

Form No.J(2)

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 842 of 2024

M/s. Maa Amba Builders & Anr.
Versus
The Assistant Commissioner of Revenue,
State Tax, Bureau of Investigation
North Bengal HQ & Ors.

For the petitioner : Mr. Sandip Choraria
Mr. Rajeev Parik

For the State : Mr. Subir Kumar Saha
Mr. Dilip Kumar Agarwal

Heard on : 2nd May, 2024.

Judgment on : **2nd May, 2024.**

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, *inter alia*, praying for quashing and/or to set aside the order dated 14th September, 2023 passed in an appeal under Section 107 of the West Bengal Goods and Services Tax Act, 2017/ Central Goods and Services Tax Act, 2017¹ from an order passed under Section 129(3) of the said Act.

¹ Hereinafter referred to as the "said Act"

2. It is the petitioners' case that the petitioner no.1 had in course of its usual business, dealings and transactions received orders from M/s City Developers Private Limited for supply of 32.200 mt. of TMT Bar (hereinafter referred to as the "contracted goods"). For the execution of the said contract the petitioner no.1 had placed order on M/s N.N. Ispat Private Limited, having its factory at Diwandighi, Palitpur Road, Burdwan, West Bengal.
3. According to the petitioner no.1, a tax invoice was generated by the said N.N. Ispat Pvt. Ltd., on 9th May, 2023, which is appearing at page 20 of the writ petition. Simultaneously, for transporting the said goods from Burdwan to the Siliguri e-way bills were also generated. Validity of such e-way bills had to be extended from time to time and the same remained valid till 17th May, 2023. Simultaneously, the petitioner no.1 had also raised e-tax invoice bearing barcode which is appearing at page 26 of the writ petition. Consequently, the petitioner no.1 had also generated e-way bills for transporting of the contracted goods to the aforesaid M/s City Developers Private Limited, being the consignee.
4. According to the petitioners, the e-way bill generated by the petitioner no.1 remained valid up to 12th May, 2023, 11.59 P.M. Unfortunately, before the consignment could reach M/s City Developers Private Limited, the e-way bill which remained valid till 11.59 P.M., of 12th May, 2023 expired. Incidentally, the goods

in question were intercepted on 13th May, 2023 before the validity of the said e-way bill could be extended by the petitioners.

5. As would appear from the order for physical verification dated 15th May, 2023, on physical verification of the goods the following discrepancy was found “*E-way bill not tendered for the goods in movement*”. Following the aforesaid, the order of detention dated 15th May, 2023 was issued under Section 129(3) of the said Act. The reason for detention was identified as “goods not covered by valid documents”. The same was followed up by a show-cause notice issued under Section 129(1) of the said Act.
6. In the interregnum, the petitioners in terms of Section 129(1)(b) of the said Act having applied for release of goods and having paid the amount of penalty as provided for under Section 129(1)(b) of the said Act, got the goods released. The petitioner by reasons of payment of penalty, did not file response to the show-cause notice as given. Records would reveal that an order under Section 129(3) of the said Act was passed on 18th May, 2023, in effect confirming the proposed penalty.
7. The petitioners had subsequently preferred an appeal under Section 107 of the said Act, challenging the order dated 18th May, 2023 passed under Section 129(3) of the said Act. The appellate authority by its order dated 13th September, 2023 was, *inter alia*, pleased to dismiss the said appeal observing that the detention of goods and imposing of penalty were as per the provisions of law,

and having not found any reasons to interfere with the adjudicating order rejected the said appeal.

8. Mr. Choraria, learned advocate representing the petitioners by placing before this Court the ground of appeal submits that the appellate authority despite being obliged to take note and dispose of the grounds of appeal had failed to do so. He submits that in the instant case, the only fault of the petitioners was to get the validity of the e-way bill extended within the prescribed time. Admittedly, the petitioners had caused the invoice to be issued, such fact would corroborate from the copies of the documents annexed with the writ petition.
9. Unfortunately, for the petitioners before the e-way bill could be extended, the goods in question were intercepted and a show-cause notice to that effect was issued. On the question, whether the proceedings under Section 129(3) are deemed to be concluded upon payment being made, in terms of Section 129 (5) of the said Act, he places reliance on the judgment delivered by the Hon'ble Kerala High Court in the case of ***Hindustan Steel and Cement N. H. Karimbilangadi v. Assistant State Tax Officer***, reported in ***2022 TaxScan (HC) 609***. He submits the Hon'ble Kerala High Court having considered the above issue had concluded that payment of penalty under Section 129(1)(a) or (b) of the said Act does not absolve the adjudicating authority from passing an order under Section 129(3) of the said Act, and taking note of the

provisions of Section 107 of the said Act, it was held that it is always open to a person aggrieved from the said order to prefer an appeal therefrom. In the instant case, there was no deliberate and willful default on the part of the petitioners to extend the validity of the e-way bill as such the respondents ought not to have imposed the penalty.

10. From the documents on record, *inter alia*, including the physical verification report, the order of detention and the show-cause notice, it would not appear that there is no other allegation, apart from the non-extension of the e-way bill. By placing before this Court an unreported judgment delivered by the Hon'ble Division Bench of this Court in the case of ***Asina Switchgear Private Limited v. State Tax Officer, Bureau of Investigation, North Bengal Headquarters & Ors.*** (MAT 32 of 2023) on 1st December 2023, he submits that the Hon'ble Division Bench was of the view that it is the obligation of the adjudicating officer to apply its mind on the defence of the appellant before taking a final decision. He submits that although, in the instant case the petitioners did not file any response to the show cause, however since the appeal is an continuation of the proceedings, the appellate authority was obliged to consider the defence set up in the form of the grounds of appeal. Having not done so and having not adjudicated on the grounds of defence, the aforesaid order cannot be sustained. He

submits that there is no *mens rea* involved, both the department as also the appellate authority ought not to have thrust the liability in the form of penalty on the petitioners especially when there was no willful default on the part of the petitioners.

11. By further placing reliance on an unreported judgment delivered on 6th June, 2023 in WPA 9610 of 2023 in the case of ***Krishna Cold Storage v. The State of West Bengal & Ors.***, the judgment delivered in the case of ***Pushpa Devi Jain versus Assistant Commissioner of Revenue, Bureau of Investigation*** reported in ***(2023) 152 Taxmann.com 239 (Calcutta)*** it is submitted that unless there is willful delay, the petitioners cannot be made responsible and no penalty could have been thrust on the petitioners in terms of Section 129(3) the said Act. The order impugned should be set aside.

12. Mr. Agarwal, learned advocate appearing for the respondents, on the other hand submits that admittedly the e-way bill in the present case had expired on the date when the vehicle-in-question along with the goods were intercepted. It is immaterial whether there is *mens rea* attached. By placing reliance on a judgment delivered in the case of ***Asian Switchgear Private Limited*** (supra), it is submitted that the Hon'ble Division Bench in paragraph 37 has come to a finding that the department stands relieved of the burden of proof of

mens rea or motive in respect of a statute imposing penalty as a civil obligation for violating a tax regime.

13. By further placing reliance on the judgment delivered in the ***Vardhan Associates Pvt. Ltd. v. Assistant Commissioner of State Tax Central Section & Ors.*** reported in **(2024) 158 Taxmann 89 SC** it is submitted in an identical set of facts, the Hon'ble Supreme Court was, *inter alia*, pleased to observe that the appellant cannot shirk from its responsibilities to comply with the requirement of law to generate e-way bill. Having regard to the aforesaid he submits that the present writ petition should be dismissed as no case for interference has been made out.

14. Heard the learned advocates appearing for the respective parties and considered the materials on record. Admittedly, in this case it is noticed that the goods in question which were in transit from Bardhaman to Siliguri, were covered by tax invoice and e-way bill. Before the said goods could reach the consignee and was on transit, the e-way bill expired on 12th May 2023 at about 11.59 P.M. The goods were not only intercepted on the following day but an order of detention under Section 129 (1) of the said Act was passed. The same was subsequently followed by notice under Section 129(1) of the said Act. From the aforesaid documents which are already on record, it would appear that no other allegation apart from the expiry of the e-way bill is noted. It may be seen that the petitioners in terms of Section 129(1)(b) of

the said Act had got the goods released upon payment of penalty and consequent thereupon, the release order dated 18th May 2023 was issued. Subsequently, the proceedings under Section 129 (3) of the said Act was disposed of by passing an order dated 18th May 2023 by confirming the order passed earlier.

15. Mr. Choraria has submitted that inasmuch as the petitioners had made payment of tax, no response to the show cause was issued. He, however, submits that the petitioners being aggrieved by the order under Section 129(3) of the said Act had preferred the appeal under Section 107 of the said Act. From the records, it would appear that amongst the several grounds, one of the grounds of appeal which had been noted down in the order passed by the appellate authority is that there was no *mens rea* on the part of the petitioners to evade tax as the assessee could have simply generated an e-way bill from Siliguri. Non evasion was of Tax was in effect made a ground as well.

16. I find that the appellate authority had rejected the said appeal by observing that the adjudicating authority was justified in detaining the goods and imposing penalty and it did not find any substantial reason to interfere with the order passed by the adjudicating authority. There is no reference to the ground of non-evasion of tax or deliberate delay. Although, Mr. Agarwal by placing reliance on a judgment delivered by the Division Bench of this Court in the case of **Asian Switchgear Pvt. Ltd.** (supra)

claims that the department stands relieved of the burden of proof of *mens rea* or motive in respect of statute imposing penalty as a civil obligation for violating a tax regime, I find that such observation is based on the judgments delivered by the Hon'ble Supreme Court in the cases of **Chairman, SEBI v. Shriram Mutual Fund & Anr** reported in (2006) 5 SCC 361, **Guljag Industries v. Commercial Tax Officer** reported in (2007) 7 SCC 269 and the **State of Gujrat and Anr v. Saw Pipes Limited** reported in 2023 SCC Online SC 428.

17. The Hon'ble Division Bench in the said case of **Asian Switchgear Pvt. Ltd.** (supra) in paragraph 27 has been pleased to observe as follows:

*“27. Relevancy of motive in respect of imposition of tax liability to the extent that it result in civil liability has been examined by the Supreme Court in **Shriram Mutual Fund & Another (supra)**, **Guljag Industries (supra)** and in **Saw Pipes Limited (supra)**. The Supreme Court has held in such authorities that, mens rea is not an essential ingredient for contravention of the provisions of a civil act. It has also held that, penalty is directed since the contravention of the statutory provisions as contemplated by a statute is established and therefore, the intention of the parties committing such violation becomes immaterial. The breach of civil obligations which attracts penalty under the provision of a statute would immediately attract levy of the penalty irrespective of the fact whether the contravention has been made by the defaulter with any*

guilty intention or not. In none of these three authorities the Supreme Court had the occasion to consider the provisions of the Act of 2017.”

18. Having regard to the aforesaid, it would be clear that in all the three cases, i.e., **Chairman SEBI v. Shriram Mutual Fund & Another** reported in (2006) 5 SCC 361., **Guljag Industries v. Commercial Tax Officer** reported in (2007) 7 SCC 269, and in **State of Gujrat and Anr v. Saw Pipes Limited** reported in 2023 SCC Online SC 428, the Hon’ble Supreme Court had no occasion to consider the provisions of the said Act. I may, however, note that that the Hon’ble Division Bench despite observing that the department may be relieved of its burden of proof of *mens rea* had at the same time proceeded to conclude that the defence raised is required to be adjudicated upon by passing a reasoned order and that absence of requirement to establish *mens rea* by the department cannot be equated with an automatic imposition of penalty under the Scheme of Section 129 of the said Act. In this context, it may be relevant to refer to the case of **Assistant Commissioner (ST) & Ors. v. Satyam Shivam Papers (P) Ltd. and others** reported in (2022) 14 SCC 157. In paragraph 4 of the aforesaid judgment the Hon’ble Supreme Court had proceeded to observe as follows:-

“4. The High Court has further found and, in our view, rightly so thus : (Satyam Shivam Papers case [Satyam

Shivam Papers (P) Ltd. v. CST, 2021 SCC OnLine TS 698] , SCC OnLine TS paras 47-48)

“47. How the second respondent could have drawn an inference that petitioner is evading tax merely because the e-way bill has expired, is also nowhere explained in the counter-affidavit.

48. In our considered opinion, there was no material before the second respondent to come to the conclusion that there was evasion of tax by the petitioner merely on account of lapsing of time mentioned in the e-way bill because even the second respondent does not say that there was any evidence of attempt to sell the goods to somebody else on 6-1-2020. On account of non-extension of the validity of the e-way bill by the petitioner or the auto trolley driver, no presumption can be drawn that there was an intention to evade tax.”

19. The Division Bench of this Court in the case of ***Pushpa Devi Jain*** (*supra*) while considering an identical issue in paragraph 4 had been pleased to observe as follows:-

“Considering the peculiar facts of the case, we find that there is no lack of bona fide on the part of the appellant to state that there was wilful misconduct committed by the appellant while transporting the goods. There is every possibility that even if an application was made for extension of the e-way bill within the time permitted, 23rd April, 2022 being a Saturday, the e-way bill, in all probabilities, would not have been revalidated within the eight hours period.”

20. Having regard to the aforesaid, I am of the view that simply because there was no extension of the e-way bill, the same does

not pre-supposes that there was an intention to evade tax. There is no finding either by the adjudicating officer or by the appellate authority as regards the intent of evasion of tax. There appears to be no material available to conclude evasion of Tax. It is true that the Hon'ble Supreme Court in the case of **Vardan Associates** (supra) in paragraph 11 had been pleased to observe that the appellant cannot shirk from its responsibilities to comply with the requirements in law to generate a fresh e-way bill or to seek extension thereof. But the observations made by the Hon'ble Supreme Court in the said judgment are in relation to a challenge as regards payment of tax and penalty and not in relation to the factum of presumption being drawn on the intention to evade tax on the non-extension of the validity of the e-way bill.

21. Having regard to the aforesaid and the case made out by the petitioners and taking into consideration the fact that the goods were intercepted within 24 hours from the expiry of the validity of the e-way bill, including there being no material on record to show that the petitioners were involved in evasion of tax and the peculiar facts of the case, I propose to and do hereby set aside the orders dated 18th May 2023 passed under Section 129 (3) of the said Act as also the order passed by the appellate authority dated 13th September 2023 under Section 107 of the said Act.

22. In view of the setting aside of the aforesaid orders, all legal consequences will automatically follow.
23. With the above observations and directions, the writ petition being WPA 842 of 2024 is accordingly disposed of.
24. There shall be no order as to costs.
25. Urgent Photostat certified copy of this order, if applied for, be made available to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)

Sb/saswata