

GST : Where assessee, engaged in supplying of tax free goods, sent machine used for production of said products for repair without issuing proper e-way bill and, thus, adjudicating authority directed assessee to deposit payment of tax and penalty, in view of facts that machine was not sent for sale but only for repair, instant appeal was to be accepted and adjudicating authority to be directed to refund amount of penalty

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**[2020] 114 taxmann.com 740 (AA- GST - HP)
Appellate Authority - GST, HIMACHAL PRADESH
Neva Plantation (P.) Ltd.**

v.

ACSTE

**ROHIT CHAUHAN, MEMBER
EXN-005/2019-GST-2992-97
FEBRUARY 12, 2020**

N.K. Thaman, Adv. for the Appellant. Kishore Kumar for the Department.

ORDER

1. At the outset, I would like to make it clear that the provisions of both the Himachal Pradesh Goods and Service Tax Act, 2017 and Central Goods & Service Act, 2017 (hereinafter referred to as HPGST and CGST Act respectively) are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the HPGST Act would also mean a reference to the corresponding similar provisions under the CGST Act and *vice versa*.
2. This appeal has been filed against the order dated 27-11-2018 passed by the Asst. Commissioner State Taxes & Excise (ACST&E)-cum-Proper Officer, North Enforcement Zone, Palampur *vide* which an additional demand of Rs. 1,18,800/- was created against the appellant under sub-section (1) Section 129 of Goods and Service Tax Act, 2017.
3. The appellant is a private limited company and is engaged in the plantation business. The plants falling under Chapter 6 of the Customs Tariff are exempt from GST as per serial number 34 of Notification No. 02/2017-Central Tax (Rate) dated 28-6-2017. Similar notification has been issued under IGST Act and HPGST Act. As per Section 23 (1) (a) of CGST Act, 2017, any person engaged exclusively in the business of supplying goods that are wholly exempt from tax, is not required to be registered. However the appellant was not aware of the above legal provision and had taken GST Registration No. 02AABCN9078P1ZX and filing GST returns by showing exempted supplies.
4. The appellant had sent one machine named "Auto Clave" for repair to its supplier M/s. Pragati Laboratory Equipment, Ambala Cantt (Haryana) in Vehicle No. HP 37F3056 and had issued Delivery Challan No. 84 dated 29-10-2018. In this delivery challan, it was specifically mentioned that "not for Sale" and "Only for Repair." Along with delivery challan, the appellant had also enclosed one certificate wherein the purpose of transportation of machine was mentioned as ".....Faulty Auto Cleve machine, which is send on below address for repair. This machine is not for sale.....". The appellant had also enclosed photocopy of purchase invoice No. 950 dated 12-1-2018 of above machine along with the above documents. The machine was purchased from the above firm *i.e.* M/s Pragati Laboratory

Equipment, Ambala Cantt (Haryana) having declared taxable value of Rs. 3,30,000/- with IGST @ 18% amounting to Rs. 59,400/-. The faulty Auto Clave machine was sent to its manufacturer/supplier for repair. It is pertinent to mention here that the above factual position is already evidenced from available records and is nowhere disputed by revenue at any stage.

5. The said machine was intercepted on 30-10-2018 at 6:20AM at Ranital. The statement of driver of the truck was recorded in GST MOV-01 having Reference No. NEZ-03/30-10-18. Further, the order for physical verification/inspection was passed in GST MOV-02 having Reference No. NEZ-03/30-10-18 on the reasoning that "E-way bill was not tendered for auto slave machine being transported in inter-state movement for repairs of value worth Rs. 3,89,400/-". Thus, the value of machine was taken by the officer from the copy of purchase invoice enclosed with the delivery challan by the appellant. The physical verification report was prepared in GST MOV-04 having Reference, No. NEZ-03-30-10-18 and machine was found to be as per description mentioned in the delivery challan and no discrepancy was found during physical verification. The self-certified copies of GST MOV-1, GST MOV-2 and GST MOV-04 are enclosed in this regard.

6. The above machine along with conveyance was detained due to non-availability of E-way bill and detention order in GST MOV-06 having Reference NO. NEZ-03/30-10-18 was served. Further, notice under section 129 (3) of CGST/HPGST Act, 2017 was issued in GST MOV-07 having Reference No. NEZ-03/30-10-18 giving options under section 129 (1) *ibid* of payment of IGST of Rs. 59,400/- [18% on Rs. 3,30,000/-] with equal penalty of Rs. 59,400/- and to file reply to the notice. In both the documents GST MOV-06 and GST MOV-07, the reason is mentioned that "E-way Bill not generated for Interstate movement of Auto Clave Machine being transported for repair". The self-certified copies of GST MOV-6 and GST MOV-7 are enclosed in this regard.

7. The appellant furnished a bond in GST MOV-08 along with FDR No. 38044098038 for the amount equivalent to tax and penalty proposed. The machine along with conveyance was released on furnishing of above bond and FDR and release order in GST MOV-05 having Reference No. NEZ-03/30-10-2018 dated 1-11-2018. The self-certified copy of FDR and GST MOV-5 is enclosed in this regard.

8. The appellant filed detailed objections *vide* their letter dated 21-11-2018 to notice issued in GST MOV-07. In this letter, they submitted that since the appellant is engaged in the supply of exempted goods, they are not required to issue e-way bill as per Rule 138 (14) (E) of CGST Rules, 2017. They had not issued e-way bill for sending above machine for repair under this *bonafide* belief that they are not required to issue e-way bill being engaged in supply of exempted goods. They further submitted that activity to send goods for job work/repair does not attract GST as not covered under the definition of "supply" and as per the provision of Section 129 (1) of CGST Act, 2017, no tax and penalty is attracted in this case. They further submitted that as per Section 129 (6) and 130 (1) of CGST Act, 2017, no detention is sustainable in this case as there is no intent to evade GST. The non-issuance of e-way bill in such a situation is only a procedural lapse without any revenue implication or loss to the department. In view of these submissions, they requested to vacate GST MOV-07.

9. The adjudicating authority *vide* their letter No. NEZ/Palampur/595 dated 26-11-2018 directed the appellant to deposit payment of tax and penalty as proposed in the notice and produce proof thereof by 28-11-2018 positively, failing which the FDR pledged under bond will be forfeited as per the provisions of law. In this letter, it is mentioned that

- (a) E-way bill is required for movement of goods not only for reason "supply", but also required to be generated for reasons other than supply (See Rule 138 (10) (ii))
- (b) Activity to send goods for job work or repairs does not come under definition

of supply is not relevant in your case a notice was issued to you for not generating E-way bill for reasons other than supply. You may be engaged in supply of exempted goods which is not relevant in your case.

(c) Your goods *i.e.* Auto Clave machine is not in e-way bill exempted list and attracts penalty under section 129 (1) (a) of the Act.

10. The appellant *vide* their letter dated 17-11-2018 requested the adjudicating authority to pass a speaking and appealable order in GST MOV-09 under section 129 (3) of CGST/HPGST Act, 2017 after considering the submissions already made *vide* their letter dated 20-11-2018.

11. The Ld. Adjudicating authority passed an order in GST MOV-09 on 27-11-2018. However, only preamble of the order was provided to the appellant. In this preamble, it is mentioned that "order enclosed", but no order was enclosed with the preamble. *Vide* this order, IGS of Rs. 59,400/- and penalty of Rs. 59,400/- has been confirmed against the appellant. However, no opportunity of personal hearing was afforded to the appellant to explain their case as required u/s 129 (4) of CGST Act, 2017. Further, detailed order considering the objections/submissions made by the appellant *vide* their reply dated 20-11-2018 and giving reason/ground for confirming demand and imposing penalty, was not passed or provided to the appellant against the principles of natural justice.

12. The summary of above order no. NEZ03/92A dated 27-11-2018 has been uploaded on common portal in FORM GST DRC-07 having Reference No. ZA021118000370G dated 27-11-2018. Further, the adjudicating authority has appropriated the amount of Rs. 1,18,000/- (IGST of Rs. 59,400/- and penalty of Rs. 59,400/-) from FDR No. 38044098038 and got deposited this amount in Electronic cash ledger on 30-11-2018 against Reference No. SBIN90027742. This amount was got debited against liability created *vide* above summary of order in Electronic Cash Ledger on 3-12-2018 against Reference No. DCO212180000639.

13. The appellant *vide* their letter dated 7-1-2019 requested the adjudicating authority for supplying operative portion of order FORM GST MOV-09 as per proforma prescribed in Circular No. 41/15/2018-GST dated 13-4-2018, In this letter, the appellant has mentioned that Para 8 of operative part relating to "Speaking Order" and para 9 of operative part relating to "Recalculation Part" are crucial part of order and without these parts, it is not possible to know the reason for rejection of objections raised by them in their reply. The appellant filed a reminder of above letter on 29-01-2019. However, till date, operative portion of order has not been supplied to the appellant. Feeling aggrieved with the impugned order, the appellant is filing the present appeal on the following grounds:-

14. Grounds of appeal:

(1) That the impugned order is against law & contrary to facts on record, hence erroneous & misconceived.

(2) That the impugned order has been passed in clear violation of principles of natural justice. Firstly, no opportunity of personal hearing was afforded to the appellant as required in Section 129 (4) of CGST/HPGST Act, 2017 as made applicable to inter-state transactions *vide* Section 20 of IGST Act, 2017 before passing order under section 129

(3) *ibid.* this sub-section provides that

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

(3) Without prejudice to above, even on merits, the impugned order is not sustainable.

The appellant is filing appeal based on objection raised in letter dated 26-11-2018 of the adjudicating

authority due to non-receipt of operative part of GST MOV-09. The appellant reserve their right to file additional submissions on receipt of operative portion of the order.

(4) The Ld. Adjudicating authority has failed to consider that there is no "applicable tax" under section 129 (1) of CGST Act, 2017 as made applicable to inter-state supply as per Section 20 of IGST Act, 2017 since the activity to send goods for repair does not attract GST as not covered under the definition of "supply", hence the confirmation of demand of GST and imposition of equal penalty as per the provisions of Section 129 910 (a) of CGST/HPGST Act, 2017 is not sustainable.

(4.1) The Id. Adjudicating authority while passing order u/s 129(3) of CGST/HPGST Act, 2017 has wrongly confirmed IGST and imposed equal penalty as per Section 129 (1) (a) *ibid*. It is an accepted fact that the appellant had sent faulty Auto clove machine for repair as per details mentioned in the statement of facts above. The charging Section 5 (1) of IGST Act, 2017 [applicable in case of inter-state transactions] provides that IGST is levied on all inter-state supply of goods or services or both. Section 7 of CGST/HPGST Act, 2017 read with Section 20 of IGST Act, 2017 defines the scope of supply. This section provides that:

Scope of supply.-(1) For the purposes of this Act, the expression "supply" includes-

- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
- (b) import of services for a consideration whether or not in the course or furtherance of business;¹ "and"
- (c) the activities specified in Schedule-I, made or agreed to be made without a consideration²."
- (d) The activities to be treated as supply of goods or supply of services as referred to in Schedule II

(2) Notwithstanding anything contained in sub-section (1),-

- (a) activities or transactions specified in Schedule-III, or
- (b) such activities or transactions undertaken by the Central Government, the State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of "sub-sections (1), (1A) and (2)" the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as-

- (a) a supply of goods and not as a supply of services; or
- (b) a supply of services and not as a supply of goods.

As per above section, supply of goods made for consideration are covered under GST Further, supplies specified in Schedule-1 made without consideration are also covered under GST.

Schedule-I of CGST Act, 2017 provides that:

Activities to be Treated As Supply Even If Made Without Consideration

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.

2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business:

Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

3. Supply of goods-

- (a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or
- (b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.

4. Import of services by a ³"person" from a related person or from any of his other establishments outside India, in the course or furtherance of business.

The machinery sent for repair is not covered under Schedule-1 above. Further, no consideration is involved in sending faulty auto clove machine for repair to its manufacturer. Thus, from the above provisions, it is concluded that machinery sent for repair is not covered under the definition of supply and does not attract GST.

(4.2) That, Section 129 (1) *ibid* [discussed in detail in the succeeding para.], provides that detention is to be released on payment of applicable tax and penalty equal to one hundred percent of tax payable on such goods. In the present case, when GST is not attracted in the transaction as not covered under the definition of "supply", there is no applicable GST in this case. Further, there can not be penalty when there is no GST payable as required in Section 129 *ibid*. Thus, the GST demanded and penalty equal to GST imposed in the impugned order is not correct and the impugned order demanding GST and imposing penalty merits to be set aside.

There can be a case for levy of GST, had the allegation of revenue was that the machine was in fact cleared clandestinely to evade payment of GST in the guise of sending the same on delivery challan for repair. However, it is nowhere in dispute, rather an accepted fact that the auto clove machine was sent for repair to its original supplier/manufacturer. It is rather a fact on record that the auto clove machine involved in the present case had already suffered GST as was earlier purchased on due payment of IGST of Rs. 59,400/- *vide* invoice no. 950 dated 12-1-2018 by the appellant and no ITC is claimed of this IGST as the appellant is engaged in the supply of exempted plants. In view of above, the impugned order is not sustainable and the same merits to be set aside.

5. The Id. Adjudicating authority has failed to consider that detention under section 129 of CGST/HPGST Act, 2017 read with Section 20 of IGST Act, 2017 is not sustainable as pre-requisite of intent to evade duty is missing in this case.

(5.1) Chapter XIX of CGST/HPGST Act, 2017, containing Section 122 to 138, deals with offences and penalties. These sections have been made applicable to inter-state supply as per Section 20 of IGST Act, 2017. Among the said provisions, Section 122 to 128 *ibid* deals with imposition of penalties. Section 129 *ibid* deals with detention, seizure and release of goods and conveyances in transit. Section 130 and 131 *ibid* deals with confiscation of goods or conveyances and levy of penalty. Section 132 to 138 *ibid* deals with various offences under the Act. Section 129 dealing with detention, seizure and release of goods and conveyance in transit provides that:

- (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
 - (i) Notwithstanding anything contained supplies or receives any goods in contravention

of any of the provisions of this Act or the rules made there under 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 there under 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 provision of this Act or the rules made there under 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 authorized 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."

A combined reading of Section 129 (6) and 130 (1) *ibid* provides that detention of goods is contemplated under section 129 *ibid* only when it is suspected that goods are liable to confiscation under section 130 *ibid*. Section 130 provides for confiscation of goods only when a taxable supply is made otherwise than in accordance with the provisions contained in statutes and the Rules made there under

with the intent to evade payment of tax.

(5.2) That, the provision relating to issuance of e-way bill are contained in Rule 138 of CGST Rules, 2017. In the present case, there is only allegation that the appellant has not issued e-way bill for sending machinery for repair in inter-state movement. Since no GST is involved in this transaction as discussed in the preceding defense, there is no question of any intent to evade GST. When there is no intention to evade payment of GST, no confiscation is warranted under section 130 *ibid*, consequently, no detention under section 129 *ibid* is sustainable. The non-issuance of e-way bill in such a situation is only a procedural lapse without any revenue implication or loss to the department, which merits to be condoned considering it a case of *bona fide* mistake on part of appellant as engaged in supply of exempted goods. Thus, the impugned order wrongly demanding GST and imposing equal penalty is not sustainable and merits to be set aside.

The Id. Adjudicating authority has failed to consider that the appellant was under *bonafide* belief that e-way bill is not required as they are engaged in the supply of exempted goods *i.e.* plants and as per Rule 138 (14) (E) of CGST Rules, 2017 they are not required to issue e-way bill. As discussed in statement of facts, the appellant is engaged in plantation business. The plants falling in Chapter 6 of the Customs Tariff are exempt from GST as per serial number 34 of Notification No. 02/2017-Central Tax (Rate) dated 28-6-2017. Similar notification has been issued under IGST Act and HPGST Act. As per Section 23 (1) (a) of CGST/HPGST Act, 2017, any person engaged exclusively in the business of supplying goods that are wholly exempt from tax, is not required to be registered. However, the appellant was not aware of above legal provision and had taken GST Registration No. 0211BCN9078P1ZX and filing returns by showing exempted supplies.

Further, e-way bill is governed *vide* Section 68 of CGST/HPGST Act, 2017 [as made applicable to inter-state transactions *vide* Section 20 of IGST Act, 2017) read with Rule 138 of CGST/HPGST Act, 2017 has made applicable to inter-state transactions *vide* Notification No. 4/2017-Integrated Tax dated 28-6-2017] As per Section Rule 138 (14) (e) of CGST/HPGST Rules, 2017, e-way bill is not required for person dealing in goods specified in the Schedule appended to this notification as mentioned in preceding para, the appellant is not required to issue e-way bill as per above clause of Section 138 (14) *ibid*. Since the appellant is engaged in supply of only exempted goods under above notification, they were under the impression that they are not required to issue e-way bill in any case. This is the reason that they had not issued e-way bill for the machinery sent for repair. This lapse merits to be condoned considering the same as of procedural nature when no revenue is involved in the transaction as discussed in the succeeding paras. Thus, the impugned order passed without considering the above *bonafide* belief & un-intentional mistake on part of appellant is not sustainable and the same merits to be set aside.

(7) The Ld. Adjudicating authority *vide* their letter No. NEZ/Palampur/595 dated 26-11-2018 has taken the plea that e-way bill is required of movement of goods not only for reason "supply", but also required to be generated for reasons other than supply (See Rules 138 (a)(ii) Further, it is mentioned in above letter that activity to send goods for job work or repairs does not come under definition of supply is not relevant as notice was issued for of generating E-way bill for reasons other than supply. It is further mentioned in this letter that the appellant may be engaged in supply of exempted goods which is not relevant in the case. Auto Clove machine is not in e-way bill exempted list and attracts penalty u/s 129 (1) (a) of the Act.

In this regard, it is submitted that the appellant has never denied that e-way bill is required in case of other than supply. But their submission is that there is no applicable tax as required in Section 129 (1) *ibid*, in view of fact that sending capital good for repair is not a supply. Since there is no applicable tax, no demand of GST can be made in the present case and no penalty equal to GST can be imposed. Further, no detention is contemplated where there is not intent to evade duty as per the provisions of

Section 129 (6) and 130 (1) *ibid*. Further, the appellant had given reference of no requirement of e-way bill since they are engaged in exempted supply and it is to show their *bonafide* belief in non-issuance of e-way bill along with disputed transaction. Thus, the grounds taken in above letter are against the legal provision o the issue as discussed in the preceding paras. The impugned order passed without considering the legal provisions is not sustainable and the same merits to be set aside.

The above grounds are independent and without prejudice to one another. The appellant seeks leave to add or withdraw any of above grounds as & when consider necessary

Relief Claim:

In view of above, it is respectfully prayed that the Ld. Additional Commissioner (Appeals) may be pleased to *set aside* the impugned order confirming IGST demand of Rs. 59,400/- and imposing equal penalty of Rs. 59,400/- on the appellant and allow the present appeal and refund the same amount deposited by the appellant. Any other order deemed just & proper may be passed.

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15. Point wise reply from respondent:

Pt. No. 1: That the impugned order passed under the CGST/HPGST Act, 2017 is accordance with the Act/Rules.

Pt. No. 2: Notice u/s 129 (3) of the HPGST Act, 2017 issued to the tax payer in form GST-MOV-07 to show cause within 7 days from the receipt of notice, but the tax payer failed to do so within stipulated time period. It is clear from interpretation of provision of the Act that notice issued GST-MOV-07 is sustainable and dealer has been afforded enough opportunity of being heard.

Pt. No. 3: Order of demand of tax and penalty in form MOV-09 issued to the tax payer on 27-1-2018 and duly received by the tax payer on same date *i.e.* 27-11-2018.

Pt. No. 4: In this para, it is submitted that E-way bill is required for movement of goods not only for the reason "supply:", but also required to be generated for the reasons other than supply as stated in rule 138 (10 (II) of the E-way bill rules.

Pt. No. 4.1: In this para, it is submitted that the tax/penalty under section 129 (3) is imposed as per Act *ibid* and rules framed there under.

Pt. No. 4.2: In this pare, it is submitted that activity to send goods for job work or repair work is considered as other than supply (Read rule 138 (i) (ii), it requires to generate E-way Bill which the dealer failed and so section 129 (1) (A) attracted and thus tax and penalty was imposed as per HPGST Act, 2017.

Pt No. 5: As the amount of commodities exceeds the value of 50,000/- rupees, the dealer is bound to generate E-way bill.

Pt. No. 5.1: Goods *i.e.* Auto cloves machine is not in E-way bill exempted list and attracts penalty under section 129 (1) (A) of the Act. Hence pare denied.

Pt. No. 5.2: Para denied, as the generation of E-way bill exempted list and attracts penalty under section 129 (1) (A) of the Act. Hence para denied.

Pt. No. 6: It is submitted that E-way bill is required for movement of goods not only for the reason "supply", but also required to be generated for reason other than supply as stated in Rule 138 (1) (ii) of F-way bill rules.

Pt. No. 7: Rule 138 of the CGST/HPGST Rules, 2017 states that every registered person who causes

movement of goods (which may not necessarily be on account of supply) of the said consignment value is required to furnish above mentioned information in part A of the E-way bill and Transporter will give details in Part B. A registered person sending Auto clothes machine for repair or job work, interstate supply of goods or other than supply of goods has not covered under E-way bill exempted list and the consignment of Auto clothes machine attracts penalty under section 129 (1) of the Act.

That rule 138 of CGST/HPGST Rules, 2017 provides for the E-way bill mechanism and in this context it is important note that "information is to be furnished prior to the commencement of movement of goods: and is to be issued whether the movement is in relation to a supply or for reasons other than supply. That the order passed by the proper officer IS under the provision of law of CGST and SGST Rule, 2017.

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16. After hearing both the parties in detail it appears that the disputed goods were sent by the petitioner for repair to the supplier on challan with a photocopy of invoice received at the time of purchase. The Ld. Proper Officer intercepted the conveyance carrying the goods and it came to the notice of the proper officer that the e-way bill has not been generated for the movement of goods. Hence, there by a tax/penalty has been imposed under section 129 of HPGST/CGST Act, 2019 for contravention of Rule 138 a demand of (*i.e* total Rs. 1,18,800/-) has been created under IGST Act against the taxpayer.

17. The ld. counsel submitted that the petitioner is engaged exclusively in the business of supplying goods that are wholly exempt from tax under GST. He further submitted that the ld. Adjudicating authority has failed to consider that the appellant was under *bonafide* belief that e-way bill is not required as they are engaged in the supply of exempted goods *i.e.* plants as per Rule 138 (14) (E) of CGST/HPGST Rules, 2017. They were under the impression that they are not required to issue e-way bill in any case. This is the reason that they had not issued e-way bill for the machinery sent for repair. He also submitted that their transaction doesn't satisfy the definition of "supply" under section 7 of HPGST/CGST Act, 2017 as the goods were not meant for sale.

18. The ld. respondent in response argued that as per Rule 138 (1) of CGST/HPGST Rules, 2017, every registered person who causes movement of goods of consignment value exceeding fifty thousand rupees in relation to a supply; or for reasons other than supply; or due to inward supply from an unregistered person, is required to generate e way bill before the commencement of such movement.

19. The petitioner later accepted the fact that e way bill is required in cases other than supply and pleaded that since there is no tax implication in this case and that they were sending capital goods for repair only, thus no penalty can be imposed under section 129 (1).

20. I have heard both the parties and have perused the record of the case. It appears that there is no dispute regarding quantity/quality of goods and further it has been clearly mentioned on the challan that the goods are not for sale only for repair. Since the transaction has no tax implications, the proper office while adjudicating the case has taken into consideration the invoice value of the nine month old purchase invoice for determining the tax and penalty in this case under section 129(1) of the Act. The method used for valuation of transaction is not just and proper as the disputed goods were old and were dispatched for repair.

21. As there is no doubt that the taxpayer has violated the provisions of the CGST/HPGST Act, 2017, so is liable to pay penalty. The tax payer has transported goods without the cover of proper documents (e way bill is one of them). In this regard, attention is invited toward section 122 of the CGST/HPGST Act that can come into play in the instant case which provides:

122. (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;

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

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 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.

22. In the view of the above facts, the instant appeal is accepted and the order passed by Assistant Commissioner State Taxes & Excise-cum- Proper Officer, North Enforcement Zone Palampur dated 27-11-2018 is set aside. The tax and penalty deposited by the appellant under section 129 (1) may be refunded and a penalty of Rs. Ten Thousand only (Rs. 10,000/-) is imposed on the taxpayer under section 122 (1) of the Act. The judgment in this case was reserved on 4-1-2020 which is released today.

Inform the parties accordingly.

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