

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 18982 of 2018**

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ORSON HOLDINGS COMPANY LIMITED & 1 other(s)  
Versus  
UNION OF INDIA & 2 other(s)

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Appearance:

MR VINAY SHRAFF WITH MR PARTH S SHAH(8375) for the Petitioner(s)  
No. 1,2

MR SIDDARTH RAMI, AGP for the Respondent(s) No. 2

MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 1

UNSERVED REFUSED (N) for the Respondent(s) No. 3

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**CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI**

and

**HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

**Date : 18/01/2023**

**ORAL ORDER**

**(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)**

1. At the time of issuance of notice on 7.12.2018 in this petition which is filed under Article 226 of the Constitution of India, this Court has passed the following order:

*“1. This petition challenges the constitutional validity of rule 138(10) of the Central Goods and Services Tax Rules, 2017 / Gujarat Goods and Services Tax Rules, 2017 as being unconstitutional and violative of Articles 14, 19(1)(g) and 301 of the Constitution of India, to the extent the said provision restricts validity period of the e-*

*way bill in terms of distance to be travelled in a day.*

*2. Mr. Vinay Shruff, learned advocate with Mr. Vishal Dave, learned advocate for the petitioners invited the attention of the court to the notice under section 129(3) of the Central Goods and Service Tax Act, 2017 (Annexure "J" to the petition), to point out that in terms of the said notice, the petitioner was directed to appear before the State Tax Officer-2. It was submitted that in response to the notice, the petitioner filed its reply. Reference was made to the impugned order passed under section 129(3) of the Act, to point out that the same has been passed on 28.09.2018 without waiting for the date of hearing, that is, 02.10.2018. It was submitted that therefore, the impugned order has been passed in breach of the principles of natural justice.*

*3. The attention of the court was invited to sub-section (4) of section 129 of the Act, which provides that no tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard. It was submitted that despite the fact that in the show cause notice the date has been fixed, the order has been passed prior to the said date, without giving an opportunity of hearing to the petitioner, which is in breach of sub-section (4) of section 129 of the Act.*

4. It was further pointed out that penalty is sought to be imposed under section 129(1) of the Act, whereas section 122(1)(xiv) of the Act provides that where a taxable person who transports any taxable goods without the cover of documents as may be specified in this behalf, he 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, etc., whichever is higher.

5. Reference was made to section 73 of the Act, which provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts, and more particularly, to sub-section (8) thereof, which provides that 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. It was submitted that in the facts of the present case, the petitioner had deposited the amount of tax and penalty within thirty days from the date of issue of the notice and therefore, the petitioner

*was entitled to the benefit of sub-section (8) of section 73 of the Act.*

*6. Reference was also made to section 74 of the Act, which provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts, and more particularly, to sub-section (8) thereof, which provides that 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 twentyfive 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. It was submitted that therefore, even in the case of fraud or willful misstatement or suppression of facts, the statute provides for payment of penalty equivalent to twenty-five per cent of the tax within thirty days from the date of the notice.*

*7. It was further submitted that the statute is required to be read as a whole and that section 129 of the Act ought not to have been read in isolation. Reliance was placed upon the decision of the Supreme Court in Kailash Chandra and others v. Mukundi Lal and others, AIR 2002 SC 829, wherein the court has held that a provision in the statute is not to be read in isolation. It has to be*

*read with other related provisions in the Act itself, more particularly, when the subject matter dealt with in different sections or parts of the same statute is the same or similar in nature.*

*8. The attention of the court was also invited to the circular No.64/38/2018-GST dated 14th September, 2018 and more particularly, clause (5) thereof, which provides that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, proceedings under section 129 of the CGST Act may not be initiated, inter alia, in the situations enumerated thereunder. It was submitted that the situations enumerated in the said circular are illustrative and not exhaustive. Therefore, a mistake in writing distance can be deemed to have been included within the ambit of the said circular.*

*9. Another contention raised by the learned advocate for the petitioner is that in terms of the Government of India circular No.3/3/2017-GST dated 5th July, 2017, the functions under different sections of the Central Goods and Service Act, 2017 or the rules made thereunder, are specifically delegated to the officers in terms of the said circular. It was pointed out that the powers under sub-section (3) of section 129 of the Act have been delegated to the Deputy or Assistant Commissioner of Central Tax.*



*It was contended that the impugned order has been passed by the State Tax Officer, who is not an officer empowered to exercise powers under sub-section (3) of section 129 of the Act and therefore, suffers from lack of jurisdiction.*

*10. Having regard to the submissions advanced by the learned advocate for the petitioner, Issue Notice returnable on 10th January, 2019. Direct Service is permitted today.”*

2. On 13.10.2022, when the matter came up for hearing, Mr.Shah for the petitioners, on instructions, submitted that the petitioners have not pressed for the prayers at paragraphs 7(a) to 7(c) and thus, he is giving up the challenge to the vires, particularly, Rule 138(10) of the CGST Rules and GGST Rules.

3. The only prayers that survives for consideration of this Court are prayers para 7(d) and 7(e).

4. We have heard learned advocate for the petitioners who has urged that the case of the petitioners is covered by the decision of this Court in

the case of Special Civil Application No.23835 of 2022 in the case of *Shree Govind Alloys Pvt.Ltd. V/s State of Gujarat*. It is further urged that in his case also, the way bill has expired and it appears to be bonafide and not with any fraudulent intent.

5. As the challenge to the Rule 138(10) of the CGST Rules has not been insisted, learned senior counsel Mr.Raval assisted by learned advocate urges that he has nothing to offer, whereas learned AGP Mr.Kathiriya appearing for the State in wake of the challenge given up of Rule 138(10) of the CGST Rules has urged this Court to consider the peculiar facts of this case, however, there is no dispute to the fact that in this case, this matter is squarely covered by the decision of Special Civil Application No.23835 of 2022.

6. Having heard both the sides, at the outset, it is to be noted that in case of *Shree Govind Alloys Pvt. Ltd.* (supra), the respondent had challenged the authority of the respondent demanding the tax and penalty under Section 129(3) of the Central Goods & Services Tax Act, 2017, where the goods, which were to be delivered on or before 17.10.2022, could not be delivered in time and on 19.10.2022 when inspected, some of the e-Way bill

numbers had shown expired. The entire truck along with the goods had been seized on account of expiration of the e-Way bill. Therefore, the Court had, after a detailed consideration, held that e-Way bill had expired 41 hours before and the release of goods of conveyance and transit through the authority concerned. Relevant observations are made in paragraphs 6 to 10 are as under :

*“6. We have heard learned advocates on both the sides and also have considered the material on the record. We notice section 129, which provides as under:*

*“Detention, seizure and release of goods and conveyances in transit*

*129(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 fifty per cent of the value of the goods or two hundred per cent of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five per cent 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) xxx xxx xxx

(3) *The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the 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 93) 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.”*

*7. It is not in dispute that in the instant case, e-Way Bill had expired 41 hours before and the release of goods of conveyance and transit through the authority concerned.*

*8. We could notice that the detention is also on the ground that the goods are of expiration of the eWay bill number, which had expired during the transit and the same cannot be the ground for detaining and seizure of M.S. Billet along with the vehicle truck.*

*9. This Court in Govind Tobacco Manufacturing Co. vs. State of U.P., [2022] 140 taxmann.com 383 (Ahmadabad) has held that as there is expiry of eWay*

*bill on transit, the seizure of said vehicle and the goods is not permissible under the law. In the case before the High Court of Madhya Pradesh at Jabalpur in M/s. Daya Shaker Singh vs State of Madhya Pradesh passed in Writ Petition No.12324 of 2022 on 10.08.2022, where also the Court had intervened considering the fact that the respondent could not establish any element of evasion of tax with fraudulent intent or negligence on the part of the petitioner. Delay was of almost 4 ½ hours before the e-Way bill could expire. It appeared to be bona fide and without establishing any fraudulent intention. Here also what is found is that there is no fraudulent intention for this to happen.*

*10. Resultantly, present petition stands allowed. The impugned order dated 04.11.2022 demanding the sum of Rs.7,53,364/- is quashed and set aside. The order of detention dated 19.10.2022 as well as the notice issued under section 129(3) of the Act dated 19.10.2022 are also quashed and set aside.”*

7. In the instant case also, as we could notice that the goods of the said vehicle has been detained at 6:05 p.m. at Amirgadh on 27.9.2018, after about expiry of 48 years. This case is squarely covered by the

decision of this Court which has not been further challenged and even otherwise, from the facts which are robust in nature, it can be gathered that there does not appear to be any ill-intent on the part of the petitioner to use the expired e-Way bill. The company is situated at Howrah, West Bengal and the place of delivery was Jamnagar, Gujarat and in transit, this e-Way bill has expired.

8. The petition deserves to be allowed and is allowed.

9. The impugned order dated 28.09.2018 demanding a sum of Rs.63,40,000/- is quashed and set aside.

10. The order of detention as well as the further notice issued under Section 129(3) of the CGST Act in FORM GST MOV-07 is also quashed and set aside, with all consequential benefits.

11. The tax of Rs.11,41,200/- and the matching amount of penalty had been recovered, making it total of Rs.22,82,400/-. The penalty being an additional amount in



wake of this quashment, the same shall be refunded to the petitioner with interest, within eight weeks.

12. Rule is made absolute to the aforesaid extent.

(SONIA GOKANI, J)

(SANDEEP N. BHATT, J)

SRILATHA

