

S/L No. 6
13.06.2023
Ct-3
(pd/)

**In the High Court at Calcutta
Circuit Bench at Jalpaiguri
Constitutional Writ Jurisdiction
Appellate Side**

WPA 1219 of 2023

***Gurbux Singh Gupta*
vs.
*State of West Bengal & Ors.***

Mr. Dhiraj Lakhotia
Ms. Radhika Agarwal
... for the petitioner.

Mr. Bikramaditya Ghosh
... for the State.

Mr. Sudipto Kumar Mazumdar
Mr. Sourab Kar
... for the Union of India.

The petitioner has filed the present writ application challenging the order passed under Section 129 (3) of Goods and Service Tax Act, 2017 dated 30th May, 2023 and also prayed for interim order for release of vehicle.

On 13th May, 2023, the petitioner having its office at Mumbai had purchased a second hand car from shifting gear, Assam in Assam for a consideration of Rs. 26,75,000/- inclusive of all taxes. On 15th

May, 2023, the vehicle bearing Registration No. NL01Q1559 was intercepted by respondent no. 2 at Hasimara, NH31C and the said vehicle was carrying three cars bearing Registration No. AS06AE2114, GK02CK1731 and MH12QF0944. On 16th May, 2023, the movements were physically inspected under the Provisions of Section 68(3) of the CGST Act, 2017 and a report was prepared and uploaded in Form GST MOV 04. Form GST MOV 6 was issued on the ground that the document produced against the goods intercepted i.e. second hand car bearing Registration No. AS06AE2114 appeared to be invalid and incomplete based on the discrepancies.

On 23rd May, 2023 Form GST MOV 07 was issued wherein it was observed that the tax invoice produced by the petitioner appeared to be invalid and not acceptable because of being in violation of Rule 46 (e, g, k, l, m, n, and q) of the CGST and SGST Rule of 2017. It was further observed that no e-way bill against the said invoice has been generated and it was held that the transporting taxable goods without the cover of any valid documents amounts to

contravention of provisions of Section 68 (1) read with Rule 138A of the CGST and WBGST Act and Rule, 2017 and also read with Section 20 of the IGST Act, 2017.

It was also observed that GSTIN of the petitioner was also cancelled suo moto on 28th December, 2020 on the grounds of non filing of the GST return for the period more than six months and it was held that the supply of detained car is being made on the basis of false and invalid documents.

The determination of taxable value of the detained car was made on the basis of taxable value of the car as disclosed in the e-way bill wherein the value of the car is assessed at Rs. 33,82,000/- and the respondent no. 2 calculated tax for determination of penalty at the rate of 28% IGST and 22% CESS on the total value, thereafter penalty was proposed at the rate of 200% on both IGST as well as CESS resulting on total demand of Rs. 33,82,000/-.

On 30th May, 2023, Form GST MOV 09, an order of demand and penalty was issued by the respondent no. 2 in

connection with detained second hand car demanding a sum of Rs. 33,82,000/- as penalty under Section 129 (1) (a) of the Act.

Mr. Dhiraj Lakhotia, learned Advocate representing the petitioner submits that the order under Section 129 (3) of the Act of 2017 issued by the respondent no. 2 specifying the penalty amount not on the basis of the margin on sale of second hand car, as contemplated in law, as well as on the basis of 200% of the CESS, is contrary to the provisions of law and without jurisdiction. He further submits that the manner in which the value of the said car had been calculated by the respondent no. 2 is completely arbitrary and against the statutory provisions of the Act.

Mr. Lakhotia submits that the respondent no. 2 had no jurisdiction to invoke penalty under Section 129 of the Act of 2017 as there is no contravention to the provisions of the said Act and Rules, 2017.

Mr. Lakhotia submits that the entire transaction relating to purchase of the second hand car was done through proper banking transaction by the petitioner and the petitioner has paid due taxes on the

purchase of the said second hand car.

Mr. Lakhotia further submits that there is no violation of the provisions of Section 68(1) of the Act of 2017 as the previous owner, who was the person responsible for transporting the goods was delivering the same on his own and the same where his personal items. He further submits that as per Rule 138, Sub-Rule 14, Clause (a) of Rule 2017, no e-way bill is required to be generated for goods which are being transported and are in the nature of used personal and household effects.

Mr. Lakhotia further submits that against the sale of second hand car and invoice-cum-bill of supply in terms of Rule 46A of the said Rules was issued and applicable CGST and SGST at the rate of 9% and TCS at the rate of 1% was charged in terms of Rule 32 (5) of the Rules read with Section 15 (5) read with notification No. 8 of 2018 dated 25th January, 2018.

Mr. Lakhotia further submits that the respondent no. 2 calculated the value of applicable tax in contravention to the statutory provisions of Explanation 2 of Section 138 read with Section 15 (5) of the

Act, 2017 read with Rule 32 (5) of Rule 2017 and further read with Notification No. 8/2018 – Central Tax (Rate) dated 25th January, 2018 and Notification No. 1/2018-Compensation CESS (Rate) dated 25th January, 2018.

Mr. Bikramaditya Ghosh, Learned Advocate representing the respondent submits that the respondents have intercepted the Conveyance No. NL01Q1559 on 15th May, 2023 wherein the car of the petitioner was transported and on verification of the document, the respondent no. 2 found that no tax invoice or delivery chalan as per Rule 138A of the CGST and SGST Rule, 2017 was found carried physically by the person in-charge of the said car.

Mr. Ghosh further submits that on careful examination of e-way bill it was found that the e-way bill is generated against the consignment note bearing No. 1028 dated 14th May, 2023 and consignment note is not a prescribed and valid document for movement of the goods as per CGST and SGST Rule, 2017.

Mr. Ghosh further submits that the

place of dispatch is stated as Gumin Nagar, RWD Complex, Allo, Guwahati, Assam which is not the correct address as Gumin Nagar is located in the State of Arunachal Pradesh as per the document produced like trading license. He further submits that the resident and work related address of Mr. Marto Lollen is in the State of Arunachal Pradesh and not in Assam and thus the car must have been dispatched from Arunachal Pradesh.

Mr. Ghosh further submits that the used car is being shipped to 573B Satguru Enclave, Gurgaon Haryana but no document in support of presence of Mr. Marto Lollen in the shipping address is produced.

Mr. Ghosh further submits that the photocopy of consignment note dated 14th May, 2023 reveals that the original copy of the consignment note is still intact in the consignment note book and was not handed over to the person in-charge of convenience at the time of movement of convenience and the goods.

Mr. Ghosh further submits that a proper inquiry was conducted and proper opportunity was given to the petitioner and

the petitioner failed to produce cogent documents and accordingly the respondent no. 2 had imposed penalty upon the petitioner.

Mr. Ghosh further submits that the writ application filed by the petitioner is not maintainable as the order under challenge by the petitioner is an appealable order.

Considered the rival submissions of the respective parties, perused the materials on record, impugned orders and judgments relied by the petitioner.

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

In the present case, the respondents have proceeded to determine the tax liability as well as penalty only under the provision of Section 129 of the Act, which is not contemplated or intended. As per Section 129, there is no provision under Section 129 for determination of tax due, which can be done only by taking recourse of the provisions of Section 73 or 74 of the CGST Act as the case may be.

Section 129, can be invoked by the respondent 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) (b) or (c) of Section 29 (1) of the Act.

In the present case, the petitioner has challenged the impugned order of penalty passed under Section 129 of the Act of

2017. On considering the submissions made by the respective parties and or perusal of the contents of the writ application, the Court finds the petitioner has challenged the jurisdiction, authority and the action of the respondent no. 2. This Court finds that a pure question of law relating to interpretation of Section 129 of the Act of 2017 as well as the other provisions of the Act are involved and the issue as to whether the valuation of the goods for imposing penalty CESS could be included or the penalty amount can be imposed on the basis of the margin of sale of secondhand car is in question. This Court is of the view that the issues involved in the present writ application required final adjudication after giving an opportunity to file affidavit. This Court also satisfied that the petitioner has made out a prima facie case for interim order as prayed for.

In view of the above, the respondents are directed to file affidavit-in-opposition within four weeks reply, if any be filed within two weeks thereafter.

There will be an interim order to the extent that the respondent authorities shall

release the vehicle of the petitioner in question on payment of the impugned demand in question excluding the CESS amount and for the CESS amount arising of the impugned demand, the petitioner shall furnish a bank guarantee subject to the satisfaction of the respondent authorities. Initially the bank guarantee will be for a period of six months and renewable from time to time. The respondent authorities shall release the vehicle in question in favour of the petitioner within a week from the date of fulfillment of conditions mentioned above.

Let the matter appear under the heading hearing on completion of six weeks before the appropriate Circuit Bench.

(Krishna Rao, J.)