

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2019

CORAM

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

Writ Petition Nos.5075, 5076, 5078, 5081,

5185, 5189 & 5128 of 2019

& WMP Nos.5787, 5792, 5794, 5798, 5848, 5898 & 5899 of 2019

- 1 M/s.Caterpillar India Pvt Ltd
(Represented by its whole Time Director)
Melnallathur village
Thiruvallur-602 004 ... Petitioner in W.P.Nos. 5075, 5076,
5078, 5081, 5185 & 5189
5076, 5078, 5081, 5185,
5189/2019
 - 2 William Henry ... Petitioner in W.P.No.5128/2019
- vs.
- 1 State Tax Officer,
Roving Squad-V, Enforcement (East)
Greems Road, Chennai 600006 ... R-1 in all W.Ps.
 - 2 The Joint commissioner (ST)
Enforcement-II, Chennai-600006
 - 3 The Commissioner of State Taxes,
Chepauk, Chennai - 05
 - 4 Government of Tamilnadu,
Represented through its secretary,
Department of commercial Taxes, TamilNadu
Secretariat ... R-2 to R-4 in W.P.Nos.5075
5076, 5078, 5081, 5185 &
5189 of 2019

Prayer in W.P.Nos. 5075, 5076, 5078, 5081, 5185 and 5189 of 2019:-

Certiorari calling for the records relating to the Impugned order/notice in Form GST MOV-06; GST MOV-07; GST MOV -06; GST MOV -07, GST MOV -06 and GST MOV -07, respectively (all) dated 11.02.2019, passed by the 1st Respondent and to quash the same.

Prayer in W.P.No.5128 of 2019:- Writ Petitions filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the respondent pertaining to the impugned proceedings Vide OR.828/ 2018-19/ RS-V(E) dated 04.02.2019 and to quash the same.

For Petitioner in W.P.Nos. 5075, 5076, 5078, 5081, 5185 & 5189 of 2019:
Mr. Raghavan Ramabadran, for, M/s. Lakshmi Kumaran & Sridharan
Attorneys.

For Petitioner in W.P.No.5128/2019: Mr. B.Raveendran

For Respondents in all W.Ps.: Mr. Mohamad Shafiq, CGSC, for, Mr.
V.Haribabu, AGP., (Taxes)

COMMON ORDER

In W.P.Nos. 5075, 5076, 5078, 5081, 5185 and 5189 of 2019, the petitioner (Caterpillar India Private Limited) prays for the issuance of writs of certiorari to quash orders dated 11.02.2019 passed by the first respondent in Form GST MOV-06; GST MOV-07; GST MOV-06; GST MOV-07, GST MOV-06 and GST MOV-07. In W.P.No.5128 of 2019 the petitioner (William Henry) prays for the issuance of a writ of certiorari to quash order dated 04.02.2019 passed by the respondent in Proceedings No.OR.828/ 2018-19/ RS- V(E).

2. Though all writ petitions were directed to be listed today, only W.P.Nos.5075, 5076, 5128, 5185 and 5189 of 2019 were listed and W.P.Nos.5078 and 5081 were omitted. Hence, at request of the learned counsel appearing for both sides to the effect that all the writ petitions dealt with identical issues, a special list was directed to be issued listing all the matters. It

is hence that all the writ petitions have been listed together and are taken up for hearing.

3. The writ petitions are segregated into two sets, one, W.P.Nos.5075, 5076, 5078, 5081, 5185 and 5189 of 2019 filed by Caterpillar India Private Limited (referred to henceforth as 'Caterpillar') and the other, W.P.No.5128 of 2019 filed by William Henry, a Transporter, and referred to, as such.

4. Heard Mr.R.Raghavan Ramabadran, learned counsel appearing for Caterpillar, Mr.B.Raveendran, learned counsel appearing for the Transporter and Mr.Mohamad Shafiq, learned Central Government Standing Counsel, appearing for the respondents, in all the writ petitions.

5. Caterpillar has, admittedly, transported consignments of 'Off Highway trucks' that are zero rated in terms of Section 18 of the IGST, without valid and necessary E-way bills accompanying the same. The case of the petitioner is that along with the Tax Invoice, an E-way bill dated 08.02.2019 was originally generated. However, the consignments required special police permission for their movement between the hours of 11 p m and 5 a m. Though sought, the police permission was delayed, by which time the E-way bill, the validity of which is four (4) hours only, had expired. It is explained that the police permission had not been received in time on account of the intervening weekend. The permission was received on 11.02.2019 and the goods moved thereafter, admittedly, unaccompanied by valid E-way bills. The consignments were intercepted on 11.02.2019 in the course of movement to the Port for shipping when it was found by the authorities that there was no valid E-way bill accompanying the same.

6. In the case of the Transporter, an E-way bill was generated on 02.11.2018. However, there was a break-down of the lorry, due to which, he was unable to move the consignment within the period of validity of the document.

7. Thus, in both cases, admittedly consignments have moved without valid E-way bills accompanying the same. The respondents thus detained the consignments in terms of the proviso to Section 129 (1) of the Central Goods and Services Tax Act, 2017 (in short 'Act').

8. A notice was thereafter issued, specifying the tax and penalty payable on 14.02.2019 in the case of Caterpillar and on 04.02.2019 in the case of the Transporter proposing tax and equal penalty for the violation detected. Section 129(3) of the Act states that the Proper Officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c) after affording an opportunity of personal hearing as stipulated in terms of Section 129 (4) of the Act. Notices as aforesaid have admittedly have been issued to both Caterpillar as well as the Transporter. However neither party has appeared before the respondents, choosing instead to approach this Court directly by way of the present writ petitions seeking release of the goods pending adjudication of proceedings.

Detailed arguments of the learned counsels have been taken into account and the relevant provisions of the Act have been discussed.

The provisions relating to renewal/cancellation of E-way bill are provided under Rule 138 (10) of the Central Goods and Services Tax Rules, 2017, reading as follows:-

'R. 138

(10) An e-way bill or a consolidated e-way bill generated under this rule shall be valid for the period as mentioned in Column (3) of the Table below from the relevant date, for the distance, within the country, the goods have to be transported, as mentioned in column (2) of the said Table:-

Sl.No.	Distance	Validity Period
(1)	(2)	(3)
1.	Up to 100 Km.	One day in cases other than Over dimensional cargo.
2.	For every 100 Km or part thereof thereafter	One additional day in cases other than Over dimensional cargo.
3.	Up to 20 Km	One day in case of Over dimensional cargo.
4.	For every 20 Km or part thereof thereafter	One additional day in case of Over dimensional cargo.

Provided that the Commissioner may, on the recommendations of the Council, by notification, extend the validity period of an e-way bill for certain categories of goods as may be specified therein:

Provided further that where, under circumstances of an exceptional nature, including trans-shipment, the goods cannot be transported within the validity period of the e-way bill, the transporter may extend the validity period after updating the details of Part B of Form GST EWB-01, if required.

Explanation 1._ for the purposes of this rule, the 'relevant date' shall mean the date on which the e-way bill has been generated and the period of validity shall be counted from the date at which the e-way bill has been generated and each day shall be counted as the period expiring at midnight of the day immediately following the date of generation of e-way bill.'

9. Notwithstanding the above, neither of the petitioners' have, admittedly, taken the necessary measures or precautions to ensure extension of validity of the E-way bill or generation of an alternate valid one, but have moved the consignments despite being aware that the documents were stale.

10. The scheme providing for detention, seizure and release of goods and the levy of penalty thereupon, is set out under Section 129 of the Act, extracted below:-

'129. Detention, seizure and release of goods and conveyances in transit

(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 the applicable tax and penalty equal to one 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 tax and penalty;

(b) on payment of the applicable tax and penalty equal to the fifty per cent of the value of the goods reduced by the tax amount paid thereon 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 tax and 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) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.'

11. Section 129 (1) provides for the release of the seized goods in three situations: (i) where the violating party comes forward, upon detection of the violation, upon payment of 100% of the tax; (ii) where the violating party does not come forward to pay the tax and penalty, upon payment of 100% tax and 50% of the penalty; (iii) upon furnishing of security as prescribed in the 1st and 2nd situations as aforesaid.

According to Caterpillar, the goods transported are zero rated and hence there is no liability to tax despite which taxes have been remitted, as a result that it is entitled to a refund. This is a matter of adjudication and I hence refrain from delving deeper upon this aspect. Suffice it to state, as a matter of fact, that, in both cases, taxes have admittedly been remitted, albeit under protest. What remains is the penalty.

Section 129 (1) (c) of the Act provides for furnishing of security equivalent to the amount payable under Clauses (a) or (b) in such form and manner as may be prescribed. This constitutes, in my view, prima facie protection of the interests of the Department, pending adjudication proceedings for determination of the tax and penalty.

12. The quantum of taxes, already remitted, will be eventually determined in assessment. At this juncture, I am thus, only concerned with the levy of penalty and the security to be furnished to the Department in this regard.

13. In this regard, my attention is drawn to the provisions of Section 130 of the Act, dealing with the confiscation of goods or conveyances and levy of penalty, extracted below:-

'130. Confiscation of goods or conveyances and levy of penalty

(1) Notwithstanding anything contained in this Act, if any person—

(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.

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as the said officer thinks fit:

Provided that such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon:

Provided further that the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under sub-section (1) of section 129:

Provided also that where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of the

confiscation of the conveyance a fine equal to the tax payable on the goods being transported thereon.

(3) Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

(4) No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an opportunity of being heard.

(5) Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government.

(6) The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession.

(7) The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government."

14. According to the respondents in all writ petitions, the confiscation of the goods is perfectly in order as the petitioners have, admittedly, transported the consignments without valid E-way bills, thus violating clause (iv) of Section 130(1) above being, a contravention of the Act/Rules with the intent to evade tax. There is, no doubt, a violation in the present case, but one that has no revenue (tax) implications, seeing as the petitioners have remitted the taxes upon the consignments in full, under protest and pending adjudication. The question of determination of tax, if any, is, of course, left open to the authorities, to be determined in accordance with law.

15. My attention has also been drawn to the provisions of Section 122, that prescribes penalties for certain offences, Section 125, that provides for levy of general penalty and Section 126 of the Act, which sets out certain general disciplines relating to the imposition of penalties.

16. The provisions of Section 122 of the Act envisage various offences for which penalty is leviable and in terms of Section 122 (2) of the Act, the maximum penalty would be a sum of Rs.10,000/- or 10% of the tax due from such person, whichever is higher. In the case of wilful mis-statement or suppression of facts to evade tax, such penalty would be equal to Rs.10,000/- or the tax due, whichever is higher. In terms of Section 125 of the Act, extracted below, the maximum penalty shall not exceed to Rs.25,000/-:-

'General penalty

125. Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.'

17. The general disciplines also provides for imposition of tax for minor breaches of regulations or procedural requirements, defined in the Explanation to the provision. Section 126 of the Act is extracted below:-

'General disciplines related to penalty.

126. (1) No officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

Explanation.--For the purpose of this sub-section,--

(a) a breach shall be considered a 'minor breach' if the amount of tax involved is

less than five thousand rupees;

(b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

(2) The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.

(3) No penalty shall be imposed on any person without giving him an opportunity of being heard.

(4) The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified.

(5) When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.

(6) The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.'

18. The Central Board of Indirect Taxes and Customs, New Delhi, has issued a Circular in F.No.CBEC/20/16/03/2017-GST, dated 14.09.2018, in regard to the procedure to be followed in the 'Interception of conveyances for inspection of goods in movement and detention, release and confiscation of such goods and conveyances'.

19. My attention is drawn to paragraphs 3, 4, 5 and 6 of the said Circular, extracted below:-

'.... 3. Section 68 of the CGST Act read with rule 138A of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as 'the CGST Rules') requires that the person in charge of a conveyance carrying any consignment of goods of value exceeding Rs 50,000/- should carry a copy of documents viz., invoice/bill of

supply/delivery challan/bill of entry and a valid e-way bill in physical or electronic form for verification. In case such person does not carry the mentioned documents, there is no doubt that a contravention of the provisions of the law takes place and the provisions of section 129 and section 130 of the CGST Act are invocable. Further, it may be noted that the non-furnishing of information in Part B of FORM GST EWB-01 amounts to the e-way bill becoming not a valid document for the movement of goods by road as per Explanation (2) to rule 138(3) of the CGST Rules, except in the case where the goods are transported for a distance of upto fifty kilometres within the State or Union territory to or from the place of business of the transporter to the place of business of the consignor or the consignee, as the case may be.

4. Whereas, section 129 of the CGST Act provides for detention and seizure of goods and conveyances and their release on the payment of requisite tax and penalty in cases where such goods are transported in contravention of the provisions of the CGST Act or the rules made thereunder. It has been informed that proceedings under section 129 of the CGST Act are being initiated for every mistake in the documents mentioned in para 3 above. It is clarified that in case a consignment of goods is accompanied by an invoice or any other specified document and not an e-way bill, proceedings under section 129 of the CGST Act may be initiated.

5. Further, 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 following situations:

a) Spelling mistakes in the name of the consignor or the consignee but the GSTIN, wherever applicable, is correct;

b) Error in the pin-code but the address of the consignor and the consignee mentioned is correct, subject to the condition that the error in the PIN code should not have the effect of increasing the validity period of the e-way bill;

c) Error in the address of the consignee to the extent that the locality and other details of the consignee are correct;

d) Error in one or two digits of the document number mentioned in the e-way bill;

e) Error in 4 or 6 digit level of HSN where the first 2 digits of HSN are correct and the rate of tax mentioned is correct;

f) Error in one or two digits/characters of the vehicle number.

6. In case of the above situations, penalty to the tune of Rs. 500/- each under section 125 of the CGST Act and the respective State GST Act should be imposed (Rs.1000/- under the IGST Act) in FORM GST DRC-07 for every consignment. A record of all such consignments where proceedings under section 129 of the CGST Act have not been invoked in view of the situations listed in paragraph 5 above shall be sent by the proper officer to his controlling officer on a weekly basis..... The questions to be determined in these cases relate to the release of consignment and the quantum of penalty, if any, to be levied at this stage, and pending adjudication.

20. As far as the determination of penalty is concerned, it is the Assessing Officer / State Tax Officer who is the competent and proper person for such determination/quantification. However, a holistic reading of the statutory provisions and the Circular noted above, indicates to me that the Department does not paint all violations/transgressions with the same brush and makes a distinction between serious and substantive violations and those that are minor/procedural in nature. Though the petitioners have been issued notices in terms of Section 129 (4) of the Act calling upon them to appear for adjudication, they have not responded to the same. The petitioners are thus directed to appear before the first respondent on 06.03.2019 at the first instance, for commencement of proceedings for adjudication. The question of whether the movement of the consignments sans valid E-way bills constitutes a substantive error or a mere technical breach shall be considered by the Assessing Officer, having regard to the provisions of Sections 122, 125 and 126 of the Act as well all relevant Instructions and Circulars issued by the Board, including the Circular extracted above. Let the officer also bear in mind that E-way bills, though stale, had, in fact, accompanied the consignments. The assessee/petitioners have offered explanations in regard to the circumstances that caused the documents

to expire and such explanations will be taken into consideration by the officer in determining the quantum of penalty to be levied.

21. As far as the consignments in the case of Caterpillar (W.P.Nos.5075, 5076, 5078, 5081, 5185 and 5189 of 2019) are concerned, while I am inclined to order their immediate release, the interests of the Department must remain protected. The penalty is quantified, for the moment, and solely for the purposes of this order, 100% of the tax. The goods shall be released forthwith, upon condition that Caterpillar furnish a Bank Guarantee(s) for a sum of Rs.3,84,30,193/- in favour of the detaining Authority prior to such release. Proceedings for adjudication shall be completed within a period of six weeks from the date of initial hearing, being 06.03.2019.

22. It is agreed by the Transporter as well as the Revenue that, as far as the Transporter is concerned, a sum of Rs.7,16,168/- has been remitted covering the tax as well as penalty and the goods have already been released. Therefore, as far as the case of Transporter (W.P.No.5128 of 2019) is concerned, proceedings for adjudication shall go on and shall be completed within a period of four weeks from the date of initial hearing, being 06.03.2019. Upon conclusion thereof, the amount paid by the petitioner shall be adjusted against the demand of tax and penalty determined in assessment.

23. With the above directions, these writ petitions are disposed of. There shall be no order as to costs. Consequently, connected WMPs are closed.

26.02.2019

Index : Yes/No

Web : Yes / No

speaking Order / Non Speaking Order

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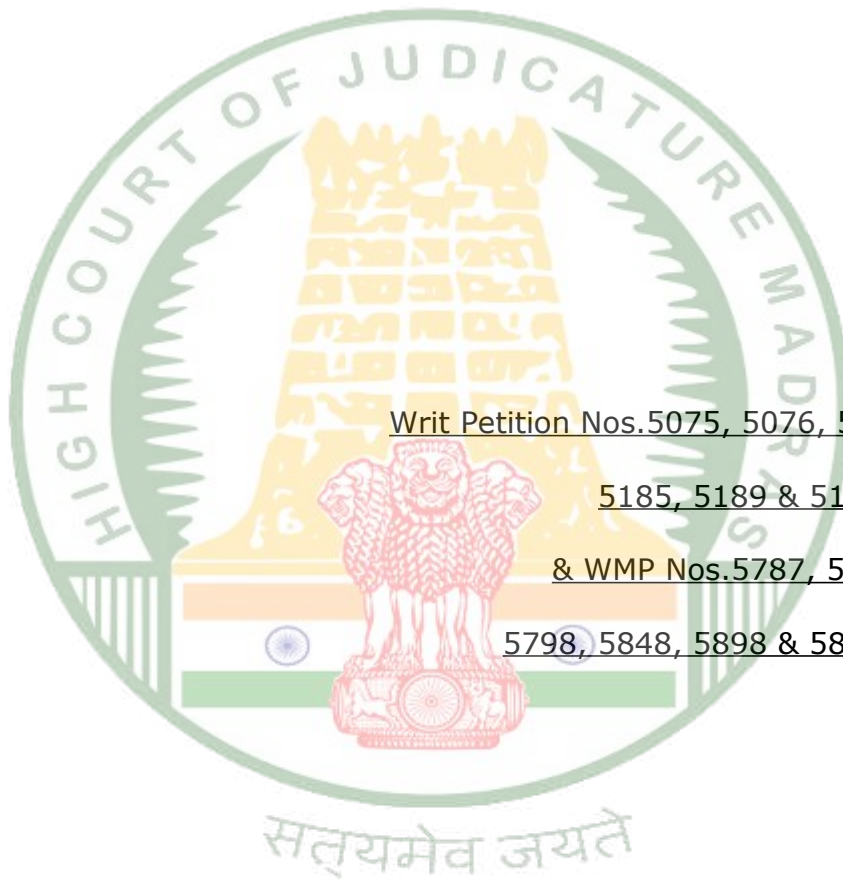
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Dr. ANITA SUMANTH, J.,

srk



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