

**Neutral Citation No. - 2024:AHC:114867**

**RESERVED**

**Court No. - 2**

**Case :- WRIT TAX No. - 1007 of 2022**

**Petitioner :- M/S Shree Om Steels**

**Respondent :- Additional Commissioner Grade-2 And Another**

**Counsel for Petitioner :- Aditya Pandey,Akhil Agnihotri**

**Counsel for Respondent :- C.S.C.**

**WITH**

**Case :- WRIT TAX No. - 1101 of 2022**

**Petitioner :- M/S Pal Trading Company**

**Respondent :- Additional Commissioner Grade-2 And Another**

**Counsel for Petitioner :- Aditya Pandey,Bipin Kumar Pandey**

**Counsel for Respondent :- C.S.C.**

**AND**

**Case :- WRIT TAX No. - 1410 of 2022**

**Petitioner :- M/S Shri Om Krishi Yantra Udyog**

**Respondent :- Additional Commissioner Grade-2 And Another**

**Counsel for Petitioner :- Aditya Pandey,Bipin Kumar Pandey**

**Counsel for Respondent :- C.S.C.**

**HON'BLE PIYUSH AGRAWAL,J.**

1. Heard Shri Aditya Pandey, learned counsel for the petitioner and Shri Rishi Kumar, learned Additional Chief Standing Counsel for the State - respondents.
2. Writ Tax No. 1007 of 2022 relates to the Assessment Year 2020-21, Writ Tax No. 1101 of 2022 relates to Assessment Year 2019-20 and Writ Tax No. 1410 of 2022 relates to Assessment Year 2019-20. Since the issues involved in these writ petitions are similar, therefore, the same are being decided by the common order. Writ Tax No. 1007 of 2022 is taken as a leading case for deciding the controversy involved in these writ petitions.

**Writ Tax No. 1007 of 2022**

3. The present writ petition has been filed challenging the impugned order dated 24.03.2022 passed by the Additional Commissioner, Grade – 2 (Appeal), Commercial Tax, Etawah in Appeal No. GST – 0044/2021 under section 130 of the UPGST Act for the assessment year 2020-21 as well as the impugned order 20.11.2020 passed by the Assistant Commissioner (SIB), Commercial Tax, Etawah.
4. The petitioner is a registered dealer and is engaged in the business of trading of iron & steel. An inspection/survey was carried out on 21.10.2020 at the business premises of the petitioner and on the basis of the said inspection, proceedings under section 130 read with section 122 of the UPGST Act were initiated against the petitioner and the goods were confiscated. On 04.11.2020, notice under section 130, read with section 122, of the UPGST Act was issued for confiscating the goods seized as well as for levying the penalty. Thereafter, vide impugned order dated 20.11.2020, tax and penalty levied upon the petitioner. Aggrieved by the said order, the petitioner preferred appeal before the respondent no. 1, which has been dismissed vide impugned order dated 24.03.2022. Hence, this writ petition.
5. Learned counsel for the petitioner submits that the survey, which was conducted under section 67 of the UPGST Act proceeded with notice under section 130, read with section 122 of the UPGST Act. He further submits that only eye measurement was done as goods were not excess as alleged. He further submits that even assuming, without admitting, that if the goods were found in excess, then the proceedings should have been initiated as per sections 73 & 74 of the UPGST Act. He further submits that as per section 35(6) of the UPGST Act, the proceedings under

section 130 of the UPGST Act are not permissible to be initiated against a registered dealer.

6. In support of his submissions, he has placed reliance on the judgements of this Court in *M/s Maa Mahamaya Alloys Pvt. Ltd. Vs. State of U.P. & 3 Others* [Writ Tax No. 31/2021, decided on 23.03.2023] and *Metenere Limited Vs. Union of India & Another* [2020 NTN (74) 574]. He prays for allowing the writ petitions.
7. Per contra, learned ACSC supports the impugned orders and submits that the petitioner is indulged in *mal practice* as it is evident from the survey that excess stocks were found without proper entry in the books of account. As excess stock has been noticed, therefore, the proceedings under section 130, read with section 122 of the UPGST Act were rightly initiated against the petitioner. He prays for dismissal of the writ petitions.
8. After hearing learned counsel for the parties, the Court has perused the record.
9. The case of the petitioner is that once the survey was conducted and alleged excess stock was found, then sections 73 & 74 of the UPGST Act come into play.
10. The issue in hand is covered by the judgement of this Court in *Metenere Limited* (supra), in which following observations have been made:-

“22. From the perusal of the scheme of the Act and the statutory provisions what emerges is that Section 9 of the CGST is the charging section which provides for levy of tax on supplies of goods or services. Section 12 of the CGST Act provides for time on which the tax are to be paid and elaborates the "time of supply of goods" and Section 12 (2) clearly provides that the "time of supply of goods" is the date of issue of invoices or the date of receiving of the payment in respect to such supplies.

23. Section 35 (1) clearly provides that all the registered person are required to keep and maintain at the principal place of business a true and correct account of things

specified in Clause (a) to (f). The Second proviso to Section 35 (1) ,Rule 56 and Rule 57 make it further necessary to keep the said documents as specified in Clause (a) to (f) in the electronic form.

24. Section 35 (6) of the said Act provides that in the event the person fails to keep their accounts for the goods or the services in accordance with the provisions of Sub-section 1 of Section 35, the proper officer is empowered to determine the amount of tax payable on the goods or the service which are unaccounted for as if such goods or services had been supplied by such person and the provisions of Section 73 or 74 shall mutatis mutandis apply for determination of the said tax.

25. A perusal of the said section 35(6) makes it clear that proper officer is empowered to determine the taxes payable and while determining the said tax payable he is bound to determine the same in accordance with the provisions of Sections 73 & 74 of the Act.

26. In the present case, the proper officer was empowered to determine the liability of payment of tax in terms of the powers conferred under Section 35 (6) after resorting to the procedure as established under Section 74 of the Act. Section 74 of the Act reads as under:

*Section 74 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.*

*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*

*(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.*

*(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short*

*paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.*

*(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.*

*(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*

*(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.*

*(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.*

*(8) 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.*

*(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.*

*(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.*

*(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.*

*27. Although in terms of the provisions of Section 35 (6), the unaccounted goods are "deemed to be supplied" however, determination and quantification of the tax on the said "deemed supply" has to be done in accordance with Section 73 or Section 74 of the Act..”*

- 11.** In the aforesaid case, this Court has specifically held that even if excess stock is found, the proceedings under section 130 of the UPGST Act cannot be initiated.
- 12.** Further, in *M/s Maa Mahamaya Alloys Pvt. Ltd.* (supra), this Court has held as under:-

*“9. Considering the rival submissions made at the bar, the following questions which arise for determination;*

*(I). Whether tax can be assessed/ determined in exercise of powers under Section 130 of the GST Act?*

*(II). Whether penalty can be levied only on the allegations that at the time of verification of goods, the goods in excess were found at the premises?*

*(III). Whether the service of notice as claimed by the respondent satisfies the requirement contemplated under Section 169 of the GST Act?*

*(IV). Whether the valuation of goods can be done on the basis of eye estimation alone and on the basis of production capacity and/ or the consumption of electricity etc?*

*11. The issue raised herein in Issue no.I is marked resemblance to facts referred in the judgment of this Court in the case M/s Metenere Limited (supra) wherein on the basis*

*of a similar search conducted, the demand was quantified. This Court after analysing the provisions of the Act and the Rules applicable held that for the infractions as contained in Section 122 of the GST Act and specified in Column 'A' of paragraph 35 of the said judgment M/s Metenere Limited (Supra) held that penalty has to be Rs.10,000/- or the amount of tax evaded whichever is higher, whereas for the infractions specified in Column 'B' of paragraph 35, the penalty that can be imposed is Rs.10,000/- only. This Court also held that the demand for tax can be quantified and raised only in the manner prescribed in Section 73 or Section 74 of the Act, as the case may be.*

*12. In the light of what has been decided by this Court in the case of M/s Metenere Limited (Supra), it is clear that the entire exercise resorted to under Section 130 of the GST Act for assessment/ determination of the tax and the penalty is neither stipulated under the Act, nor can be done in the manner in which it has been done, more so, in view of the fact that the department itself had undertaken the exercise of quantifying the tax due, by taking recourse under Section 74.*

*13. As the entire tax has been determined and the penalty has been levied only on the basis of a survey by taking recourse under Section 130 of the GST Act and not taking a recourse to Section 74, the order impugned is clearly unsustainable.*

*15. On a plain reading of the allegations levelled against the petitioner with regard to the improper accounting of goods, the only stipulation contained in Clauses (ii) and (iv) of sub-section (1) of Section 130 can at best be invoked by the department, however, in the present case, even assuming for the sake of argument, that the goods were lying in excess of the goods in record, the case against the petitioner would not fall under Clause (ii) of sub-section (1) of Section 130 for the*

*simple reason that the liability to pay the tax arises at the time of point of supply, and not at any point earlier than that. On a plain reading, the scope of Clause (ii) of sub-section (1) of Section 130 is that any assessee who is liable to pay tax and does not account for such goods, after the time of supply is occasioned, would be liable to penalty under Clause (ii). Analyzing Clause (iv) of sub-section (1) of Section 130, the contravention of any provision of the Act or the Rules should be in conjunction with an intent to evade payment tax and penalty can be levied by invoking Clause (iv) only when the department establishes that there were a contravention of the Act and Rules coupled with the 'intent to make payment of tax'. There is no such allegation in the show cause notice or any of the orders, I have no hesitation in holding that even the Clause (iv) of sub-section (1) of Section 130 would not be attracted in the present case.”*

- 13.** In the aforesaid case also, similar view has been taken by this Court and allowed the writ petition.
- 14.** In view of the aforesaid facts & circumstances of the case as well as the law laid down by this Court in the cases referred to above, the impugned orders passed by the authorities below in all the writ petitions cannot be sustained in the eyes of law. The same are hereby quashed.
- 15.** The writ petitions succeed and are allowed.

**Order Date :-19/07/2024**

*Amit Mishra*