

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP-18392-2021

Date of decision: 04.02.2022

M/s. Shiv Enterprises

.... Petitioner

Versus

State of Punjab and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Sandeep Goyal, Advocate
for the petitioner.

Ms. Sudeepti Sharma, Addl. A.G., Punjab.

PANKAJ JAIN, J.

By way of present writ petition, the petitioner challenged detention of the goods under Section 129 of the CGST Act, 2017 and prayed for release of the same.

2. According to the petitioner, he sold copper scrap to one M/s. Mittal Engineering Industries, Jagadhri. While the goods were in transit in vehicle No.PB-11CP/0194 on 30.08.2021, the same were checked. Driver of the vehicle produced requisite documents, i.e. invoice and E-way Bill No.311352418264 dated 30.08.2021. Despite the documents being in order, the same were detained on the pretext that the 'genuineness of the tendered documents need verification from regular bills of A/c'. Form MOV-02 dated 30.08.2021 was issued and the petitioner was directed to station the conveyance carrying goods at office of Assistant Commissioner. The petitioner appeared on the date fixed, i.e. 02.09.2021. He was informed that investigation is underway and was asked to appear on 03.09.2021. On 05.09.2021, the petitioner filed reply to GST MOV-02 through e-mail. The petitioner received a

communication dated 11.09.2021 whereby he was informed that on verification, it has been found that inward supply to the sellers/suppliers of the petitioner is from one Balbir Enterprises. Said Balbir Enterprises is not having inward supply and is only engaged in outward supply without paying any tax. Thus, the petitioner is liable to be proceeded under Section 130(1) of the PGST/CGST Act, 2017.

3. The petitioner filed present writ petition on 14.09.2021. At the time of preliminary hearing on 16.09.2021, the following order was passed:-

“Present petition is directed against the *mala fide* action of respondent No. 6 (*Mr. Arvind Sharma*), while exercising jurisdiction as respondent No. 5. It is **urged** that the vehicle containing a consignment was detained during transit inspite of availability / production of all the required statutory documents. **Further**, no order was passed within fourteen (14) days as per the procedure provided under Section 129(6) of the Punjab / Central Goods and Services Tax Act, 2017. **Still further**, the alleged grounds of detention till today are in the nature of proceeding to make regular assessment, which is beyond jurisdiction of the officers at this stage.

Notice of motion for **22.09.2021**.

Mr. Pankaj Gupta, Additional Advocate General, Punjab, appears and waives off notice on behalf of official respondent Nos. 1 to 5.

Issue ***dasti*** notice *qua* private respondent No. 6 as well.”

4. On 22.09.2021, it was ordered that final order be not passed till further orders.

5. In reply filed on behalf of the State through Assistant Commissioner of State Tax, Mobile Wing, Chandigarh stand taken is that:-

“The actions of the petitioner are detrimental to the revenue

of the State and the detailed verifications conducted after interception of the vehicle No.PB11CP0194 on 30.08.2021 have revealed that not only in the instant case but also in the other firms operated by the petitioner, taxes are being evaded by adapting the similar modus-operandi of routing the transactions through a series of firms where no tax, either in cash or through valid input tax credit, has been paid by any dealer across the supply chain.”

6. It has been further stated that:-

“In the absence of any purchases made by the first dealer, only invoices are being generated down the supply chain. The goods are being procured from suppliers without raising an invoice and then these are covered by fraudulent invoices generated by the non-existent firms to claim inadmissible input tax credit (ITC) in clear violation of Section 16(2)(c) of the PGST/CGST Acts, 2017.”

7. State has relied upon an investigation report dated 09.09.2021, as per which, the following findings have been recorded:-

Sr. No.	Name of the dealer and GSTIN from whom the purchases made from	Remarks	Findings
1.	M/s Star Enterprises, New Delhi. 07AKAPN4831G1 ZC	The dealer is having inward supply from M/S DURGA MULTIMETALS BIHAR (GSTIN10HTGPK 1952K1ZO) which in turn is showing the inward supply from MIS Aneja Enterprises Delhi and M/S Vardhman Sales, New Delhi. Both these firms do not have any inward supplies or no goods have ever been purchased by these firms making the transactions fraudulent and non-existent. From M/S GUPTA TRADING COMPANY	No tax at any stage has been paid by any of the firms across the supply chain does not have any inward supplies. If there are no inward supplies in the hand of the first firm, then what could have been sold across the supply chain Hence, the ITC created, circulated and utilized is fraudulent. ITC IS NON

		NEW DELHI (GSTIN 07CEHPG4358G1ZH). The dealer is having NIL inward as per the returns filed which means that only invoices are being raised to pass on inadmissible Input Tax Credits. From M/S VARDHAMAN SALES, NEW DELHI (GSTIN07HLLPK27910 D1ZU). That this firm has again shown purchases from M/S Star Enterprises, New Delhi only which clearly indicates at cyclic transactions taking place thereby creating fraudulent Input Tax Credits. Also M/S Vardhaman Sales, Delhi have shown purchases from M/S Saan Enterprises, New Delhi. No tax at any stage has been paid at any of the stage thereby rendering the creation of the input tax credits as fraudulent beyond any doubt.	EXISTENT AND FRAUDULENT.
2.	M/s. Saan Enterprises, New Delhi 07BGLPD5743F1 ZG	The Dealer is having inward supply from M/s STAR ENTERPRISES, NEW DELHI (meaning thereby that the purchases and sales are being made from amongst the same firms which is fictitious at the very onset on this issue only) AND M/S GUPTA TRADING COMPANY, NEW DELHI. The transactions made by both these firms have been proven fraudulent as above. There have been no inward supplies in the hands of the first dealer across the supply chain. Meaning thereby, only invoices are being raised without any actual movement of goods.	ITC IS NON-EXISTENT AND FRAUDULENT. THE REGISTRATIO N OF THE FIRM HAS BEEN CANCELLED BY THE AUTHORITIES FOR NON-EXISTENCE AND NON-VERIFICATION OF THE DEALER AT THE GIVEN PLACE OF BUSINESS.
3.	R.K. Metals, Haryana GSTIN 06BHZPK4852P1	The subsequent inward supply of M/S R.K. METALS is from M/S KRISHNA	ITC IS NON-EXISTENT AND

	ZA	ENTERPRISES, MAHARASHTRA which do not have any inward supplies. Meaning thereby, the complete transactions are on paper only where no goods have been sold but only invoices are being generated without any actual movement of goods.	FRAUDULENT
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8. The petitioner filed replication to the written statement denying the allegations levelled by respondents and averred that in fact the investigation report dated 09.09.2021 is a fabricated, antedated document which has been prepared after filing of this writ petition. To demonstrate, learned counsel for the petitioner argued that at the end of investigation report dated 09.09.2021, there is a note written by ACST, as per which the petitioner was to be confronted with the findings of the report whereas a bare perusal of show cause notice issued to the petitioner dated 14.09.2021 (Annexure R-4) shall reveal that he was never confronted with the findings qua M/s. Gupta Traidng Company, New Delhi and M/s. Triangle Inter Trade, Patiala. Meaning thereby investigation report (R-1) was not in existence on 14.09.2021 when R-4 was issued.

9. His further contention is that there was no reason for the authorities to Act under Section 129 of the CGST Act, 2017 as the goods were being carried with the documents as required under law. So far as proceedings under Section 130 of the CGST Act are concerned, he claims that the same are malicious and have been initiated only after filing of the writ petition by the petitioner. As per him, there is no reason to proceed against him under Section 130 of the said Act as even if Annexure R-1 is believed to be gospel truth, petitioner cannot be attributed any intention to evade payment of tax.

10. On the other hand, learned Additional Advocate General, Punjab asserts that the action of the State authorities is in consonance with law. MOV-02 was handed over to the petitioner at the time of detention wherein it was specifically spelled that the detention was for verification of the documents tendered. As per her, during investigation, incriminating material was found against the petitioner which suggested evasion of tax at its end. Resultantly, show cause notice issued under Section 130 of the CGST Act, 2017 has been issued. She has further contended that the petitioner needs to respond to the show cause notice issued under Section 130 and the present writ petition is not maintainable.

11. We have heard learned counsel for the parties and perused the paper book.

12. From the pleadings on record, the following two questions arises for the consideration of this Court:-

“(1). Whether the present writ petition deserves to be dismissed being not maintainable?

(2). Whether the impugned order dated 30.08.2021 and further proceedings under Section 130 of the 2017 Act initiated vide show cause notice dated 14.09.2021 deserve to be quashed being bad in law?”

13. To quote from De Smith's Judicial Review 7th Edition page 200:-

“Judicial review of administrative action was founded upon the premise that a public body is entitled to decide wrongly, but is not entitled to exceed the jurisdiction it was given by statute. The statutory jurisdiction (later referred to also as “vires”) permitted the public authority to make errors of fact, or errors of law within its jurisdiction, provided that such an error of law was not manifest “on the face of the record”,

Thus the touchstone will be “whether error alleged is manifest on the face of the record.” Accordingly, answer to the 1st question shall depend

upon decision of the second.

14. Enactment of CGST Act 2017 has marked arrival of new tax regime. The 2017 Act is said to be an Act to make provision for levy and collection of tax on inter-state supply of goods and services or both by the Central Government and for matters connected therewith or incidental thereto. For the case in hand, we are concerned with the provisions related to goods in transit and those related to input tax credit.

Input Tax:

15. As per Section 12 of the 2017 Act, the liability to pay tax on goods arises at the time of supply as determined in accordance with the provisions. Section 7 determines scope of supply. The Act further talks of inward supply and outward supply. Corresponding to the aforesaid expressions, i.e. the inwards supply as defined under Section 2(67) and outward supply as defined under Section 2(83) are the expression-'recipient of supply' as defined under Section 2(93) and 'supplier' as defined under Section 2(105). Section 9 provides for levy and collection of CGST. A conjoint reading of aforesaid provisions reveals that, the incidence to pay tax on goods arises at the time of supply. The value of taxable supply as per Section 15 includes the following components:-

“The value of supply shall include-

(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or

payable for the goods or services or both;

(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;

(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and

(e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.”

Thus incidence lays on the recipient of supply.

16. Like every taxation enactment, 2017 Act also has a mechanism on which operates, which is 'input tax credit' defined under Section 2(63). It means credit of 'Input tax' defined under Section 2(62). Section 16, Sections 41, 42 and Section 43A provide for eligibility and conditions for taking input tax credit, claim of input tax credit and provisional acceptance thereof, matching reversal and reclaim of input tax credit and procedure for furnishing return and availing input tax credit respectively. Thus, input tax credit to be claimed by registered person not only depends upon eligibility conditions, but also is subject to close scrutiny in form of matching, reversal etc. and furnishing returns. At the time of supply, the person receiving inward supply pays value of such supply which includes GST. As per Section 12 of 2017 Act, the liability to pay tax on goods shall arise at the time of supply. The person receiving inward supply discharges the incidence of GST and becomes eligible to claim credit of the input tax paid. But his claim is subject to adjudication.

17. Section 31 provides that a registered person supplying taxable goods shall, before or at the time of removal of goods for supply to the recipient, where the supply involves movement of goods, issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon

and such other particulars as may be prescribed. Section 43A provides procedure for furnishing return and availing input tax credit. It provides that notwithstanding anything contained in Section 16(2), Section 37 or Section 38, every registered person shall in the return furnished under sub-Section (1) of Section 39 verify, validate, modify or delete the details of supplies furnished by the suppliers. It further provides that the procedure for furnishing the details of outward supply by supplier on the common portal for the purposes of availing input tax credit by the recipient shall be such as may be prescribed. As per Section 43A(6), the supplier and recipient of the supply shall be jointly and severally liable to pay tax or to pay the input tax credit availed as the case may be in relation to outward supplies for which the details have been furnished under sub-Section(3) of sub-Section(4), but return thereof to be furnished. Thus, as per the Act availing of input tax credit by a registered person under the Act is subject to assessment.

Goods in Transit:

18. The 2017 Act and Rules framed thereunder contain specific provisions enlisting requirements and prescriptions for goods in transition. Section 68 deals with inspection of goods in movement. Sub-section 1 thereof stipulates that the person in charge of a conveyance carrying goods shall carry with him the documents and devices prescribed in this behalf. Section 68(2) further provides that the details of documents required to be carried by the person in charge of the conveyance shall be validated in the manner as may be prescribed. Section 68(3) empowers Proper Officer to require the person in charge of conveyance carrying goods to produce the documents for verification. It casts a duty upon the said person to produce the documents and allow the inspection of goods when asked by the Proper Officer. In exercise of the power conferred by Section 164 of the CGST Act, the Central Government notified the

Central Goods and Service Tax Rules, 2017. Rule 138 of 2017 Rules govern e-way bills. In case of transportation of goods by road, e-way bill is required to be generated before the commencement of the movement of the consignment. Rule 138A of CGST prescribes the documents and devices to be carried by the person in charge of the conveyance. As per the said provision, person in charge of a conveyance is required to carry the invoice or bill of supply or delivery challan, as the case may be and in case of transportation of goods by road, he is also required to carry copy of e-way bill in physical form or the e-way bill number in electronic form or mapped to a radio frequency identification device embedded on to the conveyance in such manner as may be notified by the Commissioner. Thus, as per Section 68 of the 2017 Act read with Rules 138 to 138D of the 2017 Rules, a person carrying consignment of goods in conveyance by road is required to carry invoice or bill of supply or delivery challan and a copy of e-way bill in physical form or electronic form. These documents are required to be produced when the goods are intercepted by Proper Officer.

19. Section 129 provides for detention, seizure and release of goods and conveyances in transit. Section 130 provides for confiscation of goods or conveyances and levy of penalty. The same reads as under:-

“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.

(3) 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) 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 the 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(3) 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.”

“130. Confiscation of goods or conveyance and levy of penalty

“(1) [Where] 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 [penalty equal to hundred per cent of the tax payable on such goods]:

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.”

20. Section 168 of 2017 Act confers power on the Central Board of Indirect Taxes and Customs to issue orders, instructions or directions to the Central Tax Officers as it may deem fit for the purpose of uniformity in the implementation of the Act. Exercising the said powers, the Board issued circular dated 13.04.2018 (Annexure P-7). The same reads as under:-

“Circular No. 41/15/2018-GST

CBEC-20-16/03/2017-GST

Government of India

Ministry of Finance

Department of Revenue

Central Board of Indirect Taxes and Customs

GST Policy Wing

New Delhi, Dated the 13th April, 2018

To,

The Principal Chief Commissioners/Chief Commissioners/
Principal Commissioners/Commissioners of Central Tax
(All)/The Principal Directors General/ Directors General
(All)

Madam/Sir,

Subject: Procedure for interception of conveyances for inspection of goods in movement, and detention, release and confiscation of such goods and conveyances-Reg.

Sub-section (1) of section 68 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the “CGST Act”) stipulates that the person in charge of a

conveyance carrying any consignment of goods of value exceeding a specified amount shall carry with him the documents and devices prescribed in this behalf. Sub-section (2) of the said section states that the details of documents required to be carried by the person in charge of the conveyance shall be validated in such manner as may be prescribed. Sub-section (3) of the said section provides that where any conveyance referred to in sub-section (1) of the said section is intercepted by the proper officer at any place, he may require the person in charge of the conveyance to produce the documents for verification, and the said person shall be liable to produce the documents and also allow the inspection of goods.

1.1 Rules 138 to 138D of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the “CGST Rules”) lay down, in detail, the provisions relating to e-way bills. As per the said provisions, in case of transportation of goods by road, an e-way bill is required to be generated before the commencement of movement of the consignment. Rule 138A of the CGST rules prescribes that the person in charge of a conveyance shall carry the invoice or bill of supply or delivery challan, as the case may be; and in case of transportation of goods by road, he shall also carry a copy of the e-way bill in physical form or the e-way bill number in electronic form or mapped to a Radio Frequency Identification Device embedded on to the conveyance in such manner as may be notified by the Commissioner.

1.2 Section 129 of the CGST Act provides for detention, seizure and release of goods and conveyances in transit while section 130 of the CGST Act provides for the confiscation of goods or conveyances and imposition of penalty.

2. In this regard, various references have been received regarding the procedure to be followed in case of interception of conveyances for inspection of goods in

movement and detention, seizure and release and confiscation of such goods and conveyances. In order to ensure uniformity in the implementation of the provisions of the CGST Act across all the field formations, the Board, in exercise of the powers conferred under section 168(1) of the CGST Act, hereby issues the following instructions:

- (a) The jurisdictional Commissioner or an officer authorised by him for this purpose shall, by an order, designate an officer/officers as the proper officer/officers to conduct interception and inspection of conveyances and goods in the jurisdictional area specified in such order.
- (b) The proper officer, empowered to intercept and inspect a conveyance, may intercept any conveyance for verification of documents and/or inspection of goods. On being intercepted, the person in charge of the conveyance shall produce the documents related to the goods and the conveyance. The proper officer shall verify such documents and where, prima facie, no discrepancies are found, the conveyance shall be allowed to move further. An e-way bill number may be available with the person in charge of the conveyance or in the form of a printout, sms or it may be written on an invoice. All these forms of having an e-way bill are valid. Wherever a facility exists to verify the e-way bill electronically, the same shall be so verified, either by logging on to <http://mis.ewaybillgst.gov.in> or the Mobile App or through SMS by sending **EWBVER <EWB_NO>** to the mobile number **77382 99899** (For e.g EWBVER 120100231897).
- (c) For the purposes of verification of the e-way bill, interception and inspection of the conveyance and/or goods, the proper officer under rule 138B of the CGST Rules shall be the officer who has been assigned the functions under sub-section (3) of section

68 of the CGST Act vide Circular No.3/32017 – GST, dated 05.07.2017.

- (d) Where the person in charge of the conveyance fails to produce any prescribed document or where the proper officer intends to undertake an inspection, he shall record a statement of the person in charge of the conveyance in **FORM GST MOV 01**. In addition, the proper officer shall issue an order for physical verification/inspection of the conveyance, goods and documents in **FORM GST MOV-02**, requiring the person in charge of the conveyance to station the conveyance at the place mentioned in such order and allow the inspection of the goods. The proper officer shall, within twenty four hours of the aforementioned issuance of **FORM GST MOV-02**, prepare a report in **Part A** of **FORM GST EWB-03** and upload the same on the common portal.
- (e) **Within a period of three working days from the date of issue of the order in FORM GST MOV-02, the proper officer shall conclude the inspection proceedings, either by himself or through any other proper officer authorised in this behalf. Where circumstances warrant such time to be extended, he shall obtain a written permission in FORM GST MOV-03 from the Commissioner or an officer authorized by him, for extension of time beyond three working days and a copy of the order of extension shall be served on the person in charge of the conveyance.**
- (f) On completion of the physical verification/inspection of conveyance and goods in movement, proper officer shall prepare a report of such physical verification in **FORM GST MOV-04** and serve a copy of the said report to the person in charge of the goods and conveyance. The proper officer shall also record, on the common portal, the final report of the inspection

in **Part B** of **FORM GST EWB-03** within three days of such physical verification/inspection.

- (g) **Where no discrepancies are found after inspection of the goods and conveyance, the proper officer shall issue forthwith a release order in FORM GST MOV-05 and allow the conveyance to move further. Where the proper officer is of the opinion that the goods and conveyance need to be detained under section 129 of CGST Act, he shall issue an order of detention in FORM GST MOV-06 and a notice in FORM GST MOV-07 in accordance with the provisions of sub-section (3) of section 129 of the CGST Act, specifying the tax and penalty payable. The said notice shall be served on the person in charge of the conveyance.**
- (h) Where the owner of the goods or any person authorized by him comes forward to make the payment of tax and penalty as applicable under clause (a) of sub-section (1) of section 129 of the CGST Act, or where the owner of the goods does not come forward to make the payment of tax and penalty as applicable under clause (b) of sub-section (1) of the said section, the proper officer shall, after the amount of tax and penalty has been paid in accordance with the provisions of the CGST Act and the CGST Rules, release the goods and conveyance by an order in **FORM GST MOV-05**. Further, the order in **FORM GST MOV-09** shall be uploaded on the common portal and the demand accruing from the proceedings shall be added in the electronic liability register and the payment made shall be credited to such electronic liability register by debiting the electronic cash ledger or the electronic credit ledger of the concerned person in accordance with the provisions of section 49 of the CGST Act.

- (i) Where the owner of the goods, or the person authorized by him, or any person other than the owner of the goods comes forward to get the goods and the conveyance released by furnishing a security under clause (c) of sub-section (1) of section 129 of the CGST Act, the goods and the conveyance shall be released by an order in **FORM GST MOV-05**, after obtaining a bond in **FORM GST MOV-08** along with a security in the form of bank guarantee equal to the amount payable under clause (a) of clause (b) of sub-section (1) of section 129 of the CGST Act. The finalisation of the proceedings under section 129 of the CGST Act shall be taken up on priority by the officer concerned and the security provided may be adjusted against the demand arising from such proceedings.
- (j) Where any objections are filed against the proposed amount of tax and penalty payable, the proper officer shall consider such objections and thereafter, pass a speaking order in **FORM GST MOV-09**, quantifying the tax and penalty payable. On payment of such tax and penalty, the goods and conveyance shall be released forthwith by an order in **FORM GST MOV-05**. The order in **FORM GST MOV 09** shall be uploaded on the common portal and the demand accruing from the order shall be added in the electronic liability register and, upon payment of the demand, such register shall be credited by either debiting the electronic cash ledger or the electronic credit ledger of the concerned person in accordance with the provisions of section 49 of the CGST Act.
- (k) In case the proposed tax and penalty are not paid within seven days from the date of issue of the order of detention in **FORM GST MOV-06**, action under section 130 of the CGST Act shall be initiated by serving a notice in **FORM GST MOV-10**, proposing

confiscation of the goods and conveyance and imposition of penalty.

- (l) **Where the proper officer is of the opinion that such movement of goods is being effected evade payment tax, he may directly invoke section 130 of the CGST Act by issuing a notice proposing to confiscate the goods and conveyance in FORM GST MOV-10. In the said notice, the quantum tax and penalty leviable under section 130 of the CGST Act read with section 122 of the CGST Act, and the fine in lieu of confiscation leviable under sub-section (2) of section 130 of the CGST Act shall be specified. Where the conveyance is used for the carriage of goods or passengers for hire, the owner of the conveyance shall also be issued a notice under the third proviso to sub-section (2) of section 130 of the CGST Act, proposing to impose a fine equal to the tax payable on the goods being transported in lieu of confiscation of the conveyance.**
- (m) 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.
- (n) An order of confiscation of goods shall be passed in **FORM GST MOV-11**, after taking into consideration the objections filed by the person in charge of the goods (owner or his representative), and the same shall be served on the person concerned. Once the order of confiscation is passed, the title of such goods shall stand transferred to the Central Government. In the said order, a suitable time not exceeding three months shall be offered to make the payment of tax, penalty and fine imposed in lieu of confiscation and get the goods released. The order in **FORM GST MOV-11** shall be uploaded on the common portal and the demand accruing from the order shall be added in

the electronic liability register and, upon payment of the demand, such register shall be credited by either debiting the electronic cash ledger or the electronic credit ledger of the concerned person in accordance with the provisions of section 49 of the CGST Act. Once an order of confiscation of goods is passed in **FORM GST MOV-11**, the order in **FORM GST MOV-09** passed earlier with respect to the said goods shall be withdrawn.

- (o) An order of confiscation of conveyance shall be passed in **FORM GST MOV-11**, after taking into consideration the objections filed by the person in charge of the conveyance and the same shall be served on the person concerned. Once the order of confiscation is passed, the title of such conveyance shall stand transferred to the Central Government. In the order passed above, a suitable time not exceeding three months shall be offered to make the payment of penalty and fines imposed in lieu of confiscation and get the conveyance released. The order in **FORM GST MOV-11** shall be uploaded on the common portal and the demand accruing from the order shall be added in the electronic liability register and, upon payment of the demand, such register shall be credited by either debiting the electronic cash ledger or the electronic credit ledger of the concerned person in accordance with the provisions of section 49 of the CGST Act.
- (p) The order referred to in clauses (n) and (o) above may be passed as a common order in the said **FORM CGST MOV-11**.
- (q) In case neither the owner of the goods nor any person other than the owner of the goods comes forward to make the payment of tax, penalty and fine imposed and get the goods or conveyance released within the time specified in **FORM GST MOV-11**, the proper

officer shall auction the goods and/or conveyance by a public auction and remit the sale proceeds to the account of the Central Government.

- (r) Suitable modifications in the time allowed for the service of notice or order for auction or disposal shall be done in case of perishable and/or hazardous goods.
 - (s) **Whenever an order or proceedings under the CGST Act is passed by the proper officer, a corresponding order or proceedings shall be passed by him under the respective State or Union Territory GST Act and if applicable, under the Goody and Services Tax (Compensations to States) Act, 2017. Further, sub-sections (3) and (4) of section 79 of the CGST Act/respective State GST Acts may be referred to in case of recovery of arrears of central tax/State tax/ Union territory tax.**
 - (t) The procedure narrated above shall be applicable *mutatis mutandis* for an order or proceeding under the IGST Act, 2017.
 - (u) Demand of any tax, penalty, fine or other charges shall be added in the electronic liability ledger of the person concerned. Where no electronic liability ledger is available in case of an unregistered person, a temporary ID shall be created by the proper officer on the common portal and the liability shall be created therein. He shall also credit the payments made towards such demands of tax, penalty or fine and other charges by debiting the electronic cash ledger of the concerned person.
 - (v) A summary of every order in **FORM GST MOV-09** to **FORM GST MOV-11** shall be uploaded electronically in **FORM GST-DRC-07** on the common portal.
3. The format of **FORMS GST MOV-01** to **GST MOV-11** are annexed to this Circular.

4. It is requested that suitable standing orders and trade notices may be issued to publicise the contents of this Circular.

5. Difficulties, if any, in implementation of the above instructions may be brought to the notice of the Board at an early date. Hindi version will follow.

(Upender Gupta)
Commissioner (GST)”

21. Section 129 deals with contravention of the provisions of the Act by person transporting goods or storing goods while in transit. The provision provides for consequence of contravention of the provisions of the Act in form of detention or seizure of goods. In case, transport of goods in transit is found to be in contravention of the provisions of the Act, the same are liable to detention/seizure. On the other hand, Section 130 provides for 5 different situations in which the goods or conveyances are liable to confiscation and the person is liable to penalty under Section 122. Reading of Section 131 further makes it clear that Section 130 is a penal clause and confiscation is a form of punishment over and above other punishments prescribed under the Act. Section 130 is more stringent as compared to Section 129.

22. Where the goods in transit in contravention of the provisions of the Act invites detention under Section 129, to invoke Section 130, the supply should not only be in contravention of the provisions of the Act, but such contravention should be with an intent to evade payment of tax. Thus, where there is a contravention of the provisions of the Act or the rules made thereunder and is punctuated with an intent to evade payment of tax, Section 130 can be invoked. Even though the goods have been detained or seized for contravention of provision of the Act under Section 129, if the competent authority finds during investigation that the provision(s) of the Act have been

contravened with intent to evade payment of tax, the law empowers the authority to act under Section 130. It is not in the every case where the goods in transit have been detained under Section 129, the authority should proceed under Section 130.

23. A person can be attributed intent to evade payment of tax only if the contravention of the provisions of the Act or the rules made thereunder has some direct nexus with his action. He cannot be held liable under Section 130 for contravention of the provision of law by other person in the supply chain. Wrongful claim of input tax credit may be result of a bonafide claim as well and does not necessarily involve intent to evade payment of tax. Moreover, wrongful claim of input tax credit is not one of the conditions enumerated under Section 130(1) of the 2017 Act that could entail confiscation of the goods. Section 130 being penal in nature has to be construed strictly.

24. We must notice here that the power of authorities to search, seizure, detained, confiscate goods in transit is not a phenomenon exclusively attached to 2017 Act. In fact, in earlier tax regime also, the powers of the authority to inspect and detain goods in transit continued to be a subject matter of judicial debate. A Division Bench of this Court in '**Xcell Automation vs. State of Punjab and another**' reported as **PLR (2007) Punjab and Haryana page 685**, after considering plethora of judgments culled out the following preposition:-

“The position can be summed up as under:

(1) Exercise of power at the check-post to be valid, should have reasonable nexus with the attempt at evasion.

(2) Straight-jacket approach is not called for and each instance of exercise of power has to be seen in the light of individual facts. Neither exercise of power can be restricted, wherever required for checking attempt at evasion nor can be extended to areas where there was no attempt at evasion.

(3) In an appropriate case, the writ court may examine the exercise of power and interfere if exercise of power is found to be arbitrary, mala fide and without nexus with attempt at evasion on the face of it.

(4) If there are disputed questions and there is reasonable nexus of exercise of power with attempt at evasion, writ petition against imposition of penalty at the check-post cannot be entertained.

(5) Where relevant documents are duly produced but a bona fide plea against taxability is raised and there is neither mis-declaration nor concealment, exercise of power of imposing penalty at the check-post on the ground of attempt at evasion may not be called for.” (emphasis supplied)

Conclusion:

25. When the aforesaid principles of law and the bare provisions of law are applied to the present case, we find that the investigation report relied upon by the respondents to initiate proceedings under Section 130 against the petitioner lacks sting. Under the 2017 Act, a trader is either a 'supplier' qua 'outward supply' or is a 'recipient' of 'inward supply'. The alleged 'intent to evade tax' must have a direct nexus with the activity of trader. The opinion formed by the authorities must reflect such nexus before proceeding under Section 130 of 2017 Act. A trader cannot be accused of having intention to evade payment of tax for act or omission on part of a person not immediately linked to his activity. Learned counsel for the State agreed that even if a trader wants to be prudent, there is no system in place from where he can check as to whether his predecessors in supply chain have paid input tax credit or not. Meaning thereby, it is virtually impossible for a trader to ascertain as to whether input tax has been paid by his predecessors or not and it is for this reason also that the claim to input tax credit has been made subject to scrutiny and assessment. It is the fundamental legal principle embedded in legal maxim

to do that which he cannot possibly perform”. Once a person cannot be compelled to do something not possible, definitely he cannot be penalized for not doing so.

26. In the present case, the goods and conveyance in transit were accompanied with the documents as prescribed under Rule 138A, i.e. the invoice and the e-way bill. No discrepancy has been pointed out in the said documents even in the reply filed by the respondents.

27. The notice dated 14.09.2021 reveals that the same has been issued on the basis of:-

“On subsequent verification of the inward supply of the sellers for the subsequent period it is found that:-

a) S.D. ENTERPRISES (03GBQPK0612B1Z7) - The Dealer is having inward supply from M/s K.S ENTERPRISES 03MGFPS4269EIZ3 whose subsequent inward supply is from BALBIR ENTERPRISES 03GWYPS4252J1ZR. M/s Balbir Enterprises is not having any inward supply and is just doing outward supply and is not paying any Tax as is evident from his returns for the preceding periods.

b) ROYAL METAL (03FVZPS9476P1ZX) - The dealer is having inward supply from two firms namely GLOBAL IMPEX 031AIPK9969NIZO and EKAM STEELS 03CTTPB3824M1ZH. The subsequent inward supply of GLOBAL IMPEX 031AIPK9969NIZO is from M/S K.S ENTERPRISES 03MGFPS426EIZ3 whose subsequent inward supply is from BALBIR ENTERPRISES 03GWYPS4252J1ZR. M/s Balbir Enterprises is not having any inward supply and the subsequent inward supply of the second firm EKAM STEELLS 03CTTPB3824MIZIH is also from M/s K.S ENTERPRISES 03MGFPS4269EIZ.

(c) GLOBAL IMPEX (031AIPK9969NIZO) - The subsequent inward supply of GLOBAL IMPEX 031AIPK9969NIZO is from M/s K.S ENTERPRISES

03MGFPS4269E1Z3 whose subsequent inward supply is from BALBIR ENTERPRISES 03GWYPS4252J1ZR. M/s Balbir Enterprises is not having any inward supply.

The supply chain has been created for the purpose of transfer of ITC without paying the same at any Stage. The Initial dealer i.e. M/s BAIBIR ENTERPRISES 03GWYPS4252J1ZR has made outward supply of more than 33 cr. and transferred ITC of more than Rs 6 cr. to various beneficiaries thus contravening the provisions of Section 132 (1) (b) of the Act which says that **"Issues any invoice or Bill without supply of goods or services or both in violation of the provisions of this act or the rules made there under leading to wrongful availment or utilization of Input Tax Credit"** where as the rest of the dealers in the said supply chain have contravened the provisions of section 132 (1) (c) of the act which says, **"avails input Tax credit using such invoices or bills as referred to in clause 132(1)(b)"**.

28. There is no finding with respect to contravention of any provision of the Act by the petitioner. The only contravention of the provision alleged is against M/s. Balbir Enterprises, who is shown to have indulged in outward supply without having any inward supply. It has been alleged that he has not been paying any tax and thus, the successor dealers in the said supply chain are guilty of availing input tax credit wrongfully.

29. From the pleadings on record, it is clear that there is no allegation that the petitioner has contravened any provision of the Act or the rules framed thereunder much less with an intent to evade payment of tax. It is also not the case of the State that the petitioner did not account for any goods on which he is liable to pay tax under the Act or that he supplied any goods liable to tax under the Act without having applied for registration or that he supplied or received any goods in contravention of any of the provisions of the Act. From the

perusal of show cause notice issued to the petitioner under Section 130, the case alleged against the petitioner is that of wrongful claim of input tax credit. The petitioner or for that matter any registered person shall be entitled to tax credit of input tax on any supply of goods or services, only when he shall be able to show that the tax in respect of such supply has been paid to the Government either in cash or through utilization of input tax credit admissible in respect of the said supply. Needless to reiterate any person can claim input tax credit under the provisions of the 2017 Act only if the same has been actually paid to the Government. Thus, the action of the respondents in initiating proceedings under Section 130 on the basis of show cause notice dated 14.09.2021 cannot be sustained.

30. In view of the discussion above, we find that question No.2 posed in para No. 12, deserves to be answered in favour of the petitioner. Having found that the authority committed error manifest on the record, we do not feel it appropriate to non-suit the petitioner on the ground of alternate remedy. Guided by the law laid down by Supreme Court in ***Whirlpool Corporation vs. Registrar of Trade Mark, Mumbai***, reported as 1998 Vol. 8 SCC 1:-

“20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.”

We hold the present writ maintainable rejecting the objection raised by the respondent.

31. Thus, we hold that the authorities are well within their power to check the goods in transit. In case goods in transit are being transported in contravention of any provision of the Act or the rules framed thereunder, the goods are liable to be seized and detained as per provision of Section 129 of the Act. However, in case the goods in transit are accompanied with the documents as prescribed under the Act, authorities need not proceed under Section 129 of the 2017 Act. The provisions prescribing time limit to conclude inspection in circular dated 13.04.2018 are mandatory. The goods/conveyance cannot be detained without passing appropriate orders in accordance with law. In case, the authorities find that action of the person falls within four corners of Section 130(1), the authorities have right to proceed under Section 130 of the Act. However, the opinion of the authorities which forms basis of proceedings under Section 130 must have reasonable nexus with the action of the person against whom proceedings are being initiated. Such nexus must be manifest from the record and conveyed to the person in compliance of Section 130(4) of the Act. A bonafide issue which is subject matter of assessment under the Act cannot be a ground to proceed under Section 130 of the Act unless the same falls within four corners of Section 130(1) of the 2017 Act.

32. Resultantly, the order dated 30.08.2021 (Annexure P-3) issued by office of Assistant Commissioner, State Tax, Mobile Wing, Chandigarh-2 and notice dated 14.09.2021 issued under Section 130 of the CGST Act are hereby quashed and set aside. Respondent No.4 is directed to release conveyance and goods in question forthwith. However, we need to clarify that the fact that the goods and conveyance have been ordered to be released will not in any manner come in the way of the respondent to proceed against the petitioner in connection with the contravention of any provision of the Act.

33. Since the main case has been decided, the pending miscellaneous application, if any, also stands disposed off.

(AJAY TEWARI)
JUDGE

(PANKAJ JAIN)
JUDGE

04.02.2022
Dinesh

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No