IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR.JUSTICE ASHOK MENON

FRIDAY, THE 13TH DAY OF JULY 2018 / 22ND ASHADHA, 1940

W.A.No.371 of 2018

AGAINST THE JUDGMENT IN W.P(C).NO.196/2018-Y DATED 17.01.2018
OF HIGH COURT OF KERALA.

APPELLANT(S)/ RESPONDENTS:-

1 THE ASSISTANT STATE TAX OFFICER,
SQUAD NO.VII, ERNAKULAM-16.

2 STATE TAX OFFICER (INTELLIGENCE)
O/O. INSPECTING ASST.COMMISSIONER (INT.),
COMMERCIAL TAXES, ERNAKULAM -682 016.

BY SENIOR GOVERNMENT PLEADER SRI.MOHAMMED RAFIQ.

RESPONDENT(S)/ PETITIONER:-

M/S.INDUS TOWERS LIMITED,
VANKARATH TOWERS, NH BYPASS, PALARIVATTOM, COCHIN- 682 025,
REPRESENTED BY ITS LEGAL HEAD SRI.PREMAKRISHNAN NAIR.

BY ADVS. SRI. A.KUMAR
SRI. P.J.ANILKUMAR
SMT. G.MINI(1748)
SRI. P.S.SREE PRASAD

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25-06-2018, ALONG WITH W.A.NO.699 OF 2018, THE COURT ON 13-07-2018 DELIVERED THE FOLLOWING:

"C.R."

K. Vinod Chandran & Ashok Menon, JJ.

W.A.Nos.371 & 699 of 2018

Dated, this the 13th day of July, 2018

JUDGMENT

Vinod Chandran, J:

Whether in the case of a transport, wherein obviously there is no tax liability on the goods, there could be a detention and seizure effected under Section 129 of the Central Goods and Services Tax Act, 2017 [for brevity "CGST Act"] and Kerala State Goods and Services Tax Act, 2017 [for brevity "SGST Act"] and a release ordered as provided under sub-section (1) or order passed under sub-section (3) of Section 129, is the question raised in the appeal. We need to first briefly look at the facts of both these appeals filed by the State.

2. The writ petitioner in W.A.No.371/2018 is engaged in the establishment of infrastructure for cellular telephone Companies, meaning the erection and activation of towers and other infrastructure for effective services of the mobile companies. The petitioner for the purpose of such installation had imported from other States, batteries, which were stored in its go-downs at Ernakulam. These were to be installed in two sites at Gandhinagar

at Kadavanthara and at Ambalappuzha. The vehicle in which the transport was made was detained. On examination of the documents, it was found that the goods were accompanied with a delivery chalan as provided under Rule 55 of the Kerala Goods and Services Tax Rules, 2017. However, the declaration as required under Rule 138 being KER-I, was not seen uploaded or the print out accompanied with the goods. The detaining officer issued a notice at Ext.P3 detaining the goods against which the writ petitioner was before this Court. In the other appeal the writ petitioner, dealer in surgical gloves, sent the goods for quality appraisal on job-works and was transporting the same to their business premises for further sale; when the vehicle was detained.

3. The learned Single Judge looked into the provisions defining taxable person and taxable supply as also Section 7 detailing the scope of supply to find that when a taxable person transports goods procured by them for own use to the site, where the goods are to be consumed, the transaction is not for consideration and would not even fall within the scope of Schedule I. Schedule I enumerates those activities, though made without consideration, which fall within the scope of supply. The

delivery chalan which accompanied the goods had not been disputed and hence the transaction even according to the detaining officer would not fall within the scope of a taxable supply, was the finding. In such circumstances, the goods can be said to have been detained only for the infraction, insofar as a declaration under Rule 138 (KER-I) having not been uploaded and accompanied with the transport.

4. Section 129 which was invoked by the authorities was specifically looked into as also Section 130 and it was found so:

> "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."

As a consequence of the aforesaid finding, the goods were directed to be released unconditionally; finding the action under Section 129 to be without jurisdiction. The aforesaid decision challenged in W.A.No.371 of 2018 was followed in the judgment impugned in W.A. 699 of 2018.

5. The learned Senior Government Pleader assails the decision specifically pointing out the scheme of the goods and service tax enactment and the rules framed thereunder; which encompasses both the sale of goods and supply of services bringing in a total regime change insofar as; the former value added tax & general sales tax regime applicable to sale of goods alone. The check posts as provided in the earlier regime have been done away with and hence the stringent provisions also intended at deterrence of any attempt of evasion. The provisions of the Goods and Services Tax Act and the Rules framed there under have to be treated with the rigor it intends as against any violation; without reference to any *mens rea,* contumacious conduct or even a suspicion of attempt to evade tax. Section 129 is pointed out specifically to indicate that it is a *non obstante* clause which provides for detention and seizure in the case of any contravention

of the provisions of the Act and the Rules. The release of goods so detained can be effected only on satisfying the conditions either at (a), (b) or (c) of Section 129(1). Sub-section (3) of Section 129 is the provision enabling adjudication; which again refers to sub-clause (a) to (c) of sub-section (1). Taxability or otherwise is inconsequential, argues the learned Senior Government Pleader, especially pointing out that even in the case of exempted goods, the contravention of the Act and the Rules would entail penalty equal to 2% of the value of goods or 25,000/- rupees which ever is less in the case in which the transporter or the owner of the goods voluntarily comes forward for release of the goods. In the case of no such voluntary action having been taken, the goods would be released only on payment of an amount equal to 50% of the value of goods or 25,000/- rupees whichever is less; under sub-clause (b).

6. There is also provision for release of the goods upon furnishing security equivalent to the amount payable under clause (a) or clause (b) of Section 129(1). Sub-section (3) provides for an adjudication, wherein a notice is issued specifying the tax and penalty payable and thereafter passing an order for payment of such tax and penalty under clause (a), clause (b) or clause (c).

There can be release of the goods only on the tax and penalty being paid voluntarily under clause (a) or on the detainee satisfying the tax and penalty as levied under sub-section (3) of Section 129. The fact that the transport of goods was in pursuance of a transaction which is not taxable is irrelevant and inconsequential, according to the learned Senior Government Pleader. When exempted goods are also subject to a levy of tax and penalty, on a transport in contravention of the Act or Rules, the taxability fades into oblivion and the tax and penalty leviable would be in accordance with and by reference to the goods and the rate of tax as per the statute. Hence, the impugned judgment has to be set aside, is the strong compelling argument.

7. The learned Senior Government Pleader relies on the decision in ***Guljag Industries v. CTO*** **[(2007) 7 SCC 269]** and ***Asst. CTO v.Bajaj Electricals Ltd*****. [(2009) 1 SCC 308]** to further buttress his contention that taxability is of no consequence, since what is imposed under Section 129 is a civil liability for contravention of the Act and Rules. The evasion if any attempted, is not relevant as per the statute, for detention or imposition of penalty under Section 129. The judgments of two Division Benches of this

Court, reported in ***CTO v. Madhu M.B.*** **[(2017) 105 VST 244 (Ker.)]** and in ***W.A.No.509 of 2018*** dated 28.02.2018, are also pressed into service to contend that at least at the stage of detention it cannot be looked into whether there is any taxability or not and there should be security furnished, for the tax and penalty that can be imposed under Section 129(1)(a) or (b), to effect release of the goods. Necessarily for release, sub-clause (c) of Section 129(1) will have to be employed as provided in the statute.

8. The learned Counsel for the two respondents, however, points out that Section 129 specifically speaks of penalty as relatable to the tax applicable equal to 100% of the tax payable on such goods. This would necessarily indicate that there can be no penalty imposed under Section 129 if the transaction itself is proved to be one having no tax liability. It is pointed out that in the earlier regime of tax on sale of goods there was a specific provision insofar as providing a penalty to the extent of twice the tax evaded if such evasion could be computed and in all other cases where computation is not possible, penalty to the maximum extent of Rs.10,000/-. The earlier enactments specifically provided for a penalty, wherein the tax evasion could not be computed, which is

not available in the scheme under Section 129. Though there is a general penalty applicable under Section 125, the officer detaining the goods under Section 129 would not have the power to impose such penalty. Hence on detention and notice issued even for a technical breach there would be an imposition of tax and penalty as provided under clause (a) or (b). The adjudication as provided under sub-section (3) is a mirage in the context of the liability being automatic.

9. The respondents seek to sustain the judgment of the learned Single Judge specifically pointing out that their transactions, one being of consignment to ones own site and the other of re-transmission after job work, are not taxable transactions. It is emphasized that the words employed in Section 129(1)(a) are 'applicable tax and penalty equal to one hundred per cent of the tax payable'. Hence, only if there is a liability to tax, could there be a detention and a subsequent order being passed for payment of tax and penalty under Section 129. It is pointed out that the learned Single Judge has found that there is no dispute raised by the detaining officer as to the delivery chalan which accompanied the transport. A delivery chalan is prepared in triplicate; which issued

forms are serially maintained with the assessee. The original of the delivery challan is for the consignee, the duplicate accompanies the transport and the triplicate is retained by the consignor/assessee for production along with the returns before the AO. Delivery chalan, as seen from Rule 55, is in lieu of a tax invoice and is only with respect to transactions where the transaction of transport of goods is not taxable. The detaining officer having not raised any suspicion against the delivery chalan, it is very evident that even the Department admits that the transport of goods, is pursuant to a transaction where there is no tax liability. Since there is no liability, there could be no penalty imposed in the case of the two transports covered by the two appeals. The learned Counsel also argues that under the GST regime an inter-State transaction is liable to tax even if it is 'consignment sale' under Section 7 of the Integrated Goods and Service Tax Act, 2017 [for brevity “IGST Act”). An intra-State supply is covered under Section 2(64) of the SGST Act. As the learned Single Judge has found, the present movement of goods are in instances where no supply, occurs even as enumerated in Section 7 of the IGST Act and, hence, there could be no tax or penalty levied on the transaction.

10. ***Guljag Industries*** is read over to contend that the instant case is not one in which there is a civil liability. ***Guljag Industries*** was concerned with two instances; one being the transport accompanied with a incomplete form and the other being a total absence of document, which are to accompany the goods. The finding with respect to a civil liability was confined to those instances where there was an incomplete form. In the case of absence of documents, the Hon'ble Supreme Court left it to be considered in the light of the judgment in ***State of Rajasthan v. D.P.Metals*** **[(2002) 1 SCC 279].** As held by the Hon'ble Supreme Court, the breach cannot be one merely of a technical or venial nature but postulates *mens rea*. In the present cases, where there was absence of the declaration under KER-1, it cannot be said that there is only a technical or venial breach and there should definitely be a guilty mind and a malafide intention.

11. ***CST v. Sanjiv Fabrics*** **[(2010) 9 SCC 630]** is also pressed into service to argue that if a prosecution is inevitable on detection of an offence, it could not be said to be one of civil liability. Section 132(1)(h) of the SGST Act is pointed out to indicate that a transport, in contravention of the Act and Rules, would invite

prosecution. Section 135 is a presumption insofar as *mens rea* in circumstances constituting a prosecution. Hence, it cannot be said that the liability under Section 129 can be imposed without any *mens rea* being there, especially when it would also lead to a prosecution; the actual initiation of which is inconsequential in deciding whether there should be *mens rea* in imposing penalty. The transactions in both the aforesaid cases being not taxable, there could be no detention or subsequent imposition of tax and penalty under Section 129. It is also pointed out that the adjudication as contemplated in the above provision would be a futile exercise, since on violation being found, necessarily tax and penalty would have to be imposed. This would violate the principles of reasonableness and fall foul of Article 14 of the Constitution of India. The last contention is with reference to Form KER-1 as seen from the SGST Rules. The form indicates a facilitation centre, which centres are now, after abolition of check posts; not available. Without the facilitation centre being shown, there could be no uploading effected, is the submission. Based on Section 138 of the SGST Act and Form KER-1 as seen from the Rules, it is argued that the declaration is required only for inter-State transport.

12. At the outset, it is to be stated that we refrain from considering the reasonableness of the provision or violation alleged of Article 14 for the simple reason that there is no challenge to the provisions as such in the writ petition. We also do not think that there is any finding in the notices issued as to the genuineness of the transaction having been accepted by the detaining officer. We were specifically taken to the notice at Exhibit P3 and the reply at Exhibit P6 in the writ petition; relating to W.A.No.371 of 2018. The officer, on interception, has spoken about the detention, its time and the existence of a delivery chalan. The officer then noticed Rule 138 and the absence of the document as prescribed under the said rule. The allegation was specifically with respect to violation of the Act and Rules, punishable under section 129. The reply also does not say anything more than this. From the notice and reply, it has to be only understood that on the delivery chalan being produced at the time of detention, the officer found a violation of the Act and Rules insofar as there being no Form KER-1 uploaded and a copy accompanying the goods. The delivery chalan, as produced by the assessee, indicated the assessee's case of a transaction on which no tax is payable which had to be supported by the uploaded

declaration.

13. In W.A.No.371 of 2018, the goods transported were said to have been purchased by the assessee inter-State and stored in his godown. The instant transport was allegedly to the work site of the assessee for installation of the goods at such work site. In W.A.No.699 of 2018, the assessee had purchased goods, then entrusted it for job work and was transporting it to its own business premises for further sale. Both produced delivery chalan issued by them. The delivery chalan having been produced, the transaction was found to be one having no tax liability; which necessarily required a declaration in Form KER-1. Sub-section (3) of section 55 specifically speaks of a declaration as specified in Rule 138, when goods are transported on a delivery chalan in lieu of invoice. This specifically is a violation of the Act and Rules and we cannot agree with the learned Single Judge that the genuineness of the delivery chalan was accepted by the department. A delivery chalan, under section 55, is not one issued by the Department and is one prepared by the assessee who is only obliged to maintain it serially numbered. It does not lie in the detaining officer's mouth to suspect the genuineness of the delivery

chalan when the consignor swears by it. But however the non taxable nature of the transaction will be justified as per the Rules only if a declaration is made as per Section 138. Only when there is a declaration uploaded in Form KER-1 would the transaction, which is non-taxable, would be intimated to the Department and available in its site. If not, there could definitely be a sale effected without an invoice; if the delivery chalan goes undetected, resulting in evasion of tax.

14. ***Guljag Industries*** on facts considered two different situations in which there was detention of vehicle and imposition of penalty under the Rajasthan Sales Tax Act. At one instance, when the vehicle was detained and checked, a declaration in Form ST 18-A was found in which the goods transported were not declared though signed in blank. The goods had originated in Andhra Pradesh and it was the contention of the consignee in Rajasthan; that the form was not filled up with the details of the goods, only since the consignor was not conversant in Hindi. The Adjudicating Officer refused to accept the explanation and in first appeal it was noticed that the form had to be filled up by the consignee; who had also signed it in blank. The Tribunal set aside

the penalty on the conclusion that there was no *mens rea* on the part of the consignee. The High Court reversing the findings of the Tribunal held that the declaration was not filled in deliberately, indicating the intention of the assessee to evade tax.

15. In the other instance when the goods were detained and checked the driver produced the bill for a certain quantity of goods. The quantity of goods, on actual verification, contained in the vehicle, was far more than that covered by the bill. On further inspection two envelopes with addresses of two different dealers were recovered from the vehicle and the bill produced was only for one of them. The assessee took a contention that the other bill was also with the driver and not produced at the time of inspection. The High Court, on facts found that, if for some reason the driver did not produce the documents at the check post, which were subsequently produced and it could be proved that the documents were not false or forged, there could be raised no allegation of evasion of tax.

16. In ***Guljag Industries*** the Court first considered the detention and imposition of penalty; in the context of production of a blank declaration signed by the consignee. On an examination of the provisions in the statute it was found that every import of taxable

goods has to be accompanied with a declaration in Form ST 18-A completely filled in, in all respects, which has to be produced by the driver *suo motu* at the check post on inspection. The declaration is in duplicate, the original of which, the competent officer at the check post has to forward to the Assessing Officer. It was also noticed that the Form in which the declaration has to be made is issued by the Department, which has two parts one to be filled in by the consignee and the other by the consignor. The consignee having signed it without entering the material particulars of the goods, it was held, the declaration itself becomes meaningless for reason of the identity & description of goods transported, having not been disclosed. Without these material particulars there could be manipulation of value and also multiple transport resulting in the assessment being put into jeopardy.

17. The Supreme Court, in ***Guljag Industries*** noticed the dichotomy; (i) a liability for non filing of statements before the Assessing Officer and (ii) the goods being in movement without supporting declaration forms in para 26. In the case of a statement not being filed before the Assessing officer, it results in evasion of tax. However, when the goods in movement are carried without the

declaration form, then strictly liability comes in. Even then; it was held that the goods being accompanied by a declaration form duly signed but not filled up would, from the modus operandi adopted, indicate *mens rea*.

18. From ***Guljag Industries*** we have to extract the following paragraphs speaking on *mens rea*:

> **"9.** Existence of mens rea is an essential ingredient of an offence. However, it is a rule of construction. If there is a conflict between the common law and the statute law, one has to construe a statute in conformity with the common law. However, if it is plain from the statute that it intends to alter the course of the common law, then that plain meaning should be accepted. Existence of mens rea is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals. A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime.
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> **32. ...** In the present case, we are not concerned with the transit pass. In the present case, there are no words in Section 78(5) similar to Section 28-B of the Uttar Pradesh Sales Tax Act, 1948 which states that if the transit pass was not handed over to the officer at the check-post, the Department would be entitled to raise the presumption that the goods in transit were sold in the State. As stated hereinabove, we have to go by the words used in the section to ascertain whether the legislature has excluded the element of mens rea. It is the statutory law enacted by

> the competent legislature which can exclude the presumption under common law. We hold that Section 78(5) excludes the presumption of mens rea which is normally prevailing in common law. Our reasoning is also based on one more factor, namely, that Section 78(5) provides a remedy for recovery of the loss caused to the State by such contravention".

19. The dichotomy as noticed by the Supreme Court and emphasised by the learned Counsel for the respondents is insofar as the declaration as to strict civil liability, for having failed to comply with the statutory obligation, being applicable only to cases in which there was blank/incomplete declaration form accompanying the goods. In cases in which there are no documents accompanying the goods in movement, the law laid down in ***State of Rajasthan Vs D.P. Metals (2002) 1 SCC 279*** was held to hold the field. ***D.P. Metals*** is a case in which a manufacturer of stainless steel sheets was faced with penalty proceedings by reason of absence of declaration in Form ST 18-A, on inspection of a truck carrying goods. The Court held that when there are false or forged declaration submitted to the competent officer then penalty under Section 78 (5) would be leviable. There is then a reasonable cause for a presumption to be raised of motive to mislead the authorities.

However in such cases the presumption would be rebuttable, by the assessee on production of requisite documents referred to in the provision. The declaration was to the effect that if by mistake some documents were not readily available at the time of checking, principles of natural justice require an opportunity to produce the same. Even in such circumstance, it has to be proved that there is no possibility of the document being subsequently prepared. The declaration in ***D.P. Metals*** according to us, is only to the effect that if the statutorily required documents were not accompanying the goods in transport, then the assessee should be given an opportunity to prove that the documents where in fact existing but the same did not accompany the goods for a bonafide reason. The opportunity to rebut cannot extend to the assessee creating or even making valid documents subsequent to the detention.

20. The High Court in interpreting a provision would and should be averse to speculation on facts. However considering the ramifications of our decision, in a fledgeling statute, we are constrained so to do. In the present case the assessee asserts the transport of batteries to be non-taxable for reason of the goods having been imported, to their godown and then transported to their

own work site for installation. The transaction as projected, definitely is non-taxable. The statutory rules prescribe certain documents to be accompanying the goods, even with a non-taxable transport. Rule 55 and 138 are the prescriptions, being a delivery chalan and a declaration uploaded in the site of the Department. Here we have to notice that the declaration forms as referred to in ***Guljag industries*** was issued by the Department, the counterfoil of which had to be produced before the Department at the time of filing of monthly returns or annual returns. In the present case as per the statutory rules the delivery chalan is to be issued by the consignor, in the prescribed form, serially and in triplicate. The delivery chalan is not issued by the Department and the numbering of the same in serial is fully with the assessee. We say this because the learned single judge has specifically found that there was no dispute regarding the genuineness of the delivery challan. It has to be observed that a dispute on genuineness would arise if the forms have been issued by the Department. In the earlier regime the Delivery Notes were issued by the Department, the copies of used ones to be furnished to the Department along with the return. In the present regime there is a virtual site maintained by the Department

where in the forms are to be uploaded; which serves as intimation to the Assessing Officer.

21. In the present case the delivery chalan which accompanied the transport is one issued by the assessee respondent, over which the assessee has absolute control and could be subject to manipulation. The assessee having transported the goods with delivery chalan, could very well sell the goods if the transport is undetected and then tear it up, as also issue a chalan with the same number for the next transport. The intimation regarding the transport of goods to the Assessing Officer is not achieved by the mere issuance of a chalan under Section 55. This would be achieved only if there is a declaration under Section138, which would ensure that the transaction is not otherwise and there is no diversion of the goods. This would establish the bonafides of the assessee and the transport, which could very well be checked and verified by the Department.

22. The exercise of speculation is insofar as there could have been a sale of batteries or the surgical gloves by the assessee, when there was no declaration uploaded, before the transport commenced, to the site as prescribed in the statutory

rules; if the transport went undetected. There is no dispute that in the present case the declaration uploaded was subsequent to the detention of the vehicle. This would not absolve the liability to tax and penalty under Section 129. As has been held in ***Guljag Industries*** and ***D.P. Metals*** when there is absence of a declaration in the prescribed form; mandatorily required to accompany a transport of goods, then there can be no automatic penalty. The transporter, consignor or the consignee should be given an opportunity to prove that there was in fact a declaration validly made, before the commencement of the transport and hence the ommission was only technical and venial in so far as the declaration not physically accompanying the transport. The violation would stand on a totally different footing, from a forged declaration or an incomlete or blank declaration accompanying the transport. Hence if the declration as in this case, was infact uploaded prior to the transport the assessee could be absolved from the penalty but otherwise penalty is an automatic consequence. The time when such declration was uploaded is crucial and a declaration made after the detention of the goods cannot lead to the assessee being absolved from the penalty.

23. ***Sanjiv Fabrics*** was urged to argue that mens rea is a necessary requirement and essential ingredient for sustaining an allegation of an offence committed. Answering the vexed question it was held so in para 24 & 25:-

> **"24.** Whether an offence can be said to have been committed without the necessary mens rea is a vexed question. However, the broad principle applied by the courts to answer the said question is that there is a presumption that mens rea is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered. (See *Sherras* v. *De Rutzen*and *State of Maharashtra* v. *Mayer Hans George*.)
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> **25.** Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of mens rea but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object of the statute and the language employed in the provision of the statute creating the offence. There is no gainsaying that a penal provision has to be strictly construed on its own language".

The offence alleged in the cited case law was purchase of goods on the strength of C forms; which goods were not included in the registration certificate. The defence set up was that there was a

bonafide mistake touching upon the description of the goods included in the registration certificate and the Department had been permitting such purchases in the previous years. The learned Judges held so, with reference to the specific statutory provisions in paragraphs 30 & 31:

> **"30.** To put it succinctly, in examining whether mens rea is an essential element of an offence created under a taxing statute, regard must be had to the following factors:
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> (*i*) the object and scheme of the statute;
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> (*ii*) the language of the section; and
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> (*iii*) the nature of penalty.
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> **31.** It is true that the object of Section 10(*b*) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said section, used the expression "falsely represents" in contradistinction to "wrongly represents". Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.

24. We do not think the principle has any application in the above case.Testing the facts emanating in this case with the dictum as laid down in ***Guljag Industries*** or even ***D.P. Metals***, there can be found a clear case of violation of the Act and Rules as also *mens rea*. ***Guljag Industries*** had noticed that when the

document accompanying the goods is absent, there should be an opportunity granted to the petitioner to rebut the presumption available of an attempt to evade tax by reason of the documents having not accompanied the goods. Answering this, we would think that the contention of adjudication under Section 129(3) being a mirage would also be answered. If the declaration was in fact uploaded before the commencement of the transport and by some means the driver was not able to produce it before the detention, definitely the consignor could prove that the declaration was uploaded before the transport. This would absolve the liability for penalty, since if the declaration had been uploaded prior to the transport, there is no *mens rea* on the consignor or the transporter and there could be found no intention of diversion of goods. However, a declaration made subsequent to the detention would not absolve the assessee from the liability. In fact in W.A.No.371 of 2018 there is a declaration made after detention; which cannot absolve the liability to penalty and also establish that there was no declaration made and uploaded prior to the transport. The fact of a declaration having been uploaded demolishes the contention of the respondent in W.A.No.699 of 2018 that it is physically impossible to

upload the declaration for reason of absence of facilitation centers.

25. In both the instances, the assessee had known that the transport was one where there was no tax liability to the goods and had also issued a delivery challan under Rule 55. When a delivery challan is issued under Rule 55, it is a mandate under sub-rule (3) of Rule 55 that there should be a declaration as specified in Rule 138. The fact that there was no such declaration uploaded in the site as an intimation to the Department of the transport of such goods raises a reasonable presumption of asttempt to evade tax, against the respondents herein. We cannot agree with the learned Single Judge that merely because there was no suspicion raised against the delivery challan there is an admission of non-taxability of the goods transported. The finding that the transaction would not fall within the scope of taxable supply under the statute, cannot be sustained for reason of there being no declaration made under Rule 138. The resultant finding that mere infraction of the procedural rules cannot result in detention of goods though they may result in imposition of penalty cannot also be sustained. If the conditions under the Act and Rules are not complied with, definitely Section 129 operates and confiscation

would be attracted. The respondents are entitled to an adjudication, but they would have to prove that in fact there was a declaration made under Rule 138 before the transport commenced. If they do prove that aspect, they would be absolved of the liability; otherwise, they would definitely be required to satisfy the tax and penalty as available under Section 129. We, hence, vacate the judgment of the learned Single Judge and allow the appeal. The vehicle and the goods having been already released unconditionally, further notice shall be issued and the adjudication under sub-section (3) completed; upon which if penalty is imposed, definitely the respondents would have to satisfy the same.

Writ Appeals allowed, leaving the parties to suffer their respective costs.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

jg/vku/-

[true copy]