

CGST : Petition challenging constitutional validity of rule 138(10) of the Central Goods and Services Tax Rules, 2017 / Gujarat Goods and Services Tax Rules, 2017 as being unconstitutional and violative of articles 14, 19(1)(g) and 301 of Constitution of India, to extent said provision restricts validity period of e-way bill in terms of distance to be travelled in a day was to be admitted

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[2018] 100 taxmann.com 206 (Gujarat)

HIGH COURT OF GUJARAT

Orson Holdings Company Ltd.

v.

Union of India

**MS. HARSHA DEVANI AND DR. A.P. THAKER, JJ.
R/SPECIAL CIVIL APPLICATION NO. 18982 OF 2018
DECEMBER 7, 2018**

Vinay Shraff, Avinash Poddar, Vishal J. Dave, Nipun Singhvi and Ms. Hiral Mehta, Advs. for the Petitioner.

ORDER

Ms. Harsha Devani, J. - This petition challenges the constitutional validity of rule 138(10) of the Central Goods and Services Tax Rules, 2017/Gujarat Goods and Services Tax Rules, 2017 as being unconstitutional and violative of Articles 14, 19(1)(g) and 301 of the Constitution of India, to the extent the said provision restricts validity period of the e-way bill in terms of distance to be travelled in a day.

2. Mr. Vinay Shraff, learned advocate with Mr. Vishal Dave, learned advocate for the petitioners invited the attention of the court to the notice under section 129(3) of the Central Goods and Service Tax Act, 2017 (Annexure "J" to the petition), to point out that in terms of the said notice, the petitioner was directed to appear before the State Tax Officer-2 on 02.10.2018. It was submitted that in response to the notice, the petitioner filed its reply. Reference was made to the impugned order passed under section 129(3) of the Act, to point out that the same has been passed on 28.09.2018 without waiting for the date of hearing, that is, 02.10.2018. It was submitted that therefore, the impugned order has been passed in breach of the principles of natural justice.

3. The attention of the court was invited to sub-section (4) of section 129 of the Act, which provides that no tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard. It was submitted that despite the fact that in the show cause notice the date has been fixed, the order has been passed prior to the said date, without giving an opportunity of hearing to the petitioner, which is in breach of sub-section (4) of section 129 of the Act.

4. It was further pointed out that penalty is sought to be imposed under section 129(1) of the Act, whereas section 122(1)(xiv) of the Act provides that where a taxable person who 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, etc., whichever is higher.

5. Reference was made to section 73 of the Act, which provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts, and more particularly, to sub-section (8) thereof, which provides that where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded. It was submitted that in the facts of the present case, the petitioner had deposited the amount of tax and penalty within thirty days from the date of issue of the notice and therefore, the petitioner was entitled to the benefit of sub-section (8) of section 73 of the Act.

6. Reference was also made to section 74 of the Act, which provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts, and more particularly, to sub-section (8) thereof, which provides that 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. It was submitted that therefore, even in the case of fraud or wilful misstatement or suppression of facts, the statute provides for payment of penalty equivalent to twenty-five per cent of the tax within thirty days from the date of the notice.

7. It was further submitted that the statute is required to be read as a whole and that section 129 of the Act ought not to have been read in isolation. Reliance was placed upon the decision of the Supreme Court in *Kailash Chandra and others v. Mukundi Lal and others*, AIR 2002 SC 829, wherein the court has held that a provision in the statute is not to be read in isolation. It has to be read with other related provisions in the Act itself, more particularly, when the subject matter dealt with in different sections or parts of the same statute is the same or similar in nature.

8. The attention of the court was also invited to the circular No.64/38/2018-GST dated 14th September, 2018 and more particularly, clause (5) thereof, which provides that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, proceedings under section 129 of the CGST Act may not be initiated, *inter alia*, in the situations enumerated thereunder. It was submitted that the situations enumerated in the said circular are illustrative and not exhaustive. Therefore, a mistake in writing distance can be deemed to have been included within the ambit of the said circular.

9. Another contention raised by the learned advocate for the petitioner is that in terms of the Government of India circular No.3/3/2017-GST dated 5th July, 2017, the functions under different sections of the Central Goods and Service Act, 2017 or the rules made thereunder, are specifically delegated to the officers in terms of the said circular. It was pointed out that the powers under sub-section (3) of section 129 of the Act have been delegated to the Deputy or Assistant Commissioner of Central Tax. It was contended that the impugned order has been passed by the State Tax Officer, who is not an officer empowered to exercise powers under sub-section (3) of section 129 of the Act and therefore, suffers from lack of jurisdiction.

10. Having regard to the submissions advanced by the learned advocate for the petitioner, **Issue Notice** returnable on 10th January, 2019.

Direct Service is permitted today.

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