

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 6TH DAY OF JULY 2018 / 15TH ASHADHA, 1940

WP(C).No. 21988 of 2018

PETITIONER(S)

FASHION MARBLE AND GRANITE COMPANY PVT.LTD  
S.A.ROAD VYTTILA, ERNAKULAM, REP.BY ITS MANAGING  
DIRECTOR, R.R.MAHESHWARI.

BY ADVS.SRI.DEEPU THANKAN  
SMT.NIMMY JOHNSON  
SMT.UMMUL FIDA  
SRI.A.ABDUL NABEEL

RESPONDENT(S) :

1. ASSISTANT STATE TAX OFFICER  
STATE GOODS AND SERVICE TAX DEPARTMENT, SQUAD NO.VII,  
ERNAKULAM - 682 020
2. THE ASSESSMENT OFFICER,  
RANGE II,CENTRAL GOODS AND SERVICE TAX DEPT. IS PRESS ROAD,  
ERNAKULAM 682 018.

R BY GOVERNMENT PLEADER, SRI. SHAMSUDHEEN V.K.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 06-07-2018,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

EXT.P1 TRUE COPY OF THE REGISTRATION CERTIFICATE  
28/6/2017.

EXT.P2 TRUE COPY OF THE INVOICE DATED 27/6/2018.

EXT.P3 TRUE COPY OF THE FORM GSTV MOV- 06 DATED  
27/6/2018.

EXT.P4 TRUE COPY OF THE FORM GSTV MOC-07 DATED  
27/6/2018.

EXT.P5 TRUE COPY OF THE PAYMENT RECEIPT DATED 28/6/2018.

EXT.P6 TRUE COPY OF THE LETTER SUBMITTED BY THE  
PETITIONER DT.28/6/2018

EXT.P7 TRUE COPY OF THE LETTER SUBMITTED BY THE  
PETITIONER DT.28/6/2018

EXT.P8 TRUE COPY OF THE EXTRACT OF THE TAX PAYERS  
FALLING UNDER THE JURISDICTION OF THE CENTER.

RESPONDENT'S EXHIBITS: NIL

// True copy //

PA to Judge

das

**DAMA SESHADRI NAIDU, J.**

**W.P.(C). No. 21988 of 2018 (W)**

**Dated this the 6<sup>th</sup> day of July, 2018**

## **JUDGMENT**

The petitioner, dealing in Marble and Granite, was a dealer under the Kerala Value Added Tax Act. Later it migrated to General Sales Tax Act (GST Act). When he supplied a consignment of goods to another dealer, the 1<sup>st</sup> respondent intercepted the goods and issued Ext.P3 detention proceedings. Later, he issued Ext.P4 show cause notice under Section 129(3) of the GST Act. Eventually, through Ext.P4 the 1<sup>st</sup> respondent demanded tax and penalty of Rs.22,880/-.

2. The petitioner paid the penalty as is evident from Ext.P5 receipt in the portal of GST under Section 49 of the Act. When it wanted the release of the goods, the 1<sup>st</sup> respondent insisted that the petitioner ought to have paid the amount shown in Ext.P4 either in cash or

through demand draft to the 1<sup>st</sup> respondent. Aggrieved, the petitioner has filed this writ petition.

3. Sri.Deepu Thankan, the learned counsel for the petitioner has submitted that the petitioner faced proceedings under Section 129 and it decided to pay the tax and penalty as demanded under Ext.P4 show cause notice. Therefore, it invoked Section 49 and paid the tax and penalty in the portal of GST maintained by the Central Government. According to him, Section 129 itself does not indicate the manner of payment. Under these circumstances, the residuary provision of Section 49 ought to be taken recourse to, which the petitioner did. Besides, he has also drawn my attention to the Circular No.41/15/2018-GST dated 13<sup>th</sup> April 2018, issued by the Government of India.
4. Under these circumstances, the learned counsel

contends that the 1<sup>st</sup> respondent's stand cannot be sustained and there shall be a judicial direction for the release of the detained goods.

5. The learned Government Pleader, on the other hand, has submitted that Section 17(5) of the Act is categorical that any payment paid under Section 129 will not entail input tax credit. According to him, it ought to have been under Section 130. Therefore, in the end, he has contended that as the 1<sup>st</sup> respondent has insisted to get the goods released, the petitioner ought to pay either in cash or through a demand draft.
6. Heard the learned counsel appearing for the petitioner as also the learned Government Pleader appearing for the respondents.
7. The facts are not in dispute. The goods detained, the petitioner was served with Ext.P4 show cause notice

under Section 129 (3) of the Act. Therefore, the petitioner decided to pay the demanded tax and penalty. Accordingly, he paid the amount through the portal of the GST. In this regard, I may examine Section 49 to the extent the provisions relevant. And it reads as follows:

**Section 49. Payment of tax, interest, penalty and other amounts.**

**49 (1)** Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

**49 (3)** The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

8. As the above extract demonstrates, the amount available in the electronic cash ledger may be used for making any

payment towards tax, interest, penalty, fees and so on. If we further examine the circular, which concerns the interception of conveyances, inspection of goods in movement, their detention, release, and confiscation. Of that circular, Clause 2(h) reads:

“Where the owner of the goods or any person authorized by him comes forward to make the payment of tax and penalty as applicable under clause (a) of sub-section (1) of section 129 of the CGST Act, or where the owner of the goods does not come forward to make the payment of tax and penalty as applicable under clause (b) of sub-section (1) of the said section, the proper officer shall, after the amount of tax and penalty has been paid in accordance with the provisions of the CGST Act and the CGST Rules, release the goods and conveyance by an order in FORM GST MOV-05. Further, the order in FORM GST MOV-09 shall be uploaded on the common portal and the demand accruing from the proceedings shall be added in the electronic liability register and the payment made shall be credited to such electronic liability register by debiting the electronic cash ledger or the electronic credit ledger of the concerned person in accordance with the provisions of section 49 of the CGST Act.”

9. Both the Section 49, read with Section 129, and the circular reveal that the person whose goods have been

detained could opt to pay the tax and penalty as mandated under those provisions.

10. At any rate, the learned Government Pleader has strenuously contended that Section 17(5) comes in the way. Therefore, I may examine that provision, too.

Section 17(5)(i) reads as follows:

17(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

11. This provision clarifies that if a dealer pays tax under Section 74, 129 or 130, that dealer may not be entitled to input tax credit. It does not go beyond.

12. At this juncture, the petitioner's counsel submitted that once the petitioner has paid the amount through the electronic portal, it entirely lies in its discretion how it should use it. If at all, in terms of Section 17(5), it is not



entitled to input credit, it can as well use the amounts lying to its credit for other purposes. To the extent it has paid the amount, the dealer stands discharged from the obligation under Section 129. Therefore, it is imperative that the respondent authorities shall release the goods, the counsel contended.

13. Indeed, as has rightly been contended by the petitioner's counsel, there is a difference between Section 129 and 130: Section 129 deals with detention and 130 with confiscation. Here, confiscation is not the case.

14. Under these circumstances, the Court declares that the 1<sup>st</sup> respondent's insistence that the petitioner should pay the amount either in cash or through demand draft cannot be sustained. As is further evident from Ext.P7, the petitioner is a dealer registered under the CGST. Cumulatively viewed, the petitioner's paying the penalty

under Ext.P5 receipt to the portal of GST is eminently sustainable. Therefore, I direct that the 1<sup>st</sup> respondent authority, release the goods, after receiving Ext.P5 receipt. With these observations, the writ petition stands disposed of.

Sd/-

**DAMA SESHADRI NAIDU  
JUDGE**