

Court No. - 35**Case :-** WRIT TAX No. - 779 of 2017**Petitioner :-** M/S Ramdev Trading Company And Another**Respondent :-** State Of U.P. And 3 Othrs.**Counsel for Petitioner :-** Shubham Agrawal**Counsel for Respondent :-** C.S.C.,A.S.G.I.**Hon'ble Bharati Sapru,J.****Hon'ble Saumitra Dayal Singh,J.**

Heard Shri Shubham Agrawal, learned counsel for the petitioner and Shri C.B. Tripathi , learned Standing Counsel for the department.

This writ petition has been filed by the consignor of the goods to challenge the order dated 03.11.2017 passed by the respondent no.4, Assistant Commissioner, U.P. Goods & Services Tax, Mobile Squad-II, Gorakhpur, under Section 129(1) of the U.P. GST Act(hereinafter referred to as the 'Act) and the order dated 08.11.2017 passed under Section 129(3) of the Act imposing penalty of Rs.9,54,325/-.

The petitioner claims to be a registered dealer at Rajasthan who sold 130 bags of sweet supari valuing at Rs.66,17,500 to M/s S.G. Enterprises at Assam against Tax Invoice No.52. In that invoice the petitioner has disclosed to have charged IGST @ 18 per cent. By another Tax Invoice No.51, the petitioner claims to have sold 190 cartons of refined palm oil valued at Rs.2,37,500 to the same purchaser M/s S.G. Enterprises at Assam, in which IGST @ 5 per cent is disclosed to have been

charged.

The aforesaid goods appear to have been consigned for transportation on truck bearing registration no. RJ07GB4874. The petitioner claims that these goods loaded on the aforesaid truck were passing through the State of U.P. being a transit state; that they entered U.P. on 1st of November 2017 and had reached 'Gorakhpur' and that the goods and truck were intercepted by the respondent no.4 at a place barely 15 kms. from the border with the State of Bihar.

Upon the goods being detained, and the documents being verified, it was noticed that the goods were being transported without Transit Declaration Form(hereinafter referred to as the 'TDF') required to be accompanied with such goods in accordance with the notification dated 21.07.2017 under Rule 138 of the U.P. GST, Rule 2017(hereinafter referred to as the 'Rules').

It also appears that the detaining authority was not satisfied as to the identity of the goods being same as that mentioned in the tax invoice with respect to the Palm Oil. According to the detaining authority, the goods were 'Ujala Shudh Deshi Ghee'.

The petitioner on it's part stated that due to inadvertent mistake on part of the truck driver, transit declaration form had not been downloaded and therefore, it was not found accompanying the goods. However, it is

the case of the petitioner that undisputedly the goods have originated from State of Rajasthan and were being transported to Assam through the State of U.P. At the time of detention they were near their exit point in the State of U.P., for onward journey to Assam. There is also no dispute as to the identity of the other consignment of 'sweet supari'.

Then on 03.11.2017, the seizure orders appears to have been passed, which records two reasons. First, seizure has been effected on account of TDF being absent and second, because on physical verification the goods mentioned in the invoice no. 51 as 'Refined Palm Oil' were found to be different being 'Ujala Shudh Deshi Ghee'.

Thereafter, it appears that a show-cause notice issued to the petitioner on the same day i.e. 03.11.2017 proposing to impose penalty under Section 129 (3) of the Act. In that show-cause notice also there are only two allegations i.e. of the TDF being absent and on physical verification different goods being found in place of 'Refined Palm Oil'.

The petitioner then filed it's reply to the show-cause notice through the driver of the Truck and explained that the consignment of the disputed goods in question was of Refined Palm Oil and that both consignment of goods were being transported from Rajasthan to Assam and that

no part of the consignment was meant for sale or consumption inside the State of U.P.

However, the respondent no.4 passed a penalty order on 08.11.2017 wherein the reason given for imposition of penalty are the absence of TDF as also the different identity of the goods namely 'Ujala Shudh Deshi Ghee' having been found in place of Refined Palm Oil. It has also been mentioned for the first time that the assessee had intention to evade payment of tax with the object of selling the goods inside the State of U.P.

At the outset, Shri C.B. Tripathi, learned counsel for the revenue has raised a preliminary objection as to the maintainability of the writ petition in view of alternative remedy being available to the petitioner against the penalty order.

Responding to the above, Shri Shubham Agrawal learned counsel for the petitioner submits that the seizure and penalty orders are wholly without jurisdiction and therefore, the bar of alternative remedy may not apply. Also, he submits that no appellate authority has yet been constituted under the Act. Therefore, the remedy of appeal is not available to the petitioner. In this regard, Sri C.B. Tripathi states that a new Rule 109A has been notified recently on 24.11.2017.

Considering the fact that the appellate authority had not been notified when goods were seized on 03.11.2017

or which penalty was imposed on 08.11.2017 and further, considering the fact that upon this writ petition being entertained, instructions had been sought and a short counter affidavit filed by the State, this writ petition is being disposed of in view of peculiar facts of this case, at this stage, with the consent of parties. In view of the above, the bar of the alternative remedy of the appeal is, therefore, not being enforced in the facts of the present case.

On merits, he submits that for a seizure to be made and a penalty to be enforced against the assessee, the requirements of Section 129(1) of the Act have to be fulfilled.

Relying on the aforesaid provision it is submitted that the penalty under Section 129(3) of the Act is referable to a violation contemplated under Section 129(1) of the Act. For the purpose of Section 129(1) of the Act, it is not only necessary for the revenue to establish that there is a technical violation of the Act and/or the Rules framed thereunder but that such a violation has a revenue impact inasmuch as the revenue is burdened to specifically allege and establish that the alleged violation of the Act and/or the Rules, as may be alleged, has been caused by the assessee with intention to evade payment of tax.

It is thus submitted that in the instant case the first real allegation that arises is the absence of TDF.

However, in view of the fact that full details of the transactions and place of its origin and also its destination were found mentioned in the tax invoice and other documents found accompanying the goods, in the first instance there was prima facie evidence in support of the claim raised by the petitioner that the goods were passing through the State of U.P and were not meant to be unloaded, consumed or sold inside the U.P.

Learned counsel for the petitioner further submits that the goods have been seized at 'Gorakhpur', which undeniably is the border district of the State of U.P. with State of Bihar. The revenue also does not contend or allege that the goods had been loaded from inside the State of U.P. Thus, by necessary implication, the revenue admits that the goods have originated from outside the State of U.P., in this case Rajasthan, as disclosed by the petitioner. He therefore, submits that mere absence of the TDF could not have led to an automatic inference to arise in the mind of the respondent no.4 that any amount of tax or goods have been evaded. According to him, it was for the revenue to establish evasion of tax by making specific allegation in that regard at the time of seizure and necessarily in the show-cause notice issued in penalty proceedings and thereafter to lead evidence in support of such allegations.

In absence of such allegation and evidence, penalty did not become imposable merely because the TDF was

not found accompanying the goods. Though all other documents were found accompanying to support the contention of the assessee that the goods were merely passing through the State of U.P.

Then, as to the difference in the identity of the goods namely Refined Palm Oil as alleged by the revenue, learned counsel for the petitioner submits that in the first place there is no difference as alleged inasmuch as on the packing a different description has been mentioned but the real identity of the goods is as described in the tax invoice i.e. Refined Palm Oil.

Then, it is submitted that difference in the quantity or quality or description of the goods that are admittedly passing through the State of U.P. is of no consequence to the State revenue authorities inasmuch as such a difference has no revenue impact. Once it is admitted or established on record that the goods were only passing through State of U.P., the role of the U.P. authorities was minimal and confined to ensure that the goods that had entered in the State of U.P. passed through it without being sold or consumed or unloaded in the State of U.P. In such a case by very nature of the transaction no tax could be imposed by the State of U.P. for any goods passing through it though there may be some error, mistake or wrong even if description of such goods. It would be of very little consequence as the proper officer may, if satisfied as to the difference/discrepancy in the

description of the goods may make an appropriate endorsement to that effect on the Tax Invoice accompanying the goods and communicate the same to the relevant authorities of the concerned State/s.

Reliance has been placed on a judgment of a learned Single Judge passed in ***M/s Murliwala Agrotech Ltd. Vs. Commissioner of Trade Tax, U.P. Lucknow reported in 2005 NTN (28) 198***, wherein dealing with similar situation it has been observed as follows:-

"The objection of the check post officer that in the bill or in the invoice it was not mentioned that the goods would be transferred in another vehicle and no explanation in this regard has been given is irrelevant. What had been happened prior to the arrival of the vehicle at the entry check post is wholly irrelevant. The objection of the check post officer that a different goods were found than the goods mentioned in the challan is also baseless. Perusal of the challan shows that the goods mentioned is cereal Based Blanded Food (Sattu). Show cause notice says that on verification it was found that in the packing, constituents of the goods mentioned are wheat, sugar, rice, soyabean, vitamin and mineral. Therefore, in my opinion, there was no difference in the goods mentioned in the invoice and the goods mentioned in the packing. The items mentioned in packing are the constituent of the Cereal Based Blanded Food for which invoice was issued. The word "Sattu" is mentioned in bracket. It is seen that one particular item is called by different name and are also understood differently at different places. It may be that Cereal Based Blanded Food, is called as sattu at Rajasthan but in the State of U.P. may be understood differently. Since in the invoice the name "Cereal Based Blanded Food" is mentioned and the same was also found with reference to its constituent namely wheat, soyabean, sugar, vitamin and mineral, it can not be said that a different item was found than the item mentioned in the invoice. No difference in the

quantity was found. Even assuming if according to the check post officer, there was any difference in the name mentioned in the invoice and the name of goods mentioned in Transit Pass, which has been applied, the check post officer should mention the correct name of the goods for the proper verification but this can not be a ground to raise any doubt that goods may not cross State of U.P. All the documents namely, challan, built, and Form-32, which is a declaration form for import under the Uttaranchal Trade Tax Act shows that movement of goods started from Rajasthan and was going to Uttaranchal and was not intended for import inside the State of U.P. The provision of section 28-A of the Act is not applicable. The inference of an intent to evade tax is based on suspicion and merely on surmises and conjectures and on irrelevant consideration. Therefore, the check post officer has erred in refusing to issue transit pass and seizing the goods and the Tribunal has erred in confirming the seizure of the goods."

Reliance has also been placed on another judgment of a learned Single Judge passed in **S.G. Express Vs. Commissioner of Trade Tax, U.P. reported in [2011] 37 VST 35(AII)** wherein following the judgment of M/s Murliwala Agrotech Limited (supra), the learned Single Judge held as follows:-

"In M/s Murliwala Agrotech Ltd. Vs. Commissioner of Trade Tax, U.P. Lucknow 2005 NTN (28) 198 it has been held by this Court that the goods being transported through U.P. cannot actually be seized at the entry check-post, not even on the ground that the goods were different from the goods declared in documents produced for obtaining transit form.

In view of the above, the validity of the seizure itself becomes doubtful and as such the imposition of penalty on the ground of seizure can not also be justified. It may be noted that it is not the case of the department that the goods as per the transit pass were unloaded within the State of U.P. or found to be different or not tallying with those mentioned in the form or that they were not properly accounted."

While the aforesaid two judgments arise under different enactments being U.P. Trade Tax Act, 1948 and the U.P. VAT Act, 2008, however, learned counsel for the petitioner submits that a similar interpretation is required to be made under Section 129 of the Act in the context of the situation arising in the present case.

Opposing the aforesaid argument, learned counsel for the revenue Shri C.B. Tripathi submits that under Section 129(1) of the Act, the goods are exposed to seizure and penalty the moment there is a violation of the Act or the Rules. In so far as it is not disputed that the transaction involved transit of goods through the State of U.P. the goods should have been accompanied with TDF, over and above the Tax Invoice and other documents of transportation of goods. The contravention was thus complete and no further fact or intention was required to be established by the revenue to either seize the goods or impose the penalty.

In this regard, Shri C.B. Tripathi, learned counsel for the revenue submits that the TDF was never produced by the petitioner up to the stage of imposition of penalty, as it first appears to have downloaded on 15.11.2017 i.e. one week after the penalty order.

As to the merits of the penalty order which also bearing the preliminary objection raised by Shri C.B. Tripathi, learned Standing Counsel as to the existence of

alternative remedy, he submits that the penalty order has been passed on a third reason as well being the assessee had intention to evade tax inasmuch as the penalty order specifically alleges that the assessee had conducted the transaction in the manner so as to unload the goods inside the State of U.P. in the garb of transit through the State of U.P.

Having considered the arguments so made by the learned counsel for the parties, we find that at the stage of seizure the detaining authority had not applied his mind, nor formed any opinion as to intention to evade tax. The only allegation made in the seizure order is to the effect that the TDF is absent and that the goods have been mis-described. There is no allegation whatsoever as to the intention of the petitioner to evade tax.

Even in the penalty notice issued to the petitioner on 03.11.2017, there is no allegation made of their being any intention on part of the petitioner to evade tax. Thus, the petitioner was never put to notice/show-cause why penalty may not be imposed on account of his intention to evade tax. The only allegation up to the stage of issuance of the penalty show-cause notice, therefore, appears to be that the petitioner had contravened the provisions of the Act and therefore exposed itself to the penalty. However, in the penalty order, almost in the passing the respondent no.4 has recorded that the petitioner had intention to evade tax by unloading the goods inside the

State of U.P. However, as a fact petitioner has not been found to have unloaded the goods. Also, neither such allegation was made against the petitioner at any prior stage nor the petitioner was called upon to furnish any reply nor there is any evidence in this regard. The observation made in the penalty order is, therefore, only an afterthought. The same cannot be relied upon by the State to justify the imposition of penalty.

In absence of any allegation or evasion of tax being made against the petitioner at the stage of detention and seizure and even at the stage of issuance of notice of penalty, it is difficult to sustain the penalty.

Then, as to absence of TDF, though it amounted to a breach of the Rules, yet, in the entirety of the facts & circumstances of this case, as admitted to the revenue, it does appear that goods were being transported from Rajasthan to Assam. Also, since the goods had reached near the exit point in the State of U.P. and there is no allegation that the goods were being or had been unloaded inside the State of U.P., we are of the opinion that the goods were infact being transported from Rajasthan to Assam as disclosed in the Tax Invoice and other documents found accompanying the goods. The breach was purely technical.

Last, as to alleged mis-description of goods, we find, in view of it being established that the goods (whatsoever

their correct description be) had originated from outside the State and were being transported outside the State, using the State of U.P. as a transit State, and the goods appear to have been seized near the exit point in State of U.P. the proper officer should have, at most made an endorsement to that effect and allowed the goods to pass through the State of U.P. It may however be made clear, at this stage we have made this observation in the peculiar facts of this case and it may not be treated as a procedure to be adopted in all cases of mis-description of goods. That issue or question is being left open to be decided in an appropriate case.

The seizure order as also the penalty order are wholly unsustainable and are hereby quashed. The goods and vehicle may be released forthwith without furnishing any security. Writ petition is **allowed**. No order as to costs.

Order date: 30.11.2017

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