

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

THURSDAY, THE 19TH DAY OF MARCH 2020 / 29TH PHALGUNA, 1941

WP(C).No.5384 OF 2020(W)

PETITIONER/S:

M/S.HINDUSTAN COCA COLA PRIVATE LIMITED,
BUILDING NO.XI/9, NEAR CENTRAL WAREHOUSING, EDATHALA
PANCHAYAT, OPP.SOS VILLAGES ALUVA EAST VILLAGE,
ERNAKULAM, REPRESENTED BY ITS AUTHORIZED SIGNATORY,
MR.SANISH JOHN T.D.

BY ADVS.
SRI.A.KUMAR
SRI.P.J.ANILKUMAR
SMTG.MINI(1748)
SRI.P.S.SREE PRASAD
SHRI.JOB ABRAHAM
SRI.AJAY V.ANAND

RESPONDENT/S:

- 1 ASSISTANT STATE TAX OFFICER
SQUAD NO.I, SGST DEPARTMENT, PALAKKAD,
KERALA-678001.
- 2 COMMISSIONER OF COMMERCIAL TAXES,
TAX TOWER, KILLIPPALAM, KARAMANA P.O.,
THIRUVANANTHAPURAM-695002.

R1 BY GOVERNMENT PLEADER

OTHER PRESENT:

GP DR THUSHARA JAMES

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 04-03-2020, THE COURT ON 19-03-2020 DELIVERED THE FOLLOWING:

JUDGMENT

The petitioner a Private Limited Company engaged in manufacture and supply of fruit-based beverages/drinks registered in State of Kerala with GSTIN No.32AAACH3005MIZO.

2. According to the petitioner, the carbonated fruit drinks manufactured by them was classified under HSN 2202 9920 under GST and discharging GST @ 12% on all intra State and inter-State supplies. The codes have been specified under the Chapter XXII of GST Tariff Codes. In the aforementioned code in respect of fruit-based drinks the tax is @ 12% ie., 6% under the Central GST and another 6% as State GST. During the course of Business of supplying the goods interstate, the aforementioned drinks were brought within the jurisdiction of Kerala from Karnataka manufacturing Plant and the vehicles carrying the aforementioned goods were intercepted in Walayar, Palakkad on the premise that the aforementioned goods were wrongly

classified, in fact they would be falling under the head 2202 10, for which the GST rate is 28%. Against the aforementioned detention, the petitioner vide reply to Ext.P3(d) notice submitted that, the allegation of misclassification is without merit, and petitioner has already applied for an advanced ruling pertaining to same matter in Gujarat and the said matter is pending in the Hon'ble High Court of Gujarat is with an interim stay favouring petitioner. It is in this back ground, the action of the authorities in detaining goods has been assailed in the present writ petition. Counsel for the petitioner in view of the aforementioned facts, challenged the action by raising following submissions:

a. The GST authorities in Kerala do not have jurisdiction to issue show cause notice of the tax on import as only the officers in the Karnataka could initiate the proceedings. At the best the authorities at Kerala have a remedy of sending an intimation to the authorities of Karnataka.

b. It is not a case of evasion but a bonafide dispute concerning the exigibility of tax ie. the rate of tax. A bare reading of Section 129 (1) of the GST Act states that in

contravention of any of the provisions of the Act or the rules made there under, the goods liable to be detained can be released on payment of tax and penalty but that situation would arise only when the goods in movement without any valid documents, but the instant case is covered under the valid tax invoice Ext.P1, on which the applicable IGST was duly charged and E-way Bill, Ext.P2 was correctly generated by the petitioner. The authorities in Kerala have powers to verify documents like invoice and E-way bills. Infact, there was no discrepancy in respect of the quantity or description of the goods mentioned in the tax invoice. The only reason for detention was that the respective drinks were not correctly classified and liable to be tax as 28% and not under 22029920 attracting 12% of GST.

c. In support of the aforementioned contention the learned counsel for the petitioner has relied upon the decision of this Court in ***N.V.K Mohammed Sulthan Rawtger and Sons vs. Union of India & Ors., (2018 -VIL-502-KER)*** and also the Division Bench judgment of the Hon'ble Gujarat High Court in ***Synergy Fertichem Pvt. Ltd. v. State of Gujarat***

(2019-VIL-623-GUJ).

3. Per contra, the learned Government Pleader opposed the aforementioned prayer of the petitioner by relying upon Section 129 of the CGST Act, starting with a non-obstante clause that the officers are empowered in case any person transporting any goods while they are in transit in contravention of the provisions of the Act or the rules made thereunder, such goods and conveyance shall be liable to detention or seizure. They shall be released on the conditions enumerated in clauses (a) to (c) of Section 129 and as per the provisions of sub Section (6) of Section 129 in case the amount of tax and penalty imposed upon any goods or the owner of the goods is not deposited within 14 days of such detention and seizure, the proceedings of confiscation and levy of penalty as provided under Section 130 of 2017 of the GST Act would follow. It was further submitted that there is contravention in provision relating to transportation, with wrong description of goods and misclassification of tax, hence it is possible for proper officer to detain the vehicle along with goods transported.

4. Learned counsel for the petitioner in rebuttal submitted that any ambiguity with respect to classification of products has to be resolved in favour of assessee. In support of the above contention petitioner relied upon 2018 judgment of Hon'ble Allahabad High Court in ***Commissioner of Commercial Tax vs. Racket Backizer India Ltd. [2018 (19) GSTL 596 (All.)]*** , which followed the decision of the Hon'ble Supreme Court in ***Voltas Ltd. v. State of Gujarat [(2015) 7 SCC 527]***, which laid down the same principle as reiterated by the Hon'ble Allahabad High Court. Hence, the levy of penalty arising from ambiguity in classification is arbitrary and illegal, thereupon making the demand for penalty illegal.

5. I have heard the learned counsel for the parties and apprised the paper book. The facts as narrated above with regard to the transit of goods from Karnataka to Kerala, reflecting the payment of Goods Service Tax as 12% in categorizing drink under the code 2202 99 20 are not in dispute. The only point to be pondered is whether the Officers of Kerala would have a jurisdiction to detain and

seize the goods or at the best could have intimated the jurisdictional Officer in Karnataka to initiate proper proceedings against the petitioner in view of the report. To answer the aforementioned question, it would be in the fitness of things to extract Section 129 of the GST Act.

“129. Detention, seizure and release of goods and conveyances in transit

(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,-

(a) on payment of the applicable tax and penalty equal to one hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

(b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever

is less, where the owner of the goods does not come forward for payment of such tax and penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

PROVIDED that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances,

(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within ¹ [fourteen days] of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

PROVIDED that where the detained or seized

goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of ¹ [fourteen days] may be reduced by the proper officer.”

6. On a perusal of the aforementioned Act, it is evident that Section 129 opens with a non obstante clause empowering the Officers to detain and seize the goods, if it found to be in contravention of any of the any of the provisions of the Act and release of the vehicles, as per the conditions, enumerated, therein. A similar question also arose for consideration before the Division Bench of the Gujarat High Court in ***Synergy Fertichem Pvt. Ltd.'s case*** (Supra) wherein paragraph 158 and 159 and 160 held as under:

“158. In many matters of the present type, we have noticed that the goods are detained on the ground that the tax paid on the product was less. In such matters, although the documents were found to be in order and the description of the product also accorded with the relevant declaration, still the consignment were detained on the ground that the tax paid was less.

159. In our opinion, the detention and seizure of goods on such ground cannot be justified. In such an eventuality, the correct procedure which the inspecting authority is Expected to follow is to alert the Assessing

Authority to initiate the 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. What we want to convey is that 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. In the aforesaid context, we may refer to and rely upon a decision of the Kerala High Court in the case of N.V.K. Mohammed Sulthan Rawtger & Sons Dindigul, Tamil Nadu, Represented by Managing Partner, Raja Mohammed & Ors., vs. Union of India & Ors., reported in (2019) 61 GSTR 307-2018-VIL-502-KER, wherein a learned Single Judge of the Kerala High Court observed as under;

"24. Detention under the KSGST Act has an elaborate remedial mechanism. Now, we *focus* on the release of the product, and it lies in narrow confines, Suffice it for me to examine this singular issue: Can the State Tax Officer invoke Section 129 of the Act and detain goods on the ground the tax paid on the product is less? Here, the documents are in order and the product description accords with what the first petitioner has already declared, say, in his returns before the assessing authority. Then, can the ASTO still hold up the consignment because the declaration already made does not suit his notion of what the product is?

25. True, a literal reading of Section 129 of the Act presents a different picture and, perhaps, lends support to the State's view. But purposive interpretation and the practical commercial considerations trump that view.

26. Chapter XVI of the Combined Acts deals with inspection, search, and seizure. Section 129 under Chapter XIX provides the mechanism for detention, seizure, and release of goods and conveyances in transit. It begins with a non-obstante clause and goes on to lay down the procedure. If any person transports or stores any goods "contravening this Act" or its rules, all those goods and means of transport and documents relating to those goods and conveyance will be detained or seized. They will, however, be released to the owner of the goods (a) on its paying the applicable tax and penalty equal to one hundred percent of the tax payable on the goods. If the goods belong to an exempted category, a different rate applies, though.

27. The Revenue asserts that there is "contravention", and that contravention concerns misbranding the product and paying less tax. Under the erstwhile Kerala Value Added Tax Act, the first petitioner and those trading in the same product--betel nut--have had many rounds of litigation. Eventually, as seen from the Exts.P1 to P5 proceedings, this Court and the Revenue accepted that the product is not supari and it attracts lesser tax. The Exts.P6, P6(a), P7, and P7(a) are the first petitioner's purchase and supply invoices.

28. The Exts.P8 and P8(a) are important; they are the first petitioner's recent GST returns for June and August, 2018. In those returns, the first petitioner has assigned the same HSN Code, as he did reflect in Ext.P9 invoice. He paid tax only at 5%. Thus the documents before the assessing authority and those that accompanied the consignment accord

with one another.

29. In this context, we may examine *J.K. Synthetics Limited v. Commercial Taxes Officer*, (1994) 4 SCC 276, On how to Interpret Tax Statutes, the Supreme Court machinery provisions, "which should be construed like any other statute", It has also held that "the power to levy and collect interest is substantive law though part of machinery provision".

30. In *J.K. Synthetics Limited* the issue was whether the appellant should pay interest on the additional sales tax. The Revenue, as it has done here, contended that when the law enjoins on the Assessee to file a 'return', it can only mean a true and correct return, that is, a return which reflects the tax due on final assessment, The Supreme Court in that context has held that the information to be furnished in the return "must be 'correct and complete', that is, true and complete to the best of knowledge and belief, without the dealer being guilty of willful omission." The dealer, according to *J. K. Synthetics Limited*, must deposit the full tax due, based on the information furnished. And that information must be correct and complete to the best of the dealer's knowledge and belief. If the dealer has furnished full particulars regarding his business, without willfully omitting or withholding any particular information affecting the assessment of tax, and if he honestly believes to be 'correct and complete', the dealer is said to have acted 'bona fide' in depositing the tax due and filing the return. Of course, the tax so deposited is to be deemed to be provisional and subject to necessary

adjustments under the final assessment.

31. To support its ratio, J.K. Synthetics Limited accepts the minority of view in Associated Cement Co. Ltd.. v. CTO, (1981) 4 SCC 578 And it has finally held that if the assessee pays the tax, which according to him is due based on the Information supplied in his return, there would be no default on his part to meet his statutory obligation. Therefore, it would be difficult to hold that the 'tax payable' by him is not paid' and that he is liable for consequences.

32. The correctness of the Exts.P8 and P8(a) accepted, as held in J. K. Synthetics Limited, we will examine what amounts to statutory violation or contravention under Section 129 of the Act. Apt is the case decided by this Court: Rams v. Sales Tax Officer. The petitioner in Rams contracted with the Government of India to print and supply a large number of telephone directories. For this purpose, he procured paper from the Tamil Nadu government agency. When the paper was under transport, at Kochi a sales tax officer detained the lorry, under Section 29A(2) of the Kerala General Sales Tax Act, 1963.

33. The detention was because the petitioner, an unregistered dealer, had allegedly attempted to evade the sales tax. The petitioner's producing all the documents had no impact. Instead, the detaining officer insisted on the petitioner's furnishing bank guarantee for certain sum as a condition for release of the goods, pending enquiry.

34. The order in enquiry affirmed that

the Enquiry Officer was "satisfied" that there was attempt at evasion of tax. So the penalty followed. In this context, a learned Single Judge of this Court has observed that when there is scope for a genuine dispute regarding any liability for tax, the question of detaining the goods at the check-post or imposing penalty under Section 29A does not arise. There is a ground for a genuine dispute whether there was any taxable sale at all. Rams, then, further observes:

"In such cases it is not for the check-post authority to act on mere suspicion and to find that there is any attempt at evasion of payment of tax, which alone vests him with the jurisdiction to act under S. 29A. At best, he can only alert the assessing authority in Ernakulam to initiate proceedings for assessment of any alleged sale, at which the petitioner will have all his opportunities to put forward his picas on law and on fact. The process of detention of the goods at the check post, cannot be resorted to in such cases when there is a bona fide dispute regarding the very existence of a sale and exigibility for tax. S. 29A is not intended to subserve such an object.

35. I may examine the impugned Ext.P11 notice, or in other words the act of detention, in the light of the dicta in J.K. Synthetics Limited and Rams. In the former, the Supreme Court has emphatically held that if the dealer furnishes all particulars about his business, assesses the tax as he honestly believes to be correct, and pays it; his conduct cannot be faulted as mala fide or as an effort to evade tax. Here, the Exts.P8

and P8(a) are the returns for two recent months. The first petitioner declared the HSN Code he has felt his product would attract and paid the tax accordingly. The returns are very much on record before the assessing officer. Therefore, to that extent the first petitioner's conduct cannot be faulted, nor can he be accused of evading the tax.

36. Then, I may examine the dictum of Rams, a judgment rendered by this Court. In somewhat an analogous situation as we face here, Rams held that the inspecting authority may entertain a suspicion that there is an attempt to evade tax. But if the records he seizes truly reflect the transaction and the assessee's explanation accords with his past conduct, for example, the returns he has filed earlier, the detention is not the answer. In the words of Rams, at best the inspecting authority can alert the assessing authority to initiate the proceedings "for assessment of any alleged sale, at which the petitioner will have all his opportunities to put forward his pleas on law and on fact." Indeed, emphatic is the enunciation of law in Rams that 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."

160. We are in full agreement with the aforesaid enunciation of law laid down by the Kerala High Court. Thus, in a case of a bona fide dispute with regard to the classification between the transporter of the goods and the Squad Officer, the Squad Officer may intercept the goods, detain them for the purpose of preparing the relevant

papers for effective transmission to the jurisdictional Assessing Officer. It is not open to the Squad Officer to detain the goods beyond a reasonable period. The process can, at best, take a few hours. It goes without saying that the person, who is in charge of transportation, will have to necessarily cooperate with the Squad Officer for preparing the relevant papers. [See Jeyyam Global Foods (P.) Ltd. vs. Union of India & Ors., (2019) 64 GSTR 129 (Mad.)-2019-VIL-47-MAD]

7. From the perusal of the aforementioned findings, it is irresistibly concluded that in case of a bonafide dispute with regard to the classification between a transitor of the goods and the squad officer, the squad officer may intercept the goods and detain them for the purpose of preparing the relevant papers for effective transmission to the judicial assessing officers and nothing beyond. In the present case, it is a case of bonafide miscalculation as to whether the goods would be exigible to 12% or 28%. The judgment cited in ***N.V.K Mohammed Sulthan Rawtger's case (supra)*** was also a case where the petitioner firm was a manufacturer of 'Ground Betel Nuts (Arecanuts)' and registered with the Tamil Nadu under the Goods and Service Tax Act. The goods were intercepted by the inspecting authority to be in contravention

of the misbranding. By relying upon the decision in ***J.K Synthetics Limited V. Commercial Taxes Officer, 1994 (4) SCC 276***, it was held that the charging provisions must be construed strictly but not the machinery provisions which would be construed like any other statute.

8. The upshot of the reasoning aforementioned is that the impugned order of detention Ext.P3(c) and consequential notices are not sustainable and hereby quashed. The goods are directed to be released to the petitioner with a further direction that the inspecting authority of Kerala would prepare a report and submit the same to the assessing authority, Karnataka for taking action, if deem it appropriate, in accordance with law.

Sd/-

AMIT RAWAL

JUDGE

sab

APPENDIX**PETITIONER'S/S EXHIBITS:**

EXHIBIT P1 TRUE COPY OF INVOICE DATED 08.02.2020.

EXHIBIT P2 TRUE COPY OF E-WAY BILL DATED 08.02.2020.

EXHIBIT P3 TRUE COPY OF GST MOV-01 DATED 10.02.2020.

EXHIBIT P3 (A) TRUE COPY OF GST MOV-02 DATED 10.02.2020.

EXHIBIT P3 (B) TRUE COPY OF GST MOV-04 DATED 10.02.2020.

EXHIBIT P3 (C) TRUE COPY OF GST MOV-06 DATED 10.02.2020.

EXHIBIT P3 (D) TRUE COPY OF GST MOV-07 DATED 10.02.2020.

EXHIBIT P4 TRUE COPY OF REPLY DATED 15.02.2020.

EXHIBIT P5 TRUE COPY OF LETTER BY 1ST RESPONDENT
DATED 15.02.2020.

EXHIBIT P6 TRUE COPY OF PENALTY ORDER IN GST MOV-09
DATED 17.02.2020.

EXHIBIT P7 TRUE COPY OF THE REPLY DATED 19.02.2020.