

Reserved.

Court No. - 38

Case :- WRIT TAX No. - 360 of 2020

Petitioner :- M/S Metenere Ltd.

Respondent :- Union Of India And Another

Counsel for Petitioner :- Anil Prakash Mathur

Counsel for Respondent :- A.S.G.I.,B.K.Singh
Raghuvanshi,Krishna Ji Shukla

Hon'ble Pankaj Bhatia,J.

1. Heard Sri A.P. Mathur, counsel for the petitioner, Sri B.K.S. Raghuvansi, counsel for the respondents and perused the record.

2. Petitioner has filed the present writ petition challenging the order passed by the Additional Commissioner GST, Gautam Buddh Nagar being the order dated 27.1.2020 as well as the Appellate Order dated 15.1.2020, whereby the appeal filed by the petitioner has been dismissed. As the Tribunal as provided for under the GST Act has not been constituted and in absence thereof the party cannot be left remediless as such the present petition has been filed.

3. By means of the order dated 1.12.2020, the hearing was concluded and liberty was granted to the parties to file their written arguments on or before 10.12.2020. Although the petitioner has filed written arguments, no written arguments have been filed by the respondents.

4. Facts, in brief, are that the petitioner is engaged in manufacture of lead ingots falling under GST Tariff Chapter Heading No. 7804. They are duly registered under the GST Act. On 6.1.2018 Anti Evasion Department of GST, Greater Noida visited the factory premises of the petitioner for verification of the records.

5. The petitioner claimed that petitioner had produced all the Returns of TRANS-1. It is alleged that on 10.1.2018 another team from the same department visited the factory premises and passed an order of detention detaining 12,979 metric tonnes of entire stock of the petitioner. It is alleged that the said stock included the stock manufactured prior to enforcement of GST. The petitioner claimed that it produced all the records, however, the records of GST were not available in the factory premises as the same were kept at head office of the petitioner situated at Ghazipur. It is further stated that subsequently the records were produced on various dates on 16.1.2018, 20.1.2018, 23.1.2018 and 31.1.2018. It is stated that despite production of the records, as sought for, an order dated 4.4.2018 was passed seizing the goods detained on 10.1.2018 by the separate order of seizure dated 4.4.2018. The petitioner claimed that it was served with a show cause notice dated 21.5.2018 (Annexure No.1 to the writ petition) wherein the petitioner was called upon to show cause as to why the goods valued at Rs. 1,07,99,43,351/-, which were seized, should not be confiscated and penalty should not be imposed, the action proposed action is quoted herein below;

“(i) The goods of total value of Rs. 1,07,99,43,351/- {Rupees One Hundred and Seven Crores Ninety Nine Lakh Fourty Three Thousand Three Hundred and Fifty One Only} which were seized by the department, involving Central Goods and Service Tax (CGST) of Rs 9,71,94,902/- (Nine Crores Seventy One Lakh Ninety Four Thousand Nine Hundred and Two Only) and State Goods and Service Tax (SGST) Rs 9,71,94,902- (Nine Crores Seventy One Lakh Ninety Four Thousand Nine Hundred and Two Only) should not be confiscated under Section 130 of CGST Act, 2017 & Section 130 of Uttar Pradesh GST Act, 2017, read with Section 35(6) of the CGST Act'2017 & Section 35(6) of the Uttar Pradesh GST Act'2017 and Section 74(1) of the CGST Act'2017 & Section 74(1) of the Uttar Pradesh GST Act'2017.

(ii) Penalty should not imposed upon them under Section 122(1)(xvi) and 122(1)(xvii) of CGST Act, 2017 read with

Section 122(1)(xvi) and 122(1)(xviii) of Uttar Pradesh GST Act, 2017.

(iii) Personal penalty should not imposed upon Shri Raman Gupta, Director of M/s Metenere Limited, Village Bheel Akbarpur, Main GT Road, Dadri, under Section 122 (3) (a) of the CGST Act'2017 read with Section 122 (3) (a) of the Uttar Pradesh GST Act'2017."

6. Petitioner Company and its Director to the show cause notice were called upon to file their written submissions within 30 days.

7. A perusal of the shows cause notice makes it clear that the main allegations that emerged from investigation were recorded as under:-

"(i) The party i.e. M/s Metenere Ltd, were not maintaining the records/accounts related to input tax credit, production, inward and outward supply or goods, output tax payable and paid etc, which are mandatorily to be maintained under Section 35(1) of the CGST Act 2017 at their principle place of business/additional place of business. Thus it appears that party clearly violated Section 35(1) of the CGST Act 2017.

(ii) There were huge stock of raw materials, work in progress and finished goods as detailed given above, in the factory premises. As the party could not produce any mandatory accounts and other records, the officers had all reasons to belief that the said goods have been stored by the party only to clear them without payment of GST as applicable."

8. The petitioner claimed to have filed its reply to the show cause notice denying the charges and that any verification of the stock was conducted. It was further submitted that no document showing unaccounted cash was found. The petitioner also denied its liability and requested for dropping of the show cause notice and proposed penalty.

9. It is also on record that aggrieved against the show cause notice dated 21.5.2018, the petitioner preferred a writ petition

before this Court being Writ Petition(Tax) No. 334 of 2019, which was disposed of by this Court on 15.3.2019 directing the respondents to decide the issue within a period of three weeks in accordance with law. In pursuance to the direction issued by this Court, the Additional Commissioner, GST & Central Excise Commissionerate, Gautam Budh Nagar heard the matter and passed an order confiscating the entire seized goods, however, the petitioner was given an option of redeeming the confiscated goods on payment of redemption fine amounting to Rs. 12 crores in terms of the provisions of Section 130 (2) of the Act. In addition to the said, a penalty of Rs. 19,43,89,804/- was imposed upon the petitioner in exercise of powers conferred under Section 122 (1) (xvi) & (xvii) of the CGST Act, 2017 read with Section 122 (1)(xvi) & (xvii) of the Uttar Pradesh GST Act, 2017. A further penalty amounting to Rs. 50,000/- was imposed on the Managing Director of the Company under Section 122 (3) of the CGST read with Section 122 (3) of the Uttar Pradesh GST (Rs. 25,000/- each under CGST and UP GST Act, 2017).

10. The petitioner herein preferred an appeal against the said order whereby the appeal filed was rejected and the order impugned in the appeal was confirmed. Aggrieved against the said two orders passed against the petitioner, present writ petition has been preferred as the Tribunal envisaged under the GST Act has not be constituted.

11. Sri A.P. Mathur, counsel for the petitioner extensively has drawn my attention to the provisions of CGST Act particularly Section 35, Section 122 and Section 130 of the said Act to impress that the allegations levelled were wholly baseless inasmuch as it was throughout the case of the petitioner that all the records were maintained at the principal place of business of the petitioner, which is situated at 138, East Delhi-110096, which was duly mentioned in the registration certificate also. He further argues that even, at the factory premises, the documents in the electronic form were stored in the computer, however, the

same could not be given to the respondent authorities on their visit as internet was not functional on the said date. Subsequently, the said records were produced on various dates as indicated in the writ petition. He further argues that there is no allegation or averment with regard to evasion of duty nor has any exercise been conducted by the department to establish and ascertain the duty evaded. He further argues that the said search occurred during the period when the transition was happening from the earlier tax regime to the present GST regime and, as such, the documents were being codified and were, thus, kept at the principal place of business, which is situated at Delhi and was also disclosed in the registration certificate issued under the GST. He further argues that even assuming without admitting the charges levelled against the petitioner the quantum of penalty that could have been imposed for violation of not keeping the documents at the manufacturing premises could not exceed Rs. 10,000/- inasmuch as no exercise for quantifying the "*tax evaded*" has ever been carried out nor is there any allegation with regard to evasion of tax even in the show cause notice. He argues that in terms of the provisions of GST, Section 12 clearly specifies that the liability to pay the tax on the goods arises only at the time of supply. He further stresses that Section 12 (2) clearly specifies that the time of supply of goods shall be the earlier of the following namely ;

the date of issue of invoice by the supplier

or

the date on which the supplier receives the payment with respect to such supply

and argues that there is neither any allegation with regards to issuance of invoices nor is there any allegation with regard to receiving of the payment. He further argues that even the confiscation is bad in law inasmuch as the confiscation of goods

can happen only under Section 130 (1) of the Act on the grounds as enumerated therein and none of the contingencies under Section 130 (1) were alleged even in the show cause notice. He further argues that even the detention and seizure of the goods was bad in law as no "*reason to believe*" which are "*sin qua non*" for exercise of powers under Section 66 were ever recorded. Lastly, he argues that even if the allegations made in the show cause notice against the petitioner with regard to non-maintenance of records at the place of business are accepted to be true, for the sake of arguments, a maximum penalty of Rs. 10,000/- is imposable in terms of the provisions of Section 122 (1) of the Act.

12. Counsel for the respondents, on the other hand, has argued that the orders passed against the petitioner is wholly justified inasmuch as on various occasions goods were not recorded in the records, which are liable to be maintained under Section 35. He, thus, justifies that the orders passed against the petitioner do not call for any interference in exercise of powers under Article 226 of the Constitution of India.

13. A perusal of the show cause notice, which is filed as Annexure No. 1, reveals that on the visit by the officers of the Department on 10.1.2018, it was informed to the officers that all the documents related to production and Cenvat are generally kept at their Head Office located at Ghazipur, Delhi. Paragraph 3 of the show cause notice is quoted hereinbelow:

“3. Consequently, Shri Ajay Kumar Agarwal in his statement recorded on 10.01.2018 before the Superintendent (Anti Evasion), CGST & Central Excise, Gautam Budh Nagar under Section-70 of the CGST ACT'2017 (RUD-3), interalia, stated that:

(a) He is working in the factory since 2014 as General Manager, HR.

(b) He informed that Sh. Ranjeet Singh Yadav is the Unit Head of Dadri Unit, who looks after day to day work of the factory and Sh. Manish Goyal is the Director of the unit.

(c) He informed that Sh. Ranjeet Singh Yadav is absent today and he is the immediate senior most person of the unit.

(d) On being asked about Taxation and GST Related matters, he stated that Sh. Ravi Kapil, Senior Manager, Taxation, looks after Taxation related matters of M/s Metenere Ltd. Dadri Unit and he sits at their Head Office which located at Ghazipur, Delhi.

(e) On being enquired about production, clearance, Cenvat and input credit related documents, he informed to the anti evasion officer that all the documents related to production and Cenvat are generally kept at their Head Office, located at Ghazipur, Delhi. They generally do not keep any production related document at their Dadri unit.”

14. It is further recorded that Section 35 (1) of the CGST Act requires that “*Every Registered person shall keep and maintain records as mentioned in Clause (a) to (f) of Section 35 at the principal place of business as mentioned in the certificate of registration*”, and as the party could not produce the mandatory records, the officers have 'reason to believe' that the petitioner is engaged in continuous process of production and supply and thus, goods were liable to be confiscated under Section 130 (1) of the CGST Act. It was also recorded in the show cause notice that principal place of business, as disclosed in the registration certificate, was shown as F-1A, SDF NSEZ, NOIDA.

15. It is interesting to note that in Paragraph No. 11 of the show cause notice, it is recorded that party was not maintaining records as are required under Section 35 (1) and thus they have violated the mandate of Section 35 (1) of the CGST Act. Curiously, it is recorded “*as the party could not produce any mandatory accounts and other records, the officers had all reasons to belief that the said goods have been stored by the party only to clear them without payment of GST as*

applicable.”. Thus, even in terms of the show cause notice, it was presumed that the goods which are stored would be cleared in future without payment of GST, which is applicable. In the show cause notice, the principal place of business was mentioned at Noida, although, the counsel for the petitioner has filed a registration certificate showing the principal place of business at Delhi, however, in the reply to the show cause notice there is no averment to that effect that the principal place of business was never at Noida and was actually at Delhi, as such, the said contention of the counsel for the petitioner cannot be accepted at this stage.

16. After the filing of the reply, Additional Commissioner being an adjudicating authority duly recorded that the documents, as were required to be maintained as specified under Section 35, were not maintained, even under Rules 56 and 57, the documents were required to be maintained electronically and assessee is required to produce the relevant records on being asked to do so and recorded and that the petitioner failed even to produce and submit required accounts before the adjudicating authority during the personal hearing held on 20.7.2018, 1.11.2018 and 8.1.2019.

17. In view of the submission made before the adjudicating authority, he further recorded that party through its letter dated 6.5.2019 had submitted computer print outs of ten sheets of the monthly summary of various goods, however, the adjudicating authority was not satisfied with the said summary and recorded that no accounts pertaining the production or manufacture were made available and thus, it was recorded that the party has failed to produce the records and to justify the various figures as disclosed in the ten computer sheets produced before the adjudicating authority. Considering the matter, he recorded that the party has failed to account for the goods in accordance with Section 35 (1) of the CGST Act, 2017 and failed to do so despite several opportunities. He further recorded that in terms of the

provisions of Section 35 (6), the authority is empowered to determine the amount of tax payable on the goods of the services, which are not accounted for. It is however, a common ground that no such exercise as envisaged under Section 35 (6) read with Section 73 or Section 74 has ever been undertaken nor the adjudication with regard to the amount was ever being done.

18. Thus, the Adjudicating Authority, after recording that the party has failed to maintain the records as required under Section 35 (1) of the Act, held that the goods were liable to be confiscated and proceeded to pass order to the following effect:

“(1) I order for confiscation of raw materials, Work in progress materials and finished goods [earlier seized on 04.04.2018 vide Form GST INS-02 (Order for Seizure) dated 04.04.2018] totally valued at Rs.1,07,99,43,351/- and involving Central GST of Rs. 9,71,94,902/- & State GST of Rs. 9,71,94,902/- under Section 130 of the Central GST Act, 2017 & Section 130 of the Uttar Pradesh GST Act, 2017 read with Section 35(6) of the CGST Act, 2017 & Section 35(6) of the Uttar Pradesh GST Act, 2017 and Section 74(1) of the CGST Act; 2017 & Section 74(1) of the Uttar Pradesh GST Act, 2017 on the grounds as discussed hereinabove. However, I give an option to the party to redeem the confiscated goods on payment of redemption fine amounting to Rs.12,00,00,000/-(Rupees Twelve Crore Only) within three months from the receipt of this order in terms of the provisions of Section 130(2) of above Acts subject to provisions of Section 130(3) of above Acts.

(2) I impose penalty of Rs.19,43,89,804/- on the party under the provisions of Section 122(1)(xvi) & (xvii) of the CGST Act, 2017 read with Section 122(1)(xvi) & (xvii) of the Uttar Pradesh GST Act, 2017 on the grounds mentioned hereinabove equivalent to Tax (CGST+SGST) involved in seized goods.

(3) I impose personal penalty amounting to Rs. 50,000/- (Rs. Fifty Thousand Only) on Sri Raman Gupta, Managing Director of the company under Section 122(3) of the CGST Act, 2017 read with Section 122(3) of the Uttar Pradesh, GST Act, 2017 (Rs. 25,000/- each under CGST Act, 2017

and UPGST Act, 2017) on the grounds mentioned hereinabove.

The adjudged dues shall be paid by the party forthwith.”

19. The petitioner preferred an appeal before the Appellate Authority. The Appellate Authority, once again, after referring to Section 35 of the CGST Act read with Rules 56 and 57 of the CGST Rules, recorded that it was mandatory for the appellant “to have maintained the records of production” at the principal place of business/additional place which they failed to do so. Thus, he proceeded to uphold the order of the adjudicating authority to the effect that appellant has failed to maintain the records as required to be maintained under Section 35 (1) of the CGST Act read with Rule 56 and 57 of the said Rules.

20. On the basis of the material available on the record and the arguments advanced, the point of determination that arise for consideration are;

(i) Whether the respondents were justified in recording that the petitioner-appellant has failed to maintain the records as required to be maintained under Section 35 (1) of the CGST Act read with Rules 56 and 57 of the CGST Rules?

(ii) Whether the order of confiscation as passed was justified in facts of the case ?

(iii) Whether in the facts and circumstances of the case, the imposition of the penalty, as has been done by means of the impugned order, is in accordance with Section 122 of the CGST Act?

Statutory provisions applicable to the facts of the case.

21. Section 35 (1) CGST Act, Rules 56 & 57 of the CGST Rules, 2017 as well as Section 122 and Section 130 of the CGST Act are being quoted for ready reference:

Section 35 (1) of the CGST ACT, 2017

“(1) Every registered person shall keep and maintain, at his principal place of business, as mentioned in the certificate of registration, a true and correct account of—

- (a) production or manufacture of goods;*
- (b) inward and outward supply of goods or services or both;*
- (c) stock of goods;*
- (d) input tax credit availed;*
- (e) output tax payable and paid; and*
- (f) such other particulars as may be prescribed:*

Provided that where more than one place of business is specified in the certificate of registration, the accounts relating to each place of business shall be kept at such places of business:

Provided further that the registered person may keep and maintain such accounts and other particulars in electronic form in such manner as may be prescribed.”

Section 35 (6) of the CGST ACT, 2017

(6) Subject to the provisions of clause (h) of sub-section (5) of section 17, where the registered person fails to account for the goods or services or both in accordance with the provisions of sub-section (1), the proper officer shall determine the amount of tax payable on the goods or services or both that are not accounted for, as if such goods or services or both had been supplied by such person and the provisions of section 73 or section 74, as the case may be, shall, mutatis mutandis, apply for determination of such tax.

CGST Rule 56: Maintenance of Accounts by Registered Persons

(1) Every registered person shall keep and maintain, in addition to the particulars mentioned in sub-section (1) of section 35, a true and correct account of the goods or services imported or exported or of supplies attracting payment of tax on reverse charge along with the relevant documents, including invoices, bills of supply, delivery challans, credit notes, debit notes, receipt vouchers, payment vouchers and refund vouchers.

(2) Every registered person, other than a person paying tax under section 10, shall maintain the accounts of stock in respect of goods received and supplied by him, and such accounts shall contain particulars of the opening balance, receipt, supply, goods lost, stolen, destroyed, written off or disposed of by way of gift or free sample and the balance of stock including raw materials, finished goods, scrap and wastage thereof.

(3) Every registered person shall keep and maintain a separate account of advances received, paid and adjustments made thereto.

(4) Every registered person, other than a person paying tax under section 10, shall keep and maintain an account, containing the details of tax payable (including tax payable in accordance with the provisions of sub-section (3) and sub-section (4) of section 9), tax collected and paid, input tax, input tax credit claimed, together with a register of tax invoice, credit notes, debit notes, delivery challan issued or received during any tax period.

(5) Every registered person shall keep the particulars of –

(a) names and complete addresses of suppliers from whom he has received the goods or services chargeable to tax under the Act;

(b) names and complete addresses of the persons to whom he has supplied goods or services, where required under the provisions of this Chapter;

(c) the complete address of the premises where goods are stored by him, including goods stored during transit along with the particulars of the stock stored therein.

(6) If any taxable goods are found to be stored at any place(s) other than those declared under sub-rule (5) without the cover of any valid documents, the proper officer shall determine the amount of tax payable on such goods as if such goods have been supplied by the registered person.

(7) Every registered person shall keep the books of account at the principal place of business and books of account relating to additional place of business mentioned in his certificate of registration and such books of account shall include any electronic form of data stored on any electronic device.

(8) Any entry in registers, accounts and documents shall not be erased, effaced or overwritten, and all incorrect entries, otherwise than those of clerical nature, shall be scored out under attestation and thereafter, the correct entry shall be recorded and where the registers and other documents are maintained electronically, a log of every entry edited or deleted shall be maintained.

(9) Each volume of books of account maintained manually by the registered person shall be serially numbered.

(10) Unless proved otherwise, if any documents, registers, or any books of account belonging to a registered person are found at any premises other than those mentioned in the certificate of registration, they shall be presumed to be maintained by the said registered person.

(11) Every agent referred to in clause (5) of section 2 shall maintain accounts depicting the,-

(a) particulars of authorisation received by him from each principal to receive or supply goods or services on behalf of such principal separately;

(b) particulars including description, value and quantity (wherever applicable) of goods or services received on behalf of every principal;

(c) particulars including description, value and quantity (wherever applicable) of goods or services supplied on behalf of every principal;

(d) details of accounts furnished to every principal; and

(e) tax paid on receipts or on supply of goods or services effected on behalf of every principal.

(12) Every registered person manufacturing goods shall maintain monthly production accounts showing quantitative details of raw materials or services used in the manufacture and quantitative details of the goods so manufactured including the waste and by products thereof.

(13) Every registered person supplying services shall maintain the accounts showing quantitative details of goods used in the provision of services, details of input services utilised and the services supplied.

(14) Every registered person executing works contract shall keep separate accounts for works contract showing –

(a) the names and addresses of the persons on whose behalf the works contract is executed;

(b) description, value and quantity (wherever applicable) of goods or services received for the execution of works contract;

(c) description, value and quantity (wherever applicable) of goods or services utilized in the execution of works contract;

(d) the details of payment received in respect of each works contract; and

(e) the names and addresses of suppliers from whom he received goods or services.

(15) The records under the provisions of this Chapter may be maintained in electronic form and the record so maintained shall be authenticated by means of a digital signature.

(16) Accounts maintained by the registered person together with all the invoices, bills of supply, credit and debit notes, and delivery challans relating to stocks, deliveries, inward supply and outward supply shall be preserved for the period as provided in section 36 and shall, where such accounts and documents are maintained manually, be kept at every related place of business mentioned in the certificate of registration and shall be accessible at

every related place of business where such accounts and documents are maintained digitally.

(17) Any person having custody over the goods in the capacity of a carrier or a clearing and forwarding agent for delivery or dispatch thereof to a recipient on behalf of any registered person shall maintain true and correct records in respect of such goods handled by him on behalf of such registered person and shall produce the details thereof as and when required by the proper officer.

(18) Every registered person shall, on demand, produce the books of accounts which he is required to maintain under any law for the time being in force.

CGST Rule 57: Generation and Maintenance of Electronic Records

“(1) Proper electronic back-up of records shall be maintained and preserved in such manner that, in the event of destruction of such records due to accidents or natural causes, the information can be restored within a reasonable period of time.

(2) The registered person maintaining electronic records shall produce, on demand, the relevant records or documents, duly authenticated by him, in hard copy or in any electronically readable format.

(3) Where the accounts and records are stored electronically by any registered person, he shall, on demand, provide the details of such files, passwords of such files and explanation for codes used, where necessary, for access and any other information which is required for such access along with a sample copy in print form of the information stored in such files.”

Section 122 of CGST Act 2017: Penalty for Certain Offences

(1) Where a taxable person who—

(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;

(ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act, he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 51 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,—

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who—

(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);

(b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to twenty-five thousand rupees.

Section 130 of CGST Act 2017: Confiscation of Goods or Conveyances and Levy of Penalty

(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 thereunder 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 thereunder with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder 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 confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised 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 carriage 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.

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 1 of Section 35, the proper officer is empowered to determine the amount of tax payable on the goods or the service 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.

(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.

(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.

(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.

28. A perusal of Section 73 and 74 makes it clear that a show cause notice is bound to be served prior to determination of the tax leviable on the ‘*deemed supply*’ whereas in the present case no such notice is available on record and it is common ground that apart from the said proceedings, no other proceedings have been initiated and concluded under Section 73 or 74 of the Act.

Confiscation of goods.

29. Now, coming to the provisions of Section 130 of the Act which empowers the confiscation of the goods and levy of penalty. Clause (i) to Clause (v) of Section 130 (1) are the

events which can trigger the initiation and conclusion of the confiscation proceedings.

30. In the present case, even if it is admitted, for the sake of arguments, that the documents were not maintained at the registered office or the other place of business, there is no finding to the effect that any supply was made with an intent “*to evade payment of tax*” as is required under Section(i) of Section 130 (1);

Further,there is nothing on record to establish that the petitioner did not account for any goods on which he is liable to pay tax under the Act (as required to attract Section 130 (1)(ii);

There is nothing on record to the effect that any supplies were made without having applied for registration (as required to attract Section 130 (1)(iii);

It has not been established that there was any contravention of any provision or any Rules with an “*intent to evade payment of tax*”(as required to attract Section 130 (1)(iv).

There is no averment of using any conveyance (as required to attract Section 130 (1)(v).

31. Thus, none of the ingredients which are required for confiscation existed in the present case and thus, the confiscation itself was wholly arbitrary and illegal.

Search and Seizure.

32. Coming to the provisions of Section 67 which confers the powers of inspection, search and seizure. It is necessary to record the provisions of Section 67 of the CGST Act, 2017

33. A perusal of the said section makes it clear that proper officer should have "*reasons to believe*" that there is any suppression of any transaction relating to supply of goods by the taxable person or as claimed or has claimed input tax credit in respect of entitlement or has indulged in contravention of the provisions of this Act or the Rules made there under to evade tax under this Act, or such person is keeping his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act.

34. In the present case, as the petitioner has not challenged the seizure order, I am not going to the said question in the absence of any pleadings or the arguments advanced or document produced in respect of the same.

Levy of Penalty under Section 122

35. Finally reverting to provisions of Section 122 under which the penalty has been imposed upon the petitioner. Section 122 as reproduced hereinabove provides for imposition of penalty for certain offences. The infractions which can be the basis for imposing penalty can be broadly categorised in two types

<u>Column A</u>	<u>Column B</u>
(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;	(xi) is liable to be registered under this Act but fails to obtain registration;
(ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;	(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;
(iii) collects any amount as	(xiii) obstructs or prevents any

tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;	officer in discharge of his duties under this Act;
(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;	(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;
(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;	(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;
(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;	(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;
(vii) takes or utilises input tax credit without actual receipt of goods or services	(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to

or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;	confiscation under this Act;
(viii) fraudulently obtains refund of tax under this Act;	(xix) issues any invoice or document by using the registration number of another registered person;
(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;	(xx) tampers with, or destroys any material evidence or document;
(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;	
(xv) suppresses his turnover leading to evasion of tax under this Act;	

36. The amount of penalty imposable is provided under Section 122 (xxi), which provides that the quantum of penalty imposable is Rs. 10,000/- or an amount equivalent to *tax evaded* or *tax not deducted under Section 51* or short deducted or deducted but not paid to the Government or tax not calculated under Section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, **whichever is higher**.

37. Thus, from a plain reading, it is clear that the penalty imposable for the offences specified in 'Column A' above is Rs. 10,000/- or the **"amount of tax evaded"** whereas for the offences specified in 'Column B', the penalty can be Rs. 10,000/- only as in the said case there is no question of tax evasion.

38. The facts of the present case makes it clear that even if the allegations of the department, as adjudicated and confirmed in an appeal are accepted to be true, the offence committed by the petitioner would fall under the offence specified in Column B above for following reasons; firstly, the only allegations are that the petitioner has not maintained the Book of Accounts as are required under the Act and the Rules and secondly the penalty has been imposed holding the Petioners conduct in violation of Section 122 (1) (xvi) and (xvii) of CGST Act read with Section 122(1) (xvi) & (xvii) of UP GST Act and thirdly, no exercise for quantification of the ***tax evaded*** has been done in pursuance to the powers conferred under Section 35 (6) read with Section 73 or 74 of the Act, as such, I have no hesitation in holding that in the given facts and circumstances of the case for the violations alleged and established against the Petitioner, the maximum penalty that could be imposed upon the petitioner is Rs. 10,000/-.

Relief granted

39. Accordingly, for the reasoning given above, the writ petition is allowed. The impugned orders dated 15.1.2020 and 27.1.2020 (Annexure No. 5) is set aside insofar as it relates to confiscation of goods and imposition of penalty in excess of Rs. 10,000/-, as the confiscation has been set aside, there is no question of payment of redemption fine.

40. To clarify,confiscation of goods and the penalty imposed upon the petitioner herein as indicated in the Paragraph Nos. 1 and 2 of the order passed by the Additional Commissioner dated 28.5.2019 is set aside and the total penalty imposed upon the petitioner is quantified at Rs. 10,000/-.

41. It is further clarified that as no writ petition has been filed by the Managing Director, I am not touching the penalty imposed upon him under paragraph 3 of the order dated 28.5.2019.

42. The writ petition is allowed in part on the terms as recorded above.

Order Date :- 17.12.2020

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