IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.03.2023

CORAM :

The HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.8507 of 2023
and
W.M.P.Nos.8697 & 8698 of 2023

M/s.Ajay Agency
Rep. By its Proprietor Sri.M.Sellappan
No.1, Santhosham Nagar,
Vada Andapattu, Kiliyapattu Post,
Outer Ring Road,
Tiruvannamalai – 606 604. .. Petitioner

vs

The State Tax Officer – 1,
Adjudication Cell,
Vellore. .. Respondent

Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus calling for the records of the respondent in GDN No.2450/22-23 and quash the impugned proceeding dated 10.03.2023 passed therein and further direct the respondent to release the Lorry bearing No. MG 50 N 5052 forthwith.

For Petitioner : Mr.B.Raveendran

For Respondent : Ms.Amritha Poonkodi Dinakaran
Government Advocate

ORDER

The petitioner is a proprietary concern claiming to be dealing in agricultural implements. It holds a registration under the provisions of the Tamil Nadu Goods and Services Tax Act, 2017 (in short, 'Act'). An order had been placed by the petitioner for a ‘Petrol Power Weeder’ on Kirloskar Oil Engines Limited situated in Kolhapur District in Maharashtra. Delivery was to be at Gingee in Tamil Nadu.

2. The consignor had booked a lorry for road transport. The tenure of the E-Way Bill was for the period 28.02.2023 to 05.03.2023. Upon entry into the State of Tamil Nadu, it is the case of the petitioner that the vehicle had had a puncture and thus further transportation was delayed. Since 05.03.2023 was a sunday and the vehicle was, ostensibly, in a remote place, no mechanic was available. On 06.03.2023, the vehicle is stated to have been repaired and made ready for transport.

3. At that time, the vehicle was intercepted by the Roving Squad of the Income-Tax Department. The documentation available was handed over to the officers, upon perusal of which, it was found that the E-Way bill had expired at 12.00 a.m. on 05.03.2023. The interception of the vehicle was at 10.30 a.m. on 06.03.2023.

4. Chapter XVI of the Central Goods and Service Tax Rules,

2017 deals with E-Way Rules (in short 'Rules'). Rule 138 provides for *'information to be furnished prior to commencement of goods and the generation of E Way Bill*'. The third proviso to Sub-rule 10 of Rule 138 states that the validity of the E-Way Bill may be extended within eight hours from the time of its expiry.

5. In the present case, the E-Way Bill expired on 12.00 a.m on 05.03.2023. Thus, extension of the same should have been sought within eight hours, which is prior to 8.00 a.m on 06.03.2023. However, the vehicle was intercepted at 10.00 a.m. with an expired e-way bill.

6. Admittedly, and even accepting the argument of the petitioner that there was no revenue impact in this case since the commodities in question were agricultural implements that are exempt from tax, there is a burden cast upon the parties to ensure that the documentation accompanying the consignment being transported is in order. To be noted that the respondent has, in the impugned order specifically dealt with the submission that the transaction is exempt noting that the 'petrol power weeder' is liable to tax at 12%.

7. Thus, liability to tax, or otherwise, would depend upon the petitioner satisfying the authorities in the course of assessment of the nature of the machinery and resultant liability to tax. Since such

determination involves examination and determination of facts, this question would best be left to the discretion of the authorities.

8. Undoubtedly, there is wide discretion that is available to an authority in the levy of penalty that may range from Rs.5000/- to 200% of the value of goods, which is the maximum penalty. In the present case, the officer has levied penalty at the rate 200% and the impugned order reads thus:

'PROCEEDINGS OF THE STATE TAX OFFICER-1, ADJUDICATION CELL, VELLORE DIVISION, VELLORE
PRESENT: TMT. E. SOODAMANI

GDN.NO.2450/22-23 DATED: .03.2023

Sub: GST Act – 2017 – Goods detention – Roving Squad-II, Thiruvannamalai – Notice issued – reply received – Order passed – Regarding.

Ref: 1.Goods detention notice issued by Deputy State Tax Officer, Roving Squad-II, Thiruvannamalai in GDN.No.2450/22-23 in from Mov.01,02,06 and 07 dated:06.03.2023.

2. Reply letter received from Tvl. Ajay Agency, Thiruvannamalai dated 08.03.2023.

The conveyance bearing No.MH50N5052 was intercepted by Thiru.A. Murugadoss, Deputy State Tax Officer, Roving Squad-II, Thiruvannamalai at 10.30 AM at Thiruvannamalai on 06.03.2023. The statement of the driver in charge of the vehicle was recorded on 06.03.2023.

2. The goods in movement was inspected under the provisions of sub-section (3) of section 68 of the Central Goods and Services Tax Act, 2017 read with sub-section (3) of section 68 of the State/Union territory Goods and Services Tax Act or under section 20 of the Integrated Goods and Services tax Act, 2017 read with sub-section (3) of section 68 of the Central Goods and services Tax Act 2017, on 06.03.2023 and the following discrepancy was noticed.

Goods (Petrol Power Weeder) moved from Kothapur to Gingee. On verification, E-way bill was *expired on 05.03.2023 @ 11.59 PM. Hence it is defect. Goods detained with vehicle and GDN issued.*

3. In view of the above, the goods and the conveyance used for the movement of goods were detained under sub-section (1) of section 129 of the Central Goods and Services Tax Act, 2017 read with sub-section (3) of section 68 of the State/Union Territory Goods and Services Tax Act or under section 20 of the Integrated Goods and Services Tax Act read with sub-section (3) of section 68 of the Central Goods and Services Tax Act, 2017 by issuing and order of detention in FORM GST MOV-06 and the same was served on the person in charge of the conveyance on 06.03.2023.

4.Sub-section(1) of section 129 of the Central Goods and Services Tax Act 2017 provides for the release of goods and conveyance detained on the payment of penalty as under:

. . . .

4.1 Clause (c) of sub-section (1) of section 129 of the Central Goods and Services Tax Act, 2017 provides for the release of goods upon furnishing of a security equivalent to the amount payable under clause (a) or clause (b) of the said sub-section, as indicated supra at (i) and (ii) of para 4 above, in FORM GST MOV-08.

5.The calculation of proposed tax and penalty is as under:

CALCULATION OF APPLICABLE TAX UNDER CLAUSE (a) OF SUB-SECTION (1) OF SECTION 129

					RATE OF TAX				PENALTY AMOUNT			
Sl. No.	Description goods	HSN Code	Quantity	Total Value	Central Tax	State Tax/ Union territory	Integrated Tax	Cess	Central Tax	State Tax/ Union territory	Integrated tax	Cess
1	2	3	4	5	6	7	8	9	10	11	12	13
-NIL-												

2. CALCULATION OF APPLICABLE PENALTY UNDER CLAUSE (a) OF SUB-SECTION (1) OF SECTION 129

	RATE OF TAX	PENALTY AMOUNT

S	Description goods	HSN Code	Quantity	Total Value	Central Tax	State Tax/ Union Territory	Integrated Tax	Cess	Central Tax	State Tax/ Union Territory	Integrated tax	Cess
1	2	3	4	5	6	7	8	9	10	11	12	13
1	Petrol Pwer Weeder	84321090	32 Nos.	Rs. 15,36,000/-	....	....	12% x 200%	....	....	....	Rs.3,68,640/-	....

6. Incorporating the above points, a notice in FORM GST MOV-07 was issued and duly served on the person in charge of the conveyance, providing him an opportunity to file objection, if any against the demand of penalty as applicable and to make payment of the same and to get the goods and conveyance released.

7. In response to the said notice,

The consignee of the goods Tvl. Ajay Agency, Thiruvannamalai has filed objections as under.

(i) The consignee stated that goods (Petrol Power Weeder) moved from Kothapur to Gingee. The Roving Squad Officials detained the vehicle for the reason that expiry of E-way bill. E-way bill was expired due to break down of the truck carrying consignment, repair and consequent delay. They enclosed a copy of supporting document for the vehicle repaired.

(ii) They cited the decision of Tvl. Thiruvannamalaiyar Transport Vs. Deputy State Tax Officer (Madras High Court) Madras High Court held that expiry of E-way bill does not create any scope of tax evasion.

(iii) Further they are dealing in agricultural equipments only for that no E-way bill required for the consignment of goods and requested to release the vehicle.

8.The explanations filed by the consignee Tvl.Ajay Agency, Thiruvannamalai were perused and not acceptable for the following reason.

(i) The generation of E-way bill – Part-A and Part-B details were updated by the consignor Tvl. Kirloskar Oil Enginees Ltd., Khadki, Pune having GSTIN.27AADCK5714H1ZK. They know very well about the time period of E-way bill for unloading the goods at

delivery place. Also they know about the validity of E-way bill may be extended within 8 hours from the time of its expiry. But the consignor should not extend the time of E-way bill. Also the Roving Squad Officials detained the vehicle on expiry of E-way bill (i.e.) after 10 hours.

(ii) The consignee Tvl. Ajay Agency cited the decision of Tvl. Thiruvannamalaiyar Transport Vs. Deputy State Tax Officer, Madras High Court is not applicable for this case because the goods detained by the Roving Squad Officials related to Tvl. Thiruvannamalaiyar Transport is that on expiry of E-way bill the officials detained the vehicle, after four hours.

(iii) The consignee stated that they dealing in agricultural equipments only for that no E-way bill required. This is not acceptable because the goods Petrol Power Weeder HSN Code is 84321090 @ rate of tax is 12%.

Hence the proper officer detained the vehicle as per the provisions of GST Act 2017 under section 129(1) only and also levied penalty.

Hence the tax payer is hereby directed to pay the above penalty of Rs.3,68,640/- forthwith / not later than seven days from the date of the receipt of this order. Failing which, action under Section 130 of Goods and Services Tax Act 2017 shall be initiated.'

9. Mr.Raveendran, draws attention to Circular No.10/2019 dated 31.05.2019, particularly clause 10 thereof, which deals with circumstances where penalty upto Rs.5000/- per act (contravention) shall be levied. Clause 10 of the Circular and the examples set out therein read as follows:-

"10.Circumstances where Penalty upto Rs.5000/- per act shall be levied:

Where the movement of goods is accompanied by any one of the basic documents such as invoice or bill of supply or delivery challan or E Way bill as prescribed in Rule 55A and 138 A of

the TNGST Rules 2018, and in such cases where at least one of the basic documents, manifestly showing sufferance of tax in the particular transaction is available, a penalty of upto Rs.5000/- per act shall be levied so as to deter the recurrence of offence. The following are examples in this context:
Example 1 : Vehicles meant for a vehicle distributor are delivered at the stock yard / godown/ branch; the transporter possesses the necessary tax invoice, but the E-Way bill was generated for principal place of business / different place of business.
In the case the CGST/SGST/IGST (if interstate supply) would have been suffered at the hands of manufacturer or distributor. Mere delivery of the goods at a place other than those mentioned in the documents would not render the transaction as an evasion or abetment of evasion. Being a B 2 B transaction, trail of transaction would now be available in GSTR1 for the department.
Example 2: A conveyance carrying the goods from a factory of fertilizers is delivering the same at various locations as directed by the department of Agriculture. The goods are accompanied by invoice or invoice with delivery challan and E-Way bill. The E-Way bill has expired due to delay in making delivery at various locations. The expiry of E-Way bill does not create any scope for evasion."

10. Learned counsel specifically draws attention to Example 2 above to state that the expiry of the E-Way Bill in this case may be explained, taking support from that illustration. However, that illustration is of no assistance to the petitioner since the transaction in question is distinguishable on facts. In that case the conveyance carrying fertilizers was effecting delivery at various locations as per

the directions of the Department of Agriculture. In the present case, the transaction in question is as between private parties.

11. The illustration provides for expiry of E-Way Bill due to delay in making delivery at various locations. In the present case, the transaction is an end-to-end transaction and there are no intermittent deliveries that are contemplated. That apart, the goods in that case comprised fertilisers that are admittedly exempt whereas in the present case the consignment comprises machinery, a 'petrol power weeder', that, according to the respondents is taxable, though such a conclusion is to be tested and decided in appropriate proceedings.

12. Ms.Amirtha for her part, cites a recent Circular bearing No: IW1/3365394/2022 dated 24.02.2023. Being the most recent Circular available as on date, the same is extracted in full below:-

1W1/3365394/2022

Office of the Principal Secretary/ Commissioner of Commercial Taxes,
Chennai-600 005.
Date: 24.02.2023.

Present: Thiru Dheeraj Kumar, I.A.S.,
Principal Secretary/Commissioner of Commercial Taxes.

Sub:	*Intelligence Wing-Power Roles and Responsibilities - Offences booked by Roving Squad officers - Certain circular instructions issued - amendment made- regarding.*
Ref:	*1. Circular No.10/2019 dated 31.05.2019 issued in Q1/17253/2019.* *2. Circular No.10/2019 amendment dated 17.12.2019 issued in Q1/17253/2019.* *3. Circular 10/2019 amendment dated 15.11.2021 issued in Q1/17253/2019.* *4. Circular No.38(2018)/2019 TNGST dated 05.04.2019 issued in R.C.151/2018/A1/Taxation)* *5. Circular No.64/38/2018-GST dated 14.09.2018 issued by the Central Board of Indirect Taxes and Customs, GST Policy Wing. In CBEC/20/16/03/2017-GST.* *6. Circular 10/2019 amendment issued in IW1/3365394/2022, dated 10.01.2023.*

<><><>

In the circulars in the references 1, 2, 3 & 6 cited above, detailed instructions have been issued on the protocol for Roving Squad. For further clarity, the following amendment is hereby issued to the Circular No.10/2019 dated 31.05.2019 as amended on 17.12.2019, 15.11.2021 & 10.01.2023.

2. In para 9 of the said circular, instructions have been issued for "CIRCUMSTANCES WHERE NO PENALTY SHALL BE LEVIED BY THE ROVING SQUAD". The Existing para 9 (i), (ii) & (iii), are extracted below:

i)Where the amount involved in the offence is less than Rupees Five Thousand.
(ii) Where a mistake or omission in document is easily rectifiable and has been committed without fraudulent intent or gross negligence or is not backed up with any sort of malicious intent to evade taxes.
(iii)Where the issue relates to rate of tax, classification of goods, place of supply disputes, valuation of goods etc., Instead of levying tax and penalty on the spot, these types of cases shall be re-

ferred to the assessment circle concerned for further action, without detaining the goods and conveyance. However, in respect of newly registered tax payers where the roving squad officers are able to establish that the tax payer had failed to file returns for two or more tax periods this instruction would not apply and the vehicles of such tax payers may be detained for further action, wherever appropriate.

3. The above para is modified as follows:

9 (A). <u>CIRCUMSTANCES WHERE NO PENALTY SHALL BE LEVIED BY THE ROVING SQUAD:</u>

i)Where the amount involved in the offence is less than Rupees Five Thousand.

ii) Where the issue relates to rate of tax, classification of goods, place of supply disputes, valuation of goods etc., instead of levying tax and penalty on the spot, these types of cases shall be referred to the assessment circle concerned for further action, without detaining the goods and conveyance. However, in respect of newly registered tax payers where the roving squad officers are able to establish that the tax payer had failed to file returns for two or more tax periods this instruction would not apply and the vehicles of such tax payers may be detained for further action, wherever appropriate.

<u>9(B). CIRCUMSTANCES WHERE PENALTY OF Rs. 500/- SHALL BE LEVIED:</u>

i)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 TNGST Act may not be initiated, inter alia, in the following situations:

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

b) Error in 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 one or two digits of the document number mentioned in the e-way bill;
d) 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.
e) Error in one or two digits/characters of the vehicle number.

ii) In case of the above situations, provided that, the other details in the E-way bill is correct, penalty of Rs. 500/- each under Section 125 of the SGST & CGST Act should be imposed (Rs. 1000/- under the IGST Act) in Form GST DRC-07 for every consignment.

Sd/- Dheeraj Kumar
Principal Secretary/
Commissioner of Commercial Taxes,
Chennai-600 005.

13. Circular dated 24.02.23 has amended paragraph 9 of Circular dated 31.05.2019 and sets out the position prescribed and prevailing as on date in regard to circumstances where nil/reduced penalty of Rs.500 may be levied for violations committed in transit of consignments. Paragraph number 10 of Circular No.10 of 2019 has been left untouched and would thus still be available in those specific circumstances.

14. However, in this case, there is one distinguishing and supervening factor. The impugned order refers to a supporting document provided by the transporter and placed at page 101 of the compilation accompanying the writ affidavit containing the date '06.03.2023' in the column 'தேதி'. However, the same document

has been produced by the Department wherein the field 'தேதி' is blank. The petitioner has no explanation to offer in regard to this discrepancy.

15. The above position also constitutes a question of fact and it is thus appropriate, that the appellate authority look into the matter, specifically the genuineness of the explanation put forth by the petitioner in regard to the on-road delay allegedly suffered by the consignment, and take a considered view, after taking into account all applicable facts and circumstances as well as the Circulars issued, as applicable and in accordance with law.

16. In *Tvl.Thiruvannamalaiyar Transport v The Deputy State Tax Officer and others* [W.P.No.32960 of 2022 dated 13.12.2022], a learned Judge of this Court has allowed that writ petition, proceeding on the basis of paragraph 10 of Circular No.10 dated 31.10.19, on the facts and circumstances of that case. In light of the factual distinctions noticed in the paragraphs supra, this decision is of no avail to the petitioner in the present case.

17. In light of the discussion as above, I am not inclined to intervene in the matter, particularly since the order impugned is a discretionary order that has taken note of all facts and circumstances of the case.

18. For the aforesaid reasons, writ petition is dismissed with liberty granted to the petitioner to work out its remedy in accordance with law. No costs. Connected miscellaneous petition is closed.

30.03.2023

Index:Yes
Neutral Citation:Yes
ssm

To
The State Tax Officer – 1,
Adjudication Cell,
Vellore.

DR. ANITA SUMANTH,J.

ssm

W.P.No.8507 of 2023

30.03.2023