

**P.B. SURESH KUMAR, J.**

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**W.P.(C) No. 196 of 2018**  
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**Dated 17th January, 2018**

**JUDGMENT**

Petitioner is a public limited company engaged in the establishment and maintenance of towers for telecom service providers. They are registered under the Central Goods and Services Tax Act (the CGST Act) and the Kerala State Goods and Services Tax Act (the SGST Act).

2. It is stated by the petitioner that the materials procured by them for their use at the various tower locations in the State are being stored at their warehouses and the same will be transported to the various tower locations as and when required. On 7.12.2017, in terms of Ext.P1 GST tax invoice, the petitioner procured the batteries required for their various tower locations including Gandhi Nagar in Ernakulam District and Ambalappuzha in Alappuzha District. As the said transaction was an interstate purchase, the goods suffered the tax payable in terms of Integrated Goods and Services Tax Act (the IGST Act). On 20.12.2017. the petitioner transported the, batteries covered by Ext.P1 GST tax invoice intended for tower locations referred to above on the strength of delivery chalan. The goods transported by the petitioner were intercepted by the first respondent and the petitioner was issued Ext.P3 notice of detention under Section 129 of the CGST and SGST Acts. stating that the movement of goods was not declared by the petitioner as provided for under Rules 55 and 138 of the Kerala Goods and Services Tax Rules (the State GST Rules). As per Ext.P3 notice, the first respondent has called upon the petitioner to pay a sum of Rs 57,192/- towards CGST and SGST and equal amount towards penalty, treating the transaction as a

taxable supply. Sub rule (3) of Rule 55 of the State GST Rules provides that where goods are being transported on a delivery chalan in lieu of invoice, the same shall be declared as specified in Rule 138 of the said Rules. Rule 138 of the State GST Rules provides that persons in charge of conveyances carrying consignment of goods, where the goods are transported on a delivery chalan, shall carry along with the goods a declaration in Form KER-1 uploaded before such transportation of goods in the Kerala Value Added Tax Information System portal (KVATIS). The essence of Ext.P3 notice, therefore, was that the goods transported by the petitioner were not accompanied by the uploaded Form KER-1 declaration. The petitioner sent Ext.P4 reply to Ext.P3 notice stating that it is on account of an inadvertent omission on the part of their employees that Form KER-1 declaration was not uploaded and that Form KER-1 declaration in respect of goods covered by the delivery chalan was uploaded immediately on receipt of Ext.P3 notice. Along with Ext.P4 reply, a copy of the uploaded declaration in Form KER-1 was also submitted by the petitioner to the first respondent. Ext.P5 is the Form KER-1 declaration uploaded by the petitioner. The explanation offered by the petitioner was not acceptable to the first respondent. The first respondent, therefore, sent Ext.P6 reply to Ext.P4 4 explanation stating that the Form KER-1 declaration was uploaded by the petitioner only after the detention and therefore, the same cannot be accepted as a document in terms of the requirements contained in Rules 55 and 138 of the State-GST Rules. In other words, the stand taken by the first respondent in Ext.P6 communication is that the goods can be released only on payment of the tax and penalty claimed in terms of Ext.P3 notice. Ext.P3 detention notice and Ext.P6 communication issued by the first respondent are under challenge in the writ petition.

3. Heard the learned counsel for the petitioner as also the learned Government Pleader.

4. The learned counsel for the petitioner submitted that the only defect noted in the documents that accompanied the goods was absence of Form KER-1 declaration and that since Form KER-1 declaration was uploaded and made available to

the first respondent immediately on receipt of notice, there is no justification for the continued detention of the goods. It was also contended by the learned counsel for the petitioner that the authenticity of the delivery chalan issued by the petitioner in the instant case is not disputed by the first respondent in Ext.P3 notice and therefore, the first respondent cannot be heard to contend that the transaction involves a taxable supply. According to the learned counsel, since the transaction does not involve a taxable supply, the goods cannot be detained invoking the power under Section 129 of the CGST and SGST Acts.

5. Per contra, the learned Government Pleader submitted that going by the provisions contained in Section 129, the goods can be detained for violation of the provisions contained in the CGST and SGST Acts as also the rules made there under. According to the learned Government Pleader, insofar as it is admitted by the petitioner that the documents accompanied the goods did not include the declaration made in Form KER-1, it cannot be contended that the detention is illegal. In other words, according to the learned Government Pleader, goods can be detained even in transactions which do not involve taxable supply.

6. In order to resolve the issues, it is necessary to understand the scheme of the CGST and SGST Acts. GST is a destination based tax on consumption of goods and services. The taxable event under the GST regime is the supply of goods or services or both. Section 2(107) of the CGST and SGST Acts which are identical, defines "taxable person" as a person who is registered or liable to be registered under the said statutes. Section 2(108) of the CGST and SGST Acts which are identical, defines "taxable supply" as a supply of goods or services or both which is chargeable to goods and services tax under the said statutes. Section 7 of the statutes which are identical in dealing with the scope of supply, reads thus;

7. (1) For the purposes of this Act, the expression "supply" includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or

disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business;

(c) the activities specified in Schedule I, made or agreed to be made without consideration, and (d) the activities to be treated as supply of goods or services as referred to in Schedule II.

(2) Notwithstanding anything contained in sub-section (1)-

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1) and (2). the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

It is evident from the provisions contained in section 7 referred to above that only supplies made for consideration and the activities referred to in the identical entries contained in Schedule 1 of the statutes which are made or agreed to be made without consideration, would fall within the scope of supply. Schedule 1 referred to above reads thus:

**ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION.**

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.

2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business:

Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

3. Supply of goods—

(a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or

(b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.

4. Import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business.

In the light of the aforesaid provisions, there cannot be any doubt that when a taxable person transports the goods procured by them for own use to the site where the goods are to be consumed, the transaction would not involve any consideration. Such transactions would not fall within the scope of the Schedule 1 as well. As rightly pointed out by the learned counsel for the petitioner, it is seen from Ext.P3 notice that the first respondent does not dispute the genuineness of the delivery chalan. So long as the first respondent does not dispute the genuineness of the delivery chalan issued by the petitioner for transporting the goods involved, it has to be taken that the detention of the goods by the first respondent is solely for the reason that the goods did not accompany the documents required in terms of the State GST Rules. As noted above, it is on that ground, the learned Government Pleader attempted to support the detention. In other words, the present transaction would not fall within the

scope of taxable supply under the statutes. True, the petitioner has not uploaded the declaration in Form KER-1 before the goods were transported and as such, the transportation of the goods was not in accordance with Rules 55 and 138 of the State GST Rules. The question, therefore, is as to whether the detention as provided for under Section 129 of the statutes was justified merely for non compliance of Rules 55 and 138 of the State GST rules.

7. Chapter XIX of the statutes containing Sections 122 to 138 deals with offences and penalties. Among the said provisions, Sections 122 to 128 deal with imposition of penalties. Section 129 deals with detention, seizure and release of goods and conveyances in transit. Sections 130 and 131 deal with confiscation of goods or conveyances and levy of penalty and Sections 132 to 138 deal with the various offences under the Act. Among the said provisions, Section 129 dealing with detention, seizure and release of goods and conveyances in transit, reads thus

"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 there under, 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) or clause (c).

(4) No tax, interest or 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 tax and penalty as provided in sub-section (1) within seven days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

Provided 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 seven days may be reduced by the proper officer."

Section 130 of the statutes dealing with confiscation of goods or conveyances reads thus :

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

(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made there under 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 there under with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carnage of goods in contravention of the provisions of this Act or the rules made there under 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 penalty under section 122.

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

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

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



Provided also that where any such conveyance is used for the carnage 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.

A combined reading of Sections 129 and 130, especially the provision contained in sub section (6) of Section 129 indicates that the detention of the goods is contemplated under the statutes only when it is suspected that the goods are liable to confiscation. This aspect is seen clarified by the Central Board of Excise and Customs in the FAQs published by them on 31.3.2017 also. Section 130 dealing with the confiscation of goods indicates beyond doubt that the

confiscation of goods is contemplated under the statutes only when a taxable supply is made otherwise than in accordance with the provisions contained in the statutes and the Rules made there under with the intent to evade payment of tax. If that be so, mere infraction of the procedural Rules like Rules 55 and 138 of the State GST Rules cannot result in detention of goods, though they may result in imposition of penalty. In other words, detention of goods merely for infraction of the procedural Rules in transactions which do not amount to taxable supply, is without jurisdiction. In the result, the writ petition is allowed, the impugned communications are quashed and the first respondent is directed to release the goods referred to in Ext.P3 notice forthwith.

Sd/-

**P.B. SURESH KUMAR, JUDGE.**

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