Allahabad High Court
M/S Anandeshwar Traders vs State Of U.P. And 2 Others on 18 January, 2021
Bench: Saumitra Dayal Singh

HIGH COURT OF JUDICATURE AT ALLAHABAD

?A.F.R.

Court No. - 38

Case :- WRIT TAX No. - 503 of 2020

Petitioner :- M/S Anandeshwar Traders

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Aditya Pandey

Counsel for Respondent :- C.S.C.

Hon'ble Saumitra Dayal Singh,J.

1. Heard Sri Aditya Pandey, learned counsel for the petitioner and Sri Jagdish Mishra, learned Standing Counsel.

2. The present petition is directed against the order dated 3.12.2019 passed by the Additional Commissioner Grade-2 (Appeal)-5, Commercial Tax, Kanpur, whereby the demand of tax and penalty amounting to Rs. 29,76,110/- has been confirmed.

3. Undisputedly, the petitioner is a trader in Pan Masala and other goods. It claims to have sold disputed goods to a dealer - Shri Durga Trading Company, Darjeeling, West Bengal, against its Tax Invoice nos. SAT/19-20/0059, dated 24.11.2019 and SAT/19-20/0060, also dated 24.11.2019. Two e-way bills were also prepared being e-way bill nos. 491096371734 and 491096371789. Both e-way bills were prepared on 24.11.2019 at 02.32 PM and 02.33 PM respectively. Bilty of M/s Ganpati Road Carriers Pvt. Ltd. being LR/321 and LR/322 were also prepared for transportation of those goods.

4. It is also undisputed that the goods in question along with the aforesaid two tax invoices, e-way bills and, two Bilty were found accompanying the goods on 28.11.2019 when the same were intercepted by the revenue authorities. At the stage of seizure i.e when the order under Section 129(1) of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as the Act) was passed, only one allegation was proposed to be levelled by the proper officer - of reuse of the aforesaid e-way bills. However, at the stage of final order passed under Section 129(3) of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as the Act), no finding came to be recorded to that effect. Accordingly, by order dated 3.12.2019, the Assistant Commisioner (Mobile Squad)-4, Kanpur, revised a demand of tax and penalty Rs. 29,76,110/-.

5. The petitioner's appeal against that order came to be dismissed by order dated 22.6.2020 passed by the Additional Commissioner Grade-2 (Appeal)-5, Commercial Tax, Kanpur. However, it is noted that at the stage of the appeal, certain additional evidence has been entertained by the appeal authority in the shape of receipt of toll plaza indicating (according to the revenue authority) that the goods had moved on 24.11.2019 itself, at 7.31 PM. Relying on that, the penalty appeal was also dismissed. Relying on Rule 138(9) of the Central Goods and Service Tax Rules, 2017 (hereinafter referred to as the Rules), it has been reasoned by the appeal authority that since the goods were not being transported immediately upon preparation of the e-way bills on 24.11.2019, the same should have been cancelled. Since the e-way bills were not cancelled and the transportation of the goods commenced four days thereafter, it has been inferred that the said e-way bills had been reused.

6. Learned counsel for the petitioner submits that Rule 138(9) of the Rules does not, in any way, provide either automatic cancellation of e-way bills or cancellation of e-way bills by way of necessary option to be adopted by a dealer, in case, the goods are not transported within 24 hours of such e-way bills being generated. Merely because transportation of the goods did not commence for four days thereafter, it may not itself lead to any adverse inference of second use of that e-way bills. Second, it has been submitted that, in any case, the reason for assessment and penalty has to be tested on the strength of the original order. The reasoning given therein could not be supplemented or supplanted at the stage of appeal. Relying on Rule 112 of the Rules, it has been further submitted that the right to lead additional evidence at the stage of appeal, has been granted to the appellant only. Therefore, the appeal authority has wrongly allowed the application of the revenue authority who was the respondent in the appeal. In that regard, reliance has been placed on the decision of the Supreme Court in the case of Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851.

7. On the other hand, learned Standing Counsel opposed the petition and submitted that, in case the petitioner had not transported the goods as disclosed on the e-way bills, he should have acted in accordance with law and cancelled the same under Rule 138(9) of the Rules. The fact that the e-way bills were not cancelled, itself is a evidence of the goods having been twice transported, thereon. Then, referring to the evidence received by the appeal authority, it has been submitted that clearly the petitioner-assessee had made second use of the e-way bills.

8. Having heard learned counsel for the parties and having perused the record, the rights of the parties, in the instant case, are found to be governed by the Rule 138(9) of the Rules, which reads as

below:-

"Where an e-way bill has been generated under this rule, but goods are either nottransported or are not transported as per the details furnished in the e-way bill, the e-way billmay be cancelled electronically on the common portal within twenty four hours ofgeneration of the e-way bill:

Provided that an e-way bill cannot be cancelled if it has been verified in transit inaccordance with the provisions of rule 138B:

Provided further that the unique number generated under sub-rule (1) shall be validfor a period of fifteen days for updation of Part B of FORM GST EWB-01."

9. The Rule does not prescribe that the dealer must necessarily cancel the e-way bill if no transportation of the goods is made within 24 hours of its generation. It certainly does not provide any consequence that may follow if such cancellation does not take place. On the contrary, the Rule permits a dealer to cancel the e-way bill only if the transportation does not take place and the dealer choses to cancel such e-way bill within 24 hours of its generation.

10. Even if the dealer does not cancel the e-way bill within 24 hours of its generation, it would remain a matter of inquiry to determine on evidence whether an actual transaction had taken place or not. That would be subject to evidence received by the authority. As such it was open to the seizing authority to make all fact inquiries and ascertain on that basis whether the goods had or had not been transported pursuant to the e-way bills generated on 24.11.2019. Since the petitioner-assessee had pleaded a negative fact, the initial onus was on the assessing authority to lead positive evidence to establish that the goods had been transported on an earlier occasion. Neither any inquiry appears to have been made at that stage from the purchasing dealer or any toll plaza or other source, nor the petitioner was confronted with any adverse material as may have shifted the onus on the assessee to establish non-transportation of goods on an earlier occasion.

11. The presumption could not be drawn on the basis of the existence of the e-way bills though there did not exist evidence of actual transaction performed and though there is no statutory presumption available. Also, there is no finding of the assessing authority to that effect only. Mere assertion made at the end of the seizure order that it was clearly established that the assessee had made double use of the e-way bills is merely a conclusion drawn bereft of material on record. It is the reason based on facts and evidence found by the assessing authority that has to be examined to test the correctness of the order and not the conclusions, recorded without any material on record.

12. Then, as to the power of the appeal authority to entertain additional evidence, again, there can be no doubt that Rule 112 of the Rules does not allow for additional evidence to be led at the instance of the respondent in the appeal. In the case of penalty or assessment, where the appeal may be filed by the assessee alone, the correctness of the order is to be tested on the strength of the reasons given in that order and not on the basis of any supplementary or other material that may be brought on record by the revenue authority during the appeal proceedings. To do that would be to allow the order impugned in an appeal proceeding to be tested and affirmed on fresh reasons,

existing outside the assessment or penalty order. Clearly, that is impermissible and against the principle laid down by the Supreme Court in Mohinder Singh Gill (supra). In absence of specific Rule of procedure allowing the appeal authority to admit additional evidence at the behest of the respondent, it never became open to it to confront the petitioner with that evidence and draw it's independent conclusions based thereon.

13. In view of the above position, though the petitioner-assessee has also disputed the correctness of the additional evidence, that issue is not required to be gone into in the present case. Accordingly, it is found that the order passed by the appeal authority is erroneous, being contrary to the provisions of law. The appeal authority had no jurisdiction to examine fresh evidence at the behest of the revenue or record fresh reasons to support original order. The proper authority, had not recorded any reason to establish evasion of tax or attempt to evade tax or even reuse of the documents by the petitioner. Though he raised that issue in the seizure proceedings, he did not record any finding that effect in the final order dated 3.12.2019 passed under Section 129(3) of the Act. He simply rejected the explanation furnished by the assessee without recording any reason and consequently imposed tax and penalty.

14. In view of the above, no useful purpose would be served to remand the proceeding now as that would amount to giving the revenue a second inning to built a fresh case that too after being aware of the defense set out by the assessee in the first leg of the proceedings. The order dated 3.12.2019 passed by the proper authority under Section 129(3) of the Act is found to be perverse and is set aside. Any amount that may have been deposited by the petitioner-assessee, may be returned to it, in accordance with law.

15. Accordingly, the present petition is allowed.

Order Date :- 18.1.2021 Prakhar