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THE CENTRAL GOODS & SERVICES TAX ACT, 2017: CAN ORDER OF DETENTION OF GOODS BE QUASHED IF IT IS UNREASONED?

Preface:

That it is a settled principle of law that the power to levy tax includes all the supplementary powers which are meant to prevent the evasion of levy of tax. The power of the taxing authority/ department to seize and confiscate the goods of the assessee in the event of evasion of tax and to levy penalty for such evasion of tax are in reality meant to prevent evasion of tax, and further to deter the tax-payers to act as evaders of tax; therefore, the power to seize and confiscate the goods are in fact powers which are ancillary/ incidental to the principal power of the taxing authority that is the power to levy tax on the goods and services in terms of the provisions of the CGST Act and the Rules framed therein.

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Order of confiscation of goods/ conveyance has to be a reasoned order:

In the matter of: *India Logistics & Cargo Movers V/s State of Gujarat*, High Court of Gujarat, R/ Special Civil Application No. 15178/ 2019, Date of Decision: 24.09.2019, it was observed that:

- i. Orders of confiscation (Form GST MOV-11) under Section 130 of the CGST Act have serious civil consequences for the transporter as well as the owner of the goods.
- ii. The least that is expected of the authorities discharging duties under the CGST Act is that they should properly apply their minds to the facts of a given case before taking drastic actions under the provisions of Section 130 of the CGST Act.
- iii. Passing orders in a perfunctory manner without considering the explanations tendered by the affected parties and without assigning reasons therefor amounts to abdication of duties on the part of the concerned officers and causes immense prejudice to the parties against whom orders of confiscation are passed.

- iv. In Para 16 of the report, it was observed that:
 “... It may be noted that while there appears to be a format for an order under Section 130 of the CGST Act, such format also provides a column for assigning reasons therefor. However, as noted hereinabove, that column has been left blank.”
- v. In the matter of: **Kranti Associates (P) Ltd. V/s Masood Ahmed Khan**, (2010) 9 SCC 496, the Hon’ble Supreme Court of India while laying stress on the necessity of recording of reasons in the orders passed by the administrative and/ or quasi-judicial authorities, observed that:
- a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
 - b. A quasi-judicial authority must record reasons in support of its conclusions.
 - c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done but it must also appear to have been done.
 - d. Recording of reasons operates as a valid restraint on any possible arbitrary exercise of judicial, quasi-judicial or even administrative power. Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.
 - e. Reasons facilitate the process of judicial review by superior courts. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or *rubber-stamp reasons* is not to be equated with a valid decision-making process.

Mandate of law regards being had to Sections 129 and 130 of the CGST Act:

In the matter of: **Synergy Fertichem (P) Ltd. V/s State of Gujarat**, High Court of Gujarat, R/ Special Civil Application No. 4730/ 2019, Date of Decision: 23.12.2019, it was held that:

- i. **Section 129 of the CGST Act and Section 130 of the CGST Act are mutually exclusive:**
 - a. Section 129 of the CGST Act talks about detention, seizure and release of goods and conveyances in transit. On the other hand, Section 130 of the CGST Act talks about confiscation of goods or conveyance and levy of tax, penalty and fine thereof.
 - b. Although, both the sections start with a *non-obstante clause*, yet, the harmonious reading of the two sections, keeping in mind the object and purpose

behind the enactment thereof, would indicate that they are independent of each other.

- c. Section 130 of the CGST Act, which provides for confiscation of the goods/ conveyance is not, in any manner, dependent or subject to Section 129 of the CGST Act. Both the sections are mutually exclusive.

ii. Section 130 of the CGST Act: “Evasion of Payment of Tax” V/s “Failure of Payment of Tax”:

- a. Section 130 of the CGST Act uses the phrase “*with intent to evade payment of tax*”. Thus, Section 130 of the CGST Act speaks of evasion of payment of tax, which is different from failure to pay tax.
- b. The word “*evade*” in the context of Section 130 of the CGST Act means “*defeating the provisions of law in order to avoid payment of tax*”; and the use of word “*intent*” in Section 130 of the CGST Act signifies that the assessee must deliberately avoid the payment of tax which is payable in accordance with law. However, the element of *mens rea* cannot be read into Section 130 of the CGST Act.

iii. Notice of confiscation cannot be issued on mere suspicion:

- a. Notice of confiscation of goods and conveyance under Section 130 of the CGST Act cannot be issued by the department on mere suspicion, that is, the department before issuing notice of confiscation must be convinced that the contravention of the provisions of the CGST Act by the assessee was with a definite intent to evade payment of tax.
- b. If the proper officer is of the view that a particular case is one of invoking Section 130 of the CGST Act at the very threshold, then the proper officer needs to record his reasons for such belief in writing, and such reasons recorded in writing should, thereafter, be looked into by the superior authority (Jurisdictional Commissioner) so that the superior authority can take an appropriate decision as regards whether the case is one of straightway invoking Section 130 of the CGST Act or not.
- c. Even if the goods/ conveyance is released upon payment of tax and penalty under Section 129 of the CGST Act but later, if the department/ authorities find something incriminating against the owner of the goods in the course of the inquiry, then it would be permissible for the department/ authorities to initiate

confiscation proceedings under Section 130 of the CGST Act against the owner of the goods/ conveyance.

iv. Section 130 of the CGST Act is not dependent on Clause (6) of Section 129 of the CGST Act:

- a. Sections 129 and 130 of the CGST Act are mutually exclusive and independent of each other.
- b. If the amount of tax and penalty, as determined under Section 129 of the CGST Act for the purpose of release of the goods and conveyance, is not deposited within the statutory time period, then the consequence of the same would be forfeiture of goods and conveyance with the Government.
- c. It cannot be said that confiscation proceedings can be initiated only in the event of failure on the part of the owner of the goods/ conveyance in depositing the amount towards tax and penalty as determined under Section 129 of the CGST Act.
- d. For invoking Section 129 (6) of the CGST Act it would be incumbent upon the department to establish *intention* of the assessee to evade payment of tax. If the tax and penalty amount, as determined under Section 129 of the CGST Act is not deposited within the statutory time period, then the goods/ conveyance is liable to be put to auction and the sale proceeds are to be deposited with the Government.

v. Field of operation of Sections 73 and 74 of the CGST Act is different from that of Section 129 of the CGST Act:

- a. Reference to Sections 73 and 74 of the CGST Act is not warranted for the purpose of interpreting Sections 129 and 130 of the CGST Act; both these set of provisions are independent of each other.
- b. Sections 73 and 74 of the CGST Act deal with “*demands and recovery*” that are to be made by the assessing officer based on the assessment, whereas Section 129 of the CGST Act deals with “*detention/ seizure*”.
- c. While assessing the returns of the assessee, if the assessing officer finds that:
 - (i) *The amount of tax has not been paid or erroneously refunded, or,*
 - (ii) *The input tax credit has been wrongly availed or utilized for any reason, either with mala fide intention or without the same, as the case may be;*then the provisions of Section 73 or Section 74 of the CGST Act are to be invoked by the assessing officer against the assessee.

d. Section 129 of the CGST Act deals with a situation where the evasion of tax or contravention of the provisions of the CGST Act (and the Rules framed therein) is detected during the transit of goods. That proceedings under Section 129 of the CGST Act are summary in nature.

vi. Provisional release of goods detained:

That provisional release of goods detained is to take place in pursuance of Section 129 (2) read with Section 67 (6) of the CGST Act read with Rule 140 of the Central Goods & Services Tax Rules, 2017 (hereinafter referred to as the CGST Rules).

vii. If the amount of tax paid is less than the actual amount of levy then there can be no detention of goods:

In the report, namely, *Synergy Fertilchem (P) Ltd.* (Supra) it was observed that:

“... The goods are not liable to be detained on the ground that the tax paid on the product was less. In such circumstances, the Inspecting Authority is expected to alert the Assessing Authority to initiate appropriate proceedings for assessment of any alleged sale at which the dealer will have his opportunities to put forward his pleas on law and on fact. The process of detention of the goods cannot be resorted to when the dispute is bona fide, especially concerning the exigibility of tax and, more particularly, the rate of that tax.”

viii. Order of confiscation of goods in the absence of physical availability of goods:

That even in absence of physical availability of goods/ conveyance, the taxing authority can proceed to pass an order of confiscation of goods and can also pass an order for redemption of fine in lieu of confiscation of goods. In other words, even if the goods/ conveyance has been released under Section 129 of the CGST Act and later, confiscation proceedings are initiated, then even in absence of goods/ conveyance, the payment of redemption fine in lieu of confiscation of goods can be passed by the taxing authority against the assessee.

Excursus:

That on the strength of Circular No. 41/ 15/ 2018- GST (CBEC-20/ 16/ 03/ 2017- GST) issued by Ministry of Finance (Government of India), dated: 13.04.2018, it can be stated that:

- i. Section 129 of the CGST Act provides for detention, seizure and release of goods and conveyances in transit while Section 130 of the CGST Act provides for the confiscation of goods/ conveyances and imposition of penalty.

- ii. Where goods and conveyances are to be detained by the proper officer under Section 129 of the CGST Act, then the order of detention is to be passed by him in terms of **Form GST MOV- 06** and a notice in terms of Section 129 (3) of the CGST Act is to be issued by him in terms of **Form GST MOV- 07**, specifying the amount of tax and penalty payable. This notice is to be served on the person in charge of the goods/ conveyance.
- iii. That within *seven days* from the receipt of the notice in Form GST MOV- 07, the recipient of the notice is to show cause as to why proposed tax and penalty should not be imposed upon the recipient of the notice. That adjudicating upon the reasons stated by the recipient of the notice, the proper officer is to pass an order of demand of tax and penalty in terms of **Form GST MOV- 09**.
- iv. That the order of demand of tax and penalty (Form GST MOV- 09) is to categorically state that if the assessee fails to make payment of the proposed tax and penalty within the stipulated period of time, then the department would be constrained to invoke Section 130 of the CGST Act against the assessee.
[Section 129 (6) of the CGST Act states that where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in Sub-section (1) of Section 129 of the CGST Act within *fourteen days* of detention/ seizure of goods/ conveyance, further proceedings are to be initiated in accordance with the provisions of Section 130 of the CGST Act.]
- v. That if the owner of the goods or the person in charge of the conveyance fails to make payment of the applicable tax and penalty within the time allowed in the order of demand of tax and penalty (Form GST MOV- 09), then the department through proper officer will serve upon the assessee a notice for confiscation of goods/ conveyances and levy of penalty (**Form GST MOV- 10**), thereby proposing confiscation of the goods/ conveyances and imposition of penalty.
- vi. That notice for confiscation of goods/ conveyances and levy of penalty (Form GST MOV- 10) is to categorically direct the owner or person in charge of goods and conveyance to show cause with *seven days* from the receipt of the notice, as to why the goods in question and the conveyance used to transport the goods not be confiscated under the provisions of Section 130 of the CGST Act. That no order for confiscation of goods/ conveyance or for imposition of penalty, is to be passed without giving the assessee an opportunity of being heard.

- vii. That an order of confiscation of goods/ conveyance and demand of tax, fine and penalty is to be passed in **Form GST MOV- 11**, after taking into consideration the objections filed by the owner or the person in charge of the goods/ conveyance, and this order passed is to be served upon the owner of goods or his representative.
- viii. Once order of confiscation is passed, the title of goods stands transferred to the Central Government.
- ix. That in the order of confiscation passed by the department, an appropriate period of time not exceeding **three months** is to be offered by the department to the assessee to make payment of tax, penalty and fine imposed in lieu of confiscation of goods, to get the goods released. Once an order of confiscation of goods is passed in Form GST MOV- 11, the order passed earlier in Form GST MOV- 09, with respect to the aforesaid goods/ conveyance, is to be withdrawn.
- x. In case neither the owner of the goods nor any person other than the owner of the goods comes forward to make the payment of tax, penalty and fine imposed and get the goods/ conveyance released within the time specified in Form GST MOV- 11, the proper officer shall auction the goods and/ or conveyance by a public auction and remit the sale proceeds to the account of the Central Government.

