Court No. - 10

Case :- WRIT TAX No. - 1503 of 2024
Petitioner :- M/S Janta Machine Tools
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Ravi Pratap Singh,Tanmay Sadh
Counsel for Respondent :- C.S.C.

Hon'ble Piyush Agrawal,J.

1. Heard learned counsel for the petitioner and Mr. Ravi Shanker Pandey, learned ACSC for the State-respondents.

2. By means of present petition, the petitioner is assailing the order dated 16.5.2024 passed by respondent no. 2 and the order dated 26.9.2022 passed by respondent no. 3.

3. Learned counsel for the petitioner submits that the petitioner is a partnership firm and is engaged in the business of purchase and sale of machines, machinery part, hardware goods, etc. having GSTIN No. 09AAKFJ9517B1Z9 and its registered place of business is situated in Agra. During course of business, a search was conducted by respondent no. 3 on the premises of petitioner firm on 4.5.2022 and in pursuance thereof the proceedings under the GST Act were initiated by issuing notice dated 20.7.2022 under Section 130 read with Section 122 of CGST / UPGST Act by which proposed demand of tax of Rs. 7,17,560/- along with penalty of Rs. 7,17,560 and confiscation fine of Rs. 7,17,560 was raised against the petitioner, to which the petitioner submitted its reply on 27.7.2022 but being not satisfied with the same, the impugned order dated 26.9.2022 has been passed against which the petitioner has filed an appeal, which was partly allowed to the extent that relief of Rs. 6,93,869/- was granted and remaining demand of Rs. 14,58,811/- has been confirmed. Hence the present petition.

4. He further submits that the proceedings under section 130 of the GST Act could not have been initiated against the petitioner, rather, proceedings under sections 73/74 of the GST Act should have been initiated.

5. He further submits that the issue in hand is squarely covers with the decision of this Court in **S/s Dinesh Kumar Pradeep Kumar Vs. Additional Commissioner, Grade - 2 & Another [Writ Tax No. 1082 of 2022, decided on 25.07.2024]**, which has been affirmed by the Apex Court in **Special Leave Petition (Civil) Diary No. 5879 of 2025 vide order dated 17.4.2025**. He prays for allowing the writ petition.

6. *Per contra,* learned Standing Counsel for the State - respondents supports the impugned orders.

7. After hearing learned counsel for the parties, the Court has perused the record.

8. It is not in dispute that survey was conducted at the business premises of the petitioner on 4.5.2022. It is also not in dispute that excess stock was found, which triggered the initiation of the present proceedings against the petitioner. On various occasions, this Court has held that if excess stock is found, then proceedings under sections 73/74 of the GST Act should be pressed in service and not proceedings under section 130 of the GST Act, read with rule 120 of the Rules framed under the Act.

9.This Court in **S/s Dinesh Kumar Pradeep Kumar (supra)** has held as under:-

> *"9. Recently, this Court in Writ Tax No. 1007 of 2022 (M/s Shree Om Steels Vs. Additional Commissioner Grade-2 and Another) along with connected cases has held in para nos. 10, 11, 12 & 13 as under:-*
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> > *"10. The issue in hand is covered by the judgement of this Court in Metenere Limited (supra), in which following observations have been made:-*
> >
> > > *"22. From the perusal of the scheme of the Act and the statutory provisions what emerges is that Section 9 of the CGST is the charging section which provides for levy of tax on supplies of goods or services. Section 12 of the CGST Act provides for time on which the tax are to be paid and elaborates the "time of supply of goods" and Section 12 (2) clearly provides that the "time of supply of goods" is the date of issue of invoices or the date of receiving of the payment in respect to such supplies.*
> > >
> > > *23. Section 35 (1) clearly provides that all the registered person are required to keep and maintain at the principal place of business a true and correct account of things specified in Clause (a) to (f). The Second proviso to Section 35 (1) ,Rule 56 and Rule 57 make it further necessary to keep the said documents as specified in Clause (a) to (f) in the electronic form.*
> > >
> > > *24. Section 35 (6) of the said Act provides that in the event the person fails to keep their accounts for the goods or the services in accordance with the provisions of Sub-section 1of Section 35, the proper officer is empowered to determine the amount of tax payable on the goods or the services which are unaccounted for as if such goods or services had been supplied by such person and the provisions of Section 73 or 74 shall mutatis mutandis apply for determination of the said tax.*
> > >
> > > *25. A perusal of the said section 35(6) makes it clear that proper officer is empowered to determine the taxes payable and while determining the said tax payable he is bound to*

determine the same in accordance with the provisions of Sections 73 & 74 of the Act.

26. In the present case, the proper officer was empowered to determine the liability of payment of tax in terms of the powers conferred under Section 35 (6) after resorting to the procedure as established under Section 74 of the Act. Section 74 of the Act reads as under:

> *Section 74 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.*
>
> *(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*
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> *(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.*
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> *(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.*
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> *(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.*

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

27. Although in terms of the provisions of Section 35 (6), the

unaccounted goods are "deemed to be supplied' however, determination and quantification of the tax on the said "deemed supply' has to be done in accordance with Section 73 or Section 74 of the Act.."

11. In the aforesaid case, this Court has specifically held that even if excess stock is found, the proceedings under section 130 of the UPGST Act cannot be initiated.

12. Further, in M/s Maa Mahamaya Alloys Pvt. Ltd. (supra), this Court has held as under:-

"9. Considering the rival submissions made at the bar, the following questions which arise for determination;

(I). Whether tax can be assessed/ determined in exercise of powers under Section 130 of the GST Act?

(II). Whether penalty can be levied only on the allegations that at the time of verification of goods, the goods in excess were found at the premises?

(III). Whether the service of notice as claimed by the respondent satisfies the requirement contemplated under Section 169 of the GST Act?

(IV). Whether the valuation of goods can be done on the basis of eye estimation alone and on the basis of production capacity and/ or the consumption of electricity etc?

11. The issue raised herein in Issue no.I is marked resemblance to facts referred in the judgment of this Court in the case M/s Metenere Limited (supra) wherein on the basis of a similar search conducted, the demand was quantified. This Court after analysing the provisions of the Act and the Rules applicable held that for the infractions as contained in Section 122 of the GST Act and specified in Column "A' of paragraph 35 of the said judgment M/s Metenere Limited (Supra) held that penalty has to be Rs.10,000/- or the amount of tax evaded whichever is higher, whereas for the infractions specified in Column "B' of paragraph 35, the penalty that can be imposed is Rs.10,000/- only. This Court also held that the demand for tax can be quantified and raised only in the manner prescribed in Section 73 or Section 74 of the Act, as the case may be.

12. In the light of what has been decided by this Court in the case of M/s Metenere Limited (Supra), it is clear that the entire exercise resorted to under Section 130 of the GST Act for assessment/ determination of the tax and the penalty is neither stipulated under the Act, nor can be done in the manner in which it has been done, more so, in view of the fact that the department itself had undertaken the exercise of

quantifying the tax due, by taking recourse under Section 74.

13. As the entire tax has been determined and the penalty has been levied only on the basis of a survey by taking recourse under Section 130 of the GST Act and not taking a recourse to Section 74, the order impugned is clearly unsustainable.

15. On a plain reading of the allegations levelled against the petitioner with regard to the improper accounting of goods, the only stipulation contained in Clauses (ii) and (iv) of sub-section (1) of Section 130 can at best be invoked by the department, however, in the present case, even assuming for the sake of argument, that the goods were lying in excess of the goods in record, the case against the petitioner would not fall under Clause (ii) of sub-section (1) of Section 130 for the simple reason that the liability to pay the tax arises at the time of point of supply, and not at any point earlier than that. On a plain reading, the scope of Clause (ii) of sub-section (1) of Section 130 is that any assessee who is liable to pay tax and does not account for such goods, after the time of supply is occasioned, would be liable to penalty under Clause (ii). Analyzing Clause (iv) of sub-section (1) of Section 130, the contravention of any provision of the Act or the Rules should be in conjunction with an intent to evade payment tax and penalty can be levied by invoking Clause (iv) only when the department establishes that there were a contravention of the Act and Rules coupled with the "intent to make payment of tax'. There is no such allegation in the show cause notice or any of the orders, I have no hesitation in holding that even the Clause (iv) of sub-section (1) of Section 130 would not be attracted in the present case."

13. In the aforesaid case also, similar view has been taken by this Court and allowed the writ petition."

10. The law is clear on the subject that the proceedings under section 130 of the GST Act cannot be put to service if excess stock is found at the time of survey.

11. In view of the aforesaid fact as well as law laid down by this Court as referred herein above, the impugned orders dated 16.5.2024 and 26.9.2022 cannot be sustained in the eyes of law and same are hereby quashed.

12. The writ petition succeeds and is **allowed**.

13. Any amount deposited by the petitioner shall be refunded to him in accordance with law.

Order Date :- 22.5.2025
Rahul Dwivedi/-