

Allahabad High Court

Clear Secured Services Private ... vs Commissioner, State Tax Gst, U.P.on 23 November, 2023

Bench: Pankaj Bhatia

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Neutral Citation No. - 2023:AHC-LKO:76926

Court No. - 8

Case :- WRIT TAX No. - 5 of 2023

Petitioner :- Clear Secured Services Private Limited, Thru. Shailendra Dubey, Authorized

Respondent :- Commissioner, State Tax Gst, U.P. Commercial Tax, Lucknow And Another

Counsel for Petitioner :- Jameel Ahmad

Counsel for Respondent :- C.S.C.

A N D

Case :- WRIT TAX No. - 1 of 2023

Petitioner :- Clear Secured Services Private Limited Thru. Shailendra Dubey Authorized

Respondent :- Commissioner, State Tax Gst, Up Lucknow And Another

Counsel for Petitioner :- Jameel Ahmad

Hon'ble Pankaj Bhatia, J.

1. Since both the petitions raise a common issue, they are being decided by this common order.
2. Heard Shri Raghvendra Sworup Sharma and Shri Jameel Ahmad, learned counsel for the petitioner and Shri Anurag Shukla, learned counsel for the respondent department.
3. For the sake of brevity, the facts of Writ Tax No.5 of 2023 is being taken up.
4. Present petition has been filed by the petitioner challenging the order dated 25.08.2021 whereby the order of penalty was passed imposing a penalty of Rs.28,00,476/- towards CGST and

Rs.28,00,476/- towards SGST in purported exercise of powers under Section 122 of GST Act.

The petitioner also challenges the order dated 14.09.2022 whereby the appeal preferred by the petitioner was dismissed. The said two orders are contained in Annexure - P1 & P2.

5. The facts, in brief, are that the petitioner is a private company limited and is providing manpower supply services. The petitioner was served with a show-cause notice dated 27.05.2021 contained in Annexure - P1, whereby allegations were levelled against the petitioner alleging that although the petitioner had collected the GST but the same was not paid within the time prescribed and thus, the petitioner was liable for payment of penalty in terms of the mandate of Section 122(1)(iii) of the GST Act (hereinafter referred to as 'the Act'). The quantum of penalty was specified in the show-cause notice. The petitioner could not give a reply on account of Covid - 19 situation prevalent and in the absence of such a reply, an order came to be passed against the petitioner which was ex-parte. In terms of the said order passed against the petitioner, a penalty of the amount as indicated in the show-cause notice was imposed. The amount imposed was Rs.28,00,476.36/- towards CGST and a similar amount towards SGST, as such, the total amount of penalty imposed against the petitioner was Rs.56,00,952.72/-.

6. Aggrieved against the said order, the petitioner preferred an appeal. The Appellate Authority dismissed the appeal by means of an order dated 14.09.2022. While dismissing the appeal, the Appellate Authority recorded the submission of the petitioner to the effect that the amount could not be deposited within the time frame as the amounts were not received within time owing to the Covid - 19 situation and in any case, the said amounts were paid alongwith late fee after the expiry of three months' time and thus no case for levy of penalty was made out. The ground with regard to not giving an opportunity of hearing was also taken. The Appellate Authority after recording the submission upheld the imposition on penalty and dismissed the appeal by placing reliance on the mandate of Section 122(1)(iii) of the Act.

7. A counter affidavit has been filed by the State justifying the orders imposing penalty again on the strength of the mandate of Section 122(1)(iii) of the Act. In the counter affidavit filed by the respondents, it has been reiterated that in terms of the GSTR - 1 filed by the petitioner, the petitioner did not pay the amount for a period of three months. It is also taken as a defense that the petitioner not only failed to deposit the GST collected by him within the time limit but also failed to provide any justification in not depositing the tax amount so collected within the time limit, and again placing reliance on the mandate of Section 122(1)(iii) of the Act, the penalty imposed against the petitioner is sought to be justified.

8. Contention of counsel for the petitioner is that the penalty is imposable in terms of the mandate of Section 122(1)(iii) of the Act in respect of there being delay in depositing the tax so collected beyond a period of three months, however, the amount of penalty imposable is specified and the same is a sum of Rs.10,000/- or an amount equivalent to the tax evaded or tax not deducted under Section 51 of the Act. In the light of the said, he argues that without agreeing to the allegations levelled against the petitioner, in worst case scenario, the petitioner could have been saddled with a penalty of Rs.10,000/- as admittedly no amount of tax has been evaded.

Section 122(1)(iii) of the Act reads as under:

"122: Penalty for certain offences.

(1) Where a taxable person who -

....

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due."

9. He further draws my attention to the mandate of Section 123 and lays emphasis on the mandate of Section 126, 127 & 128 of the Act, which are quoted herein below:

123: Penalty for failure to furnish information return.

If a person who is required to furnish an information return under section 150 fails to do so within the period specified in the notice issued under sub-section (3) thereof, the proper officer may direct that such person shall be liable to pay a penalty of one hundred rupees for each day of the period during which the failure to furnish such return continues:

Provided that the penalty imposed under this section shall not exceed five thousand rupees.

Section 126: General disciplines related to penalty.

(1) No officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

Explanation.- For the purpose of this sub-section,-

(a) a breach shall be considered a 'minor breach' if the amount of tax involved is less than five thousand rupees;

(b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

(2) The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.

(3) No penalty shall be imposed on any person without giving him an opportunity of being heard.

(4) The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law,

regulation or procedure under which the amount of penalty for the breach has been specified.

(5) When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.

(6) The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.

Section 127. Power to impose penalty in certain cases.

Where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings under section 62 or section 63 or section 64 or section 73 or section 74 or section 129 or section 130, he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person.

Section 128: Power to waive penalty or fee or both.

The Government may, by notification, waive in part or full, any penalty referred to in section 122 or section 123 or section 125 or any late fee referred to in section 47 for such class of taxpayers and under such mitigating circumstances as may be specified therein on the recommendations of the Council.

10. He also argues that owing to Covid - 19 situation, the Ministry of Finance had issued a Notification dated 01.06.2021 whereby the amount of late fee in respect of registered persons who failed to furnish the return for the months/quarter of July, 2017 to April 2021 was waived. He argues that although no notification waiving the penalty was issued in terms of the mandate of Section 128 of the Act, however, the fact that the Government itself chose to waive the late fee, should have been a valid criteria for imposing penalty in terms of Section 126 of the Act, which has not been followed in the present case.

11. Considering the submissions made at the Bar and after perusal of the averments made in the writ petition and the counter affidavit, it transpires that the stand of the revenue was that the amounts have been paid after the prescribed period of three months despite collecting the same; there is no material on record or even an allegation against the petitioner that the amount was collected but not paid or evaded, but only allegation is that the amount was not paid within the time prescribed and was paid after a delay. Even if the said allegation for the sake of argument is treated to be correct, the only penalty imposable against the petitioner would be Rs.10,000/- as no amount of tax has admittedly been evaded by the petitioner. Even otherwise, the Appellate Authority or even the Assessing Authority has failed in following the general disciplines relating to penalty, specifically the mandate of Section 126(2) of the Act.

12. In the present case, in terms of the Notification dated 01.06.2021, the Government in exercise of its powers under Section 128 of the Act had issued guidelines waiving the late fee for filing the returns, this factor had to be validly considered while imposing the penalty in terms of mandate of Section 126(2) of the Act. In the facts of case, the maximum penalty imposable was Rs.10,000/- or the tax evaded, whichever was more; there being no allegation of tax evasion, the maximum penalty that could have been imposed was Rs.10,000/- which could even be lower than the said amount if the Taxing Authority as well as the Assessing Authority had considered the mandate of Section 126(2) of the Act read with Notification dated 01.06.2021. The said exercise clearly has not been done.

13. At this stage, learned counsel for the petitioner states that the petitioner is ready and willing to accept the penalty of Rs.10,000/- to give quietus to the litigation.

14. Considering the scope of the provisions as discussed herein above as well as the offer made by the petitioner, the orders impugned dated 25.08.2021 & 14.09.2022 in Writ Tax No.5 of 2023 are set aside.

15. In the second case being Writ Tax No.1 of 2023, only the amounts are different and all other aspects are common, as such, the orders impugned in the said case dated 15.03.2021 & 14.09.2022 are also set aside.

16. The petitioner shall pay a penalty of Rs.10,000/- in both the cases within a period of two weeks from today by depositing the same with the department.

17. Both the writ petitions stand disposed off in above terms.

Order Date :- 23.11.2023

[Pankaj Bhatia, J.]

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