.12.2018 whereby certain documents were called from the petitioner. The petitioner claims to have produced the documents on the date fixed, however, an order came to be passed thereafter without issuance of any show cause notice to the petitioner levying the tax liability of Rs.26,10,000/- and further an amount of Rs.26,10,000/- was determined as penalty to be paid by the petitioner and further a fine of Rs.25,000/- was also imposed, thus, a total liability of Rs.52,45,000/- was determined to be payable under Section 130(3) of the GST Act. As the petitioner had paid an amount of Rs.52,20,000/-, the total balance amount payable by the petitioner came to Rs.25,000/-. The said order was challenged by the petitioner by preferring an appeal. The said appeal was partly allowed by means of the order dated 15.06.2020 and an amount of tax assessed against the petitioner was quantified at Rs.7,92,405/- on which a like penalty of Rs.7,92,405/- was imposed and thus, in terms of the appellate order, the petitioner was required to pay a total amount of Rs.15,84,810/-. The amount paid by the petitioner in excess was directed to be refunded in accordance with law.

5. The contention of the Counsel for the petitioner is that the order impugned as well as the appellate order is bad in law for the reasons more than one. He argues that in terms of the mandate of the GST Act, although a power of search and seizure is conferred upon the authorities, the manner in which the goods were held to be in excess of the recorded goods, is wholly arbitrary. He argues that the goods were quantified only on the basis of the eye estimation, which argument of the petitioner was also accepted by the appellate authority, as is clear from the perusal of the appellate order. In the light of the same, he argues that once the appellate authority accepted the contention of the petitioner that the valuation of the goods on the

basis of eye estimation was not possible, the entire proceedings ought to have been declared as null and void. He further argues that even otherwise the manner in which the appellate authority has quantified (although reduced), the demand against the petitioner has no foundation whatsoever.

6. The Counsel for the petitioner further argues that in any event while proceeding to pass an order under Section 130 of the GST Act, no power is vested in the authority to undertake the determination of liability of tax, which can only be done by taking recourse to Section 73 or Section 74 of the Act, as the case may be. He draws my attention to the statutory provisions contained in the GST Act and emphasises on the provisions contained and elaborated in Sections 67, 73, 74, 122 and Section 130 of the Act. He places reliance on the judgment of this Court in the case of ***M/s Metenere Limited vs Union of India and another***, ***Writ Tax No.360 of 2020***, decided on 17.12.2020. He further argues that after the passing of the orders, on the same grounds, proceedings have been initiated under Section 74 of the Act and an order has already been passed against the petitioner, against which, the petitioner is availing the remedies. He argues that the same is not the subject matter of the present writ petition and has been brought to the notice of this Court only to apprise that no penalty could have levied in view of the mandatory provisions contained in Section 75 (13) of the GST Act.

7. During the course of the hearing, this Court vide order dated 21.03.2023 had called upon the Counsel for the respondent to inform whether a show cause notice was issued under Section 130(4) of the GST Act or not? In response to the said order, the learned Standing Counsel has produced the instructions and argues that prior to passing of the impugned order, a show cause notice dated 27.12.2018 was issued to the petitioner, which was served upon the accountant of the

firm/ company on 29.12.2018. Learned Standing Counsel has also produced a copy of the show cause notice. The said instruction and show cause notice are taken on record.

8. The learned Standing Counsel argues that the estimation of various goods was done in the manner prescribed. He further argues that at the appellate stage, the contention of the Counsel for the petitioner was partly accepted and with regard to the demand quantified at the appellate stage, the appellate authority had applied its mind and arrived at a conclusion with regard to the goods available and on the said basis, the demand was quantified and substantially released. He thus argues that the writ petition is liable to be dismissed, more particularly because no reply to the show cause notice was given.

9. Considering the rival submissions made at the bar, the following questions which arise for determination;

> (I). Whether tax can be assessed/ determined in exercise of powers under Section 130 of the GST Act?
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> (II). Whether penalty can be levied only on the allegations that at the time of verification of goods, the goods in excess were found at the premises?
>
> (III). Whether the service of notice as claimed by the respondent satisfies the requirement contemplated under Section 169 of the GST Act?
>
> (IV). Whether the valuation of goods can be done on the basis of eye estimation alone and on the basis of production capacity and/ or the consumption of electricity etc?

10. The issue raised in the present writ petition is being decided in view of the fact that the appellate tribunal contemplated under the Act has not yet been constituted.

11. The issue raised herein in Issue no.I is marked resemblance to facts referred in the judgment of this Court in the case *M/s Metenere Limited (supra)* wherein on the basis of a similar search conducted, the demand was quantified. This Court after analysing the provisions of the Act and the Rules applicable held that for the infractions as contained in Section 122 of the GST Act and specified in Column 'A' of paragraph 35 of the said judgment *M/s Metenere Limited (Supra)* held that penalty has to be Rs.10,000/- or the amount of tax evaded whichever is higher, whereas for the infractions specified in Column 'B' of paragraph 35, the penalty that can be imposed is Rs.10,000/- only. This Court also held that the demand for tax can be quantified and raised only in the manner prescribed in Section 73 or Section 74 of the Act, as the case may be.

12. In the light of what has been decided by this Court in the case of *M/s Metenere Limited (Supra)*, it is clear that the entire exercise resorted to under Section 130 of the GST Act for assessment/ determination of the tax and the penalty is neither stipulated under the Act, nor can be done in the manner in which it has been done, more so, in view of the fact that the department itself had undertaken the exercise of quantifying the tax due, by taking recourse under Section 74.

13. As the entire tax has been determined and the penalty has been levied only on the basis of a survey by taking recourse under Section 130 of the GST Act and not taking a recourse to Section 74, the order impugned is clearly unsustainable.

14. Coming to the Issue no.2, Section 130 of the GST Act contemplates and provides for levy of the penalty, in the event, any of the

conditions so mentioned in Section 130(1) are made out. Section 130(1) reads as under:

> *"**Section 130. Confiscation of goods or conveyances and levy of penalty-***
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> *(1) Notwithstanding anything contained in this Act, if any person -*
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> *(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or*
>
> *(ii) does not account for any goods on which he is liable to pay tax under this Act; or*
>
> *(iii) supplies any goods liable to tax under this Act without having applied for registration; or*
>
> *(iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or*
>
> *(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,*
>
> *then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122."*

15. On a plain reading of the allegations levelled against the petitioner with regard to the improper accounting of goods, the only stipulation contained in Clauses (ii) and (iv) of sub-section (1) of Section 130 can at best be invoked by the department, however, in the present case, even assuming for the sake of argument, that the goods were lying in

excess of the goods in record, the case against the petitioner would not fall under Clause (ii) of sub-section (1) of Section 130 for the simple reason that the liability to pay the tax arises at the time of point of supply, and not at any point earlier than that. On a plain reading, the scope of Clause (ii) of sub-section (1) of Section 130 is that any assessee who is liable to pay tax and does not account for such goods, after the time of supply is occasioned, would be liable to penalty under Clause (ii). Analyzing Clause (iv) of sub-section (1) of Section 130, the contravention of any provision of the Act or the Rules should be in conjunction with an intent to evade payment tax and penalty can be levied by invoking Clause (iv) only when the department establishes that there were a contravention of the Act and Rules coupled with the '*intent to make payment of tax*'. There is no such allegation in the show cause notice or any of the orders, I have no hesitation in holding that even the Clause (iv) of sub-section (1) of Section 130 would not be attracted in the present case.

16. Coming to the Issue no.3 of determination, Section 169 of the Act provides for manner of service of notice in certain circumstances. Section 169 is quoted hereinbelow:

> *"**Section 169. Service of notice in certain circumstances.-***
>
> *(1) Any decision, order, summons, notice or other communication under this Act or the rules made there under shall be served by any one of the following methods, namely:-*
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> *(a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or*

(b) by registered post or speed post or courier with acknowledgment due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or

(c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time; or

(d) by making it available on the common portal; or

(e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or

(f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision, order, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in sub-section (1).

(3) When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved."

17. In terms of Clause (a) of Section 169(1), a service would be completed only when it is tendered to the taxable person or on his Manager or authorized representative.

18. Serving on the Accountant of the firm is neither contemplated nor provided for under Section 169(1)(a) and thus, the service as claimed by the Counsel for the respondent on the Accountant cannot be held to

be a valid service, thus, on that count also, the entire proceedings are liable to be quashed.

19. Coming to the Issue no.IV with regard to the determination of value of the goods. Section 15 of the GST Act provides for valuation of the taxable supply. In furtherance of the provisions contained in the Act, Rules have been framed and Rule 27 of the said Rules provides for the manner of valuation of supply of goods or services, however, in the present case, the valuation of the goods is required to be done in terms of the mandate of Section 15(1) read with Section 15(2) and read with Section 15(3). In the said Section 15 or the Rules framed thereunder, there is no prescriptions for valuation of the goods on the basis of eye estimation as has been done by the department and has been repelled by the appellate authority. The appellate authority has erred in repelling the valuation done on the basis of eye estimation, however, has proceeded to value the goods (although differently) at the appellate stage without resorting to the mandate and manner prescribed in Section 15 read with the Rules, thus, on that count also, the impugned order is not sustainable.

20. For all the reasons recorded above, the writ petition deserves to be allowed. Accordingly, the impugned order dated 29.01.2019 is set aside and the writ petition is ***allowed***.

21. The amount deposited by the petitioner shall be refunded subject to the outcome of the demand quantified under Section 74 of the Act in accordance with law.

Order Date :- 23.03.2023

akverma **(Pankaj Bhatia, J)**