

Neutral Citation No. - 2023:AHC:175071

Reserved

Court No. - 5

Case :- WRIT TAX No. - 857 of 2021

Petitioner :- M/S Khan Enterprises

Respondent :- Additional Commissioner And Another

Counsel for Petitioner :- Aditya Pandey

Counsel for Respondent :- Rishi Kumar ACSC.

Hon'ble Piyush Agrawal,J.

1. Heard Sri Aditya Pandey learned counsel for the petitioner and Sri Rishi Kumar learned ACSC for the respondents.
2. Since the GST Tribunal has not yet been formed the present writ petition is being entertained against the impugned order passed by the Additional Commissioner (Appeals).
3. Present writ petition has been filed challenging the order dated 19.8.2021 passed by the respondent no.1 in Appeal No. GST-77/20, Assessment Year 2020-21 under the provisions of Section 129(3) of the Uttar Pradesh Goods and Services Tax Act, 2017 (for short 'GST Act") by which the order dated 21.10.2020 passed by the respondent no.2 has been confirmed.
4. Brief facts of the case are that petitioner was a registered dealer under the GST Act having GSTIN No. 09DHGPK6236N3ZP. (Cancelled on 20.9.2020). At the time of transaction the petitioner was having the said GSTIN. In the normal course of business the petitioner purchases Supara (Areca Nuts) from a registered dealer situated at Gurgaon, Haryana i.e. M/s Gaurav Gtraders Shop No. 2 Kherki Daula, Gurugram, Haryana having GSTIN No. 06ANMPG5419N2ZL. For the said

transaction the seller issued Tax Invoice No. 7, E-Waybill and GR No.28 dated 27.9.2020. The goods were being transported from Gurgaon, Haryana to Robertsganj, U.P. The goods were intercepted by respondent no.2; statement of the driver was taken on MOV 01 dated 30.9.2020 and physical verification of the goods was also done in MOV 04 dated 5.10.2020. Thereafter MOV 06 was issued detaining the goods. A notice under section 129(3) of the GST Act was issued in MOV 07 dated 5.10.2020. A supplementary notice was also issued on 17.10.2020 in which the stand was taken that the product in question was not Arecanut/Betul Nut but there was processed Betul Nut and thereafter MOV 09 dated 21.10.2020 was issued. Being aggrieved the petitioner filed GST APL 01 on 29.10.2020 before respondent no.1 which was dismissed by the impugned order dated 19.8.2021. Hence the present writ petition.

5. Learned counsel for the petitioner submits that at the relevant time i.e. on the date of transaction the parties were duly registered under GST Act; the goods were purchased by the petitioner and was accompanied with all relevant documents, i.e. tax invoice, e-waybill, GR as prescribed under the GST Act; neither any discrepancy what so ever was found at the time of interception of the goods nor at physical verification of the goods. He further submits that the goods have been detained on the ground that the goods were not on the regular route but on a different route and the truck driver had given a statement that instead of Robertsganj the goods were to be unloaded at Ghaziabad as well as no document was produced for unloading the goods at Ghaziabad.

6. He further submits that at the time of physical verification the goods were found as Arecanut/Betul Nut but without any

rhyme or reason the goods were alleged to be different and treated the same as Processed Betul Nut to which higher rate of tax is applicable. He further submits that neither any adequate report has been obtained nor any expert report were obtained and to the contrary at the time of physical verification the goods found which were uploaded in MOV 04 do not refer to processed betul nut except the Arecaut/betul nut, therefore the view taken by the authorities are illegal, without any basis, therefore, bad.

7. He further submits that the respondents have brought various materials for the first time before the appellate authority and on consideration of those materials impuged order has illegally been passed. He further submits that Rule 112 of the G.S.T. Rules does not empower the respondent to file additional evidence before the first appeal. In support of his submission he has relied upon the judgment and order of this Court passed in Writ Tax No. 503 of 2020 (**Anandeshwar Traders vs. State of U.P.**) decided on 18.1.2021 where this Court has specifically held that Rule 112 does not allow for additional evidence to be lead at the instance of the State-respondent in appeal and quashed the order. He has also relied upon the judgment of the Apex Court in **Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others** (1978 SCC (1) 405).

8. He further submits that once the owner of the goods has come forward the provision of Section 129(1)(b) of the Act could not be invoked for imposing penalty. In support of his submission he has relied upon the judgment of this Court in Writ Tax No. 28 of 2023 (**M/s Riya Traders vs. State of U.P. And another**) decided on 17.1.2023 and in Writ Tax No. 1580 of 2022 (**M/s Margo Brush India and others vs. State of U.P. And others**) decided on 16.1.2023.

9. He further submits that once the goods accompanying with proper documents such as tax invoice, e-waybill and GR the goods ought not to have been seized. In support of his contention he has relied upon the the judgments in Writ Tax No. 600 of 2022 (**M/s Gobind Tobacco Manufacturing Co. And another vs. State of U.P. And others**) decided on 17.5.2022 and in Writ Tax No. 1464 of 2022 (**S/S S.K. Trading Co. And another vs. Additional Commissioner Grade 2 (Appeal) and another**) decided on 16.3.2023. He further submits that at the time of interception of goods statement of the driver was taken wherein it has been recorded that goods were to be unloaded at Robertganj, U.P. but subsequently some statement was recorded that too was not uploaded on website/ MOV that goods to be uploaded at Ghaziabad and not at Robertsganj, which cannot be relied upon. In support of his submission he has relied upon the judgment of the Gujrat High Court in **F.S. Enterprise vs. State of Gujarat** (G.S.T. Judgments page 774) (R/Special Civil Application No. 7061 of 2019 decided on 11.9.2019).

10. In view of the aforesaid judgments learned counsel for the petitioner has summarized his submission as under:

- (i) The goods were accompanying with all genuine documents and no discrepancy has been found in it.
- (ii) At the relevant time of purchases the parties were registered dealers, therefore goods cannot be seized.
- (iii) The purchaser has come forward, therefore, the enhancement of penalty cannot be made and order should have been passed under section 129(1)(a) of the Act.
- (iv) The additional evidence cannot be accepted at

behest of the State-respondents under Rule 112 of GST Rules.

(v) Subsequent alleged statement of driver cannot be relied upon as not uploaded in MOV 01.

(vi) The authority has no authority to issue supplementary notice after MOV 07 dated 30.9.2020.

In view of the above mentioned facts and the submissions he prays that the impugned order deserves to be set aside and the writ petition deserves to be allowed giving all consequential benefits to the petitioner.

11. Per contra, Sri Rishi Kumar, learned ACSC supports the impugned orders. He submits that the petitioner is a member of syndicates, involved in tax evasion. He further submits that after interception of goods a detailed enquiry was conducted of which materials/report were placed before the appellate authority and on the basis of the various discrepancies having been found and a very large scale of tax evasion was detected, the impugned order has rightly been passed. He further submits that seller and purchaser were found to be fictitious, therefore the impugned order invoking section 129(1)(b) has rightly be passed. He further submits that the driver was on the wrong route when the goods were intercepted and the statement was made by the driver that the goods were to be unloaded at Ghaziabad and not at Robersganj and this is the second round for transporting goods on the basis of the same documents in question, therefore, he supports the proceedings initiated against the petitioner. He further submits that on physical verification the goods were found different than the goods disclosed in the accompanying

documents. He submits that processed betul nut (meethi supari) was found which was other than the disclosed in the accompanying documents as Arecanut/Betul Nut. He further submits that the transaction was not genuine, therefore the impugned order has rightly been passed. He prays for dismissal of the writ petition.

12. After hearing the learned counsel for the parties, perused the record

13. The GST Act is a complete Code in itself. Various provisions, Rules and Forms are prescribed as well as various steps are also to be followed in an appropriate circumstances to be taken by the assesseees as well as by the State authority. There is no room for deviation from it. The provision and the Rules are to be complied with strictly. In another words the action/working of the officers of State authority should be transparent.

14. Admittedly the goods in question was coming from Gurgaon, Haryana to Robertsganj, U.P. The goods were incepted on onwards journey on 30.9.2020 under the GST Act.

15. Admittedly the goods were accompanied with tax invoice, e-waybill and GR which shows that the goods were originated from Gurgaon, Haryana and to be terminated at Robertsganj, U.P.. The goods were intercepted and detained on 30.9.2020 and the documents were produced and the same were verified and duly signed and same were uploaded in Form GST MOV 01, copy of which has been annexed as Annexure 2 to the writ petition at page 45 of the writ petition. On perusal of the said form, it clearly indicates that GR number and date, tax invoice number and date, consigner/seller's name and purchaser/consignee's name, item with disclosed amount and e way bill number were mentioned and

no discrepancy has been pointed out. Thereafter almost after five days the physical verification of the goods was done on 5.10.2020 and after verification the same was recorded in GST MOV 04, copy of which has been annexed as Annexure 3 at page 49 of the writ petition wherein GR number and date, notice number and date, name of the commodity disclosed in the invoice was mentioned and thereafter name of the goods, commodity found were also mentioned. The quantity of the goods as disclosed in the invoice and after physical verification no difference was found. Thereafter on the same date detention order was passed which was recorded in the form GST MOV 06.

16. On perusal of the detention memo. It shows that the goods in question was detained on the ground that driver gave a statement that goods were to be unloaded at Ghaziabad and not at Robertsganj as disclosed in the accompanying documents. Further a statement was given by the driver that this was second round of transporting goods at the strength of the same documents i.e. tax invoice no.07 and third was taken that a fresh e-waybill has been generated on 30.9.2020. On the said premise the goods have been detained and notice under section 129(3) of the Act was issued in the Form GST MOV 07 wherein value of the goods, amount of tax and penalty was determined for release of the goods, copy of which has been brought on record as Annexure 5 at page 53 of the writ petition. Thereafter another supplementary notice dated 17.10.2020 has been issued, copy of which has been brought on record as Annexure 06 to the writ petition. Thereafter on 21.10.2020 a demand of tax and penalty was raised in the Form GST MOV 09 wherein name of the product has been mentioned Betul Nut, but name of the goods changed and value was enhanced and for release of the goods the

petitioner was required to deposit a sum of Rs. 70,09,200/-. Against the demand of the said amount the petitioner preferred an appeal which was dismissed.

17. On perusal of the record it reveals that the statement of the truck driver was recorded in MOV 1 on 30.9.2020, copy of which has been brought on record as Annexure 2 to the writ petition in which no such fact was mentioned by the detaining/ seizing authority in the detention order dated 5.10.2020 in Form GST MOV 6 that the driver made a statement that goods were to be unloaded at Ghaziabad. Further no discrepancy was found by the seizing authority in the accompanying goods with regard to quantity, quality or item disclosed. The detention of the goods cannot be said to be justified as held by a Division Bench of this Court in Writ Tax No. 6000 of 2020.

18. Further the record reveals that the petitioner from the very beginning has taken a stand on the threat or variation of the tax invoice and e waybill which were generated and submitted on 30.9.2020 before the authority, cannot be taken adverse to the petitioner as the goods accompanying tax invoice no. 7 and e-way bill accompanying the same was valid on the date of detention/ interception on 30.9.2020 and passing the order on 5.10.2020. The validity of the e way bill with regard to earlier transaction was valid upto 6.10.2020.

19. This Court in the case of Writ Tax No. 464 of 2021 (**M/s Sleevco Traders through Its Proprietor Shri Alok Gupta vs. Additional Commissioner Grade-2 (Appeal) Fifth, Commercial Tax and another**) decided on 17.5.2022 has held that even during the validity of first e-way bill the subsequent e way bill was generated and no adverse inference was drawn against the

petitioner. The said judgment has been assailed by the State before the Apex Court in Special Leave Petition No. 20769 of 2023 **(Additional Commissioner Grade-2 (Appeal) Fifth Commercial Tax & Anr. Vs Sleeveco Traders)** which has been dismissed on 5.7.2023.

20. In the case in hand during the validity of the first e-waybill the subsequent e-waybill was generated and submitted before the detention authority, i.e. before the expiry of earlier e-way bill, therefore the seizure cannot be justified.

21. Once the authority have recorded the statement given by the truck driver on 30.9.2020 in MOV 01 (annexure 2) that the goods were to be unloaded at Robersganj and then the subsequent statement of the truck driver alleging to unload the goods at Ghaziabad instead of Robersganj cannot be recorded by any stretch of imagination and not permissible in the eye of law without any cogent material on record, which shows that perverse action has been taken against the petitioner.

22. The authorities have issued a show cause notice in the Form of GST MOV 07 on 5.10.2020 and thereafter without any authority of law subsequent show cause notice dated 17.10.2020 was issued specifically with a view that on physical verification the goods in question was found different than the disclosed in the accompanying documents (tax invoice, e way bill and GR). The goods in question was product of Betul Nut. On perusal of the said notices no reason or material has been brought on record even before this Court as to show that some expert opinion was taken or some laboratory examination was being done or any other supporting documents. In absence of any of the above mentioned documents which are relevant materials, the assessing

authorities below were not justified in passing the impugned orders.

23. Further no provision has been referred empowering the respondents for issuing supplementary notice with a view to take a different view all together treating the goods in question different than the disclosed in Form GST MOV 04 dated 5.10.2020 i.e. physical verification report copy of which has been brought on record as Annexure 3 to the writ petition. From a perusal of the MOV 04 dated 5.10.2020 it is evidently clear that after physical verification goods were found as per disclosed documents and in absence of any justification as mentioned herein above, upto this Court the product as treated as different as disclosed by the Revenue cannot be accepted, therefore, the action for seizure/ detention, demand of levy of penalty is vitiated.

24. Record further reveals that the respondents have brought on record various materials to justify their action as well as filed the same before the first appellate authority as additional evidence. The additional evidence has wrongly been accepted by the first appellate authority and before accepting the said additional evidence neither any notice was given to the petitioner nor any reason has been assigned. Rule 112 of the Rules has been considered by this Court in **Anandeshwar Traders** (supra) and writ petition was allowed on 18.1.2021 wherein this Court has held that additional evidence cannot be led at the instance of the State-respondent in appeal. Once it has been laid down by this Court vide order dated 18.1.2021 that no additional evidence can be accepted at the behest of the State-respondent in appeal under Rule 112 of the Rules the impugned order is vitiated as it is in the teeth of the law laid down by this Court.

25. Once the mandate has been given by this Court on 18.1.2021 about non accepting of the additional evidence at the behest of the Revenue the impugned order cannot be sustained. The Apex Court in the **Mohinder Singh Gill** (supra) has held that fresh reason existing outside the order passed cannot be accepted. In view of the aforesaid law laid down by the Apex Court as well as this Court the first appellate authority is vitiated and is liable to be set aside.

26. Record further reveals that at the time of transaction i.e. 27.9.2020 when the purchased goods were on its transit, the goods were detained for the first time on 30.9.2020. The petitioner was duly registered under the GST Act. It is brought on record that the registration of the petitioner was cancelled by way of additional evidence on 19.10.2020. In other words at the time of interception, detention, seizure, passing of the impugned order was much prior to the cancellation of the registration of the petitioner.

27. Once the owner of the goods has come forward the levy of penalty under section 129(1)(b) of the GST Act cannot be justified as section 129(1)(a) of the GST Act provides that where the owner of the goods come forward for payment of penalty the amount of tax payable should be 200%, whereas in the case in hand the penalty has been levied to the tune of 200% of the value of the goods.

28. In M/s **Riya Traders** (supra) and in **M/s Margo Brush India (supra)** the Division Bench of this Court has held that proceedings under section 129(1)(b) is bad when the owner of the goods comes forward to pay the penalty.

29. In **M/s Margo Brush India (supra)** the Division Bench of

this Court has held as follows:

“6. In view of the aforesaid fact and also the clarification given by the Board vide its Circular dated 31, 2018, in our opinion, levy of penalty under Section 129(1)(b) of the Act was not called for and could not be justified as Section 129(1)(a) of the Act provides that where owner of the goods comes forward for payment of penalty, the amount has to be two hundred per cent of the tax payable, whereas, in the case in hand, the penalty has been levied to the tune of hundred per cent of the value of the goods.

7. For the reasons mentioned above, the impugned order dated October 7, 2022 passed by respondent no. 2 is set aside. The writ petition is allowed. The matter is remitted back to the competent authority for passing fresh order within a period of two weeks from the date of receipt of copy of the order. ”

30. In the aforesaid case 100% penalty was levied on the value of the goods which was held to be unjustified. In the case in hand penalty @ 100% of the value of the goods has been levied which should be 200% of the tax payable as the owner of the goods has come forward to pay the penalty.

31. In view of the said facts and circumstances as well as law laid down by the Division Benches of this Court as discussed herein above impugned order dated 19.8.2021 passed by the respondent no.1 in Appeal No. GST-77/20, Assessment Year 2020-21 under the provisions of Section 129(3) of the Uttar Pradesh Goods and Services Tax Act, 2017 affirming the order dated 21.10.2020 passed by the respondent no.2 cannot be sustained and are hereby set aside.

32. The writ petition succeeds and is allowed with all consequential benefits.

33. Any amount deposited by the petitioner during the pendency of the litigation shall be returned in accordance with law within a period of two weeks from the date of production of a certified copy of this order.

34. List the case after two months for compliance of this order.

Order Date :- 4.9.2023

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