GST Offences & Penalties and Select Case Laws

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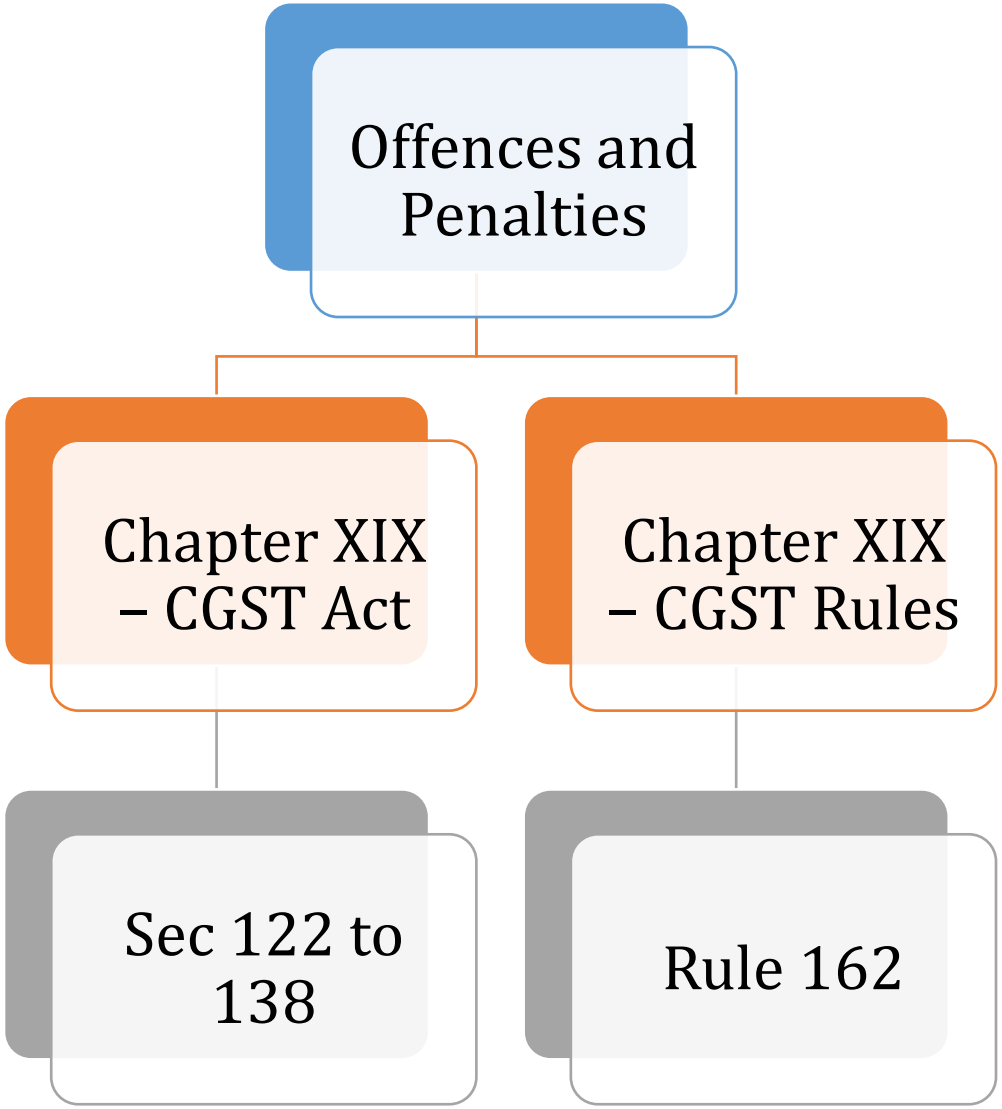
Offences and Penalties under GST – Chapter XIX



Offences and Penalties – Chapter XIX (CGST Act)

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Offences and Penalties – Chapter XIX (CGST Act)

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Meaning of Offence

An offence is a breach of a law or rule, i.e., an illegal act.

Meaning of Penalty

Word Penalty not defined under GST Law

A penalty is a punishment imposed by law for committing an offence or failing to do something that was the duty of a party to do.

A penalty can be both corporal or pecuniary, civil or criminal.

Both corporal (jail) and pecuniary (monetary) penalties are applicable under GST.

Penalty for certain offences – Sec 122 (1) – For a Taxable Person

S. No	Offence
(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
(ii)	issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder
(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
(iv)	collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due
(v)	fails to deduct the tax in accordance with the provisions of sec 52(1), or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax
(vi)	fails to collect tax in accordance with the provisions of sec 52(1), or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of sec 52

Penalty for certain offences – Sec 122 (1) – For a Taxable Person

S. No	Offence
(vii)	takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder
(viii)	fraudulently obtains refund of tax under this Act
(ix)	takes or distributes input tax credit in contravention of section 20, or the rules made thereunder
(x)	falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act
(xi)	is liable to be registered under this Act but fails to obtain registration
(xii)	furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently
(xiii)	obstructs or prevents any officer in discharge of his duties under this Act
(xiv)	transports any taxable goods without the cover of documents as may be specified in this behalf
(xv)	suppresses his turnover leading to evasion of tax under this Act

Penalty for certain offences – Sec 122 (1) – For a Taxable Person

S. No	Offence
(xvi)	fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder
(xvii)	fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act
(xvii)	supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act
(xix)	issues any invoice or document by using the registration number of another registered person
(xx)	tampers with, or destroys any material evidence or document
(xxi)	disposes off or tampers with any goods that have been detained, seized, or attached under this Act

Penalty for certain offences – Sec 122(1) – For a Taxable Person

Offence	Penalty
Section 122(1) **Taxable Person**	**Higher** of a penalty of ***ten thousand rupees or an amount equivalent*** to the T**ax -** tax evaded; or **TDS -** the tax not deducted under section 51 or short deducted or deducted but not paid to the Government; or **TCS -** tax not collected under section 52 or short collected or collected but not paid to the Government; or **ITC -** input tax credit availed of or passed on or distributed irregularly, or **Refund -** the refund claimed fraudulently, whichever is higher.

Penalty for certain offences – Sec 122(1A) – For any Person

Offence	Penalty
Section 122(1A)	Any **person who retains the benefit of a transaction** covered under clause - (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 (ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder (vii) takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder (ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder and at whose instance such transaction is conducted, shall be liable to a ***penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on***

Penalty for certain offences – Sec 122(1B) – For E-Com Operator

Offence	Penalty
Section 122(1B) Any electronic commerce operator, who is liable to collect TCS u/s 52	(i) allows a supply of goods or services or both through it by an unregistered person other than a person exempted from registration by a notification issued under this Act to make such supply (ii) allows an inter-State supply of goods or services or both through it by a person who is not eligible to make such inter-State supply; or (iii) fails to furnish the correct details in the statement to be furnished under sub-section (4) of section 52 of any outward supply of goods effected through it by a person exempted from obtaining registration under this Act, shall be liable to a ***penalty of ten thousand rupees, or an amount equivalent to the amount of tax involved had such supply been made by a registered person other than a person paying tax under section 10, whichever is higher.***

Penalty for certain offences – Sec 122(2) – For any Registered Person

Offence	Penalty
Section 122(2) - Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilized	(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ***ten thousand rupees or ten per cent of the tax due from such person, whichever is higher***; (b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a ***penalty equal to ten thousand rupees or the tax due from such person, whichever is higher***.

Penalty for certain offences – Sec 122(3) – For any Person

Offence	Penalty
Section 122(3) - Any person who **Penalty may extend to Rs 25,000**	(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1) (b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules; (c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder (d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry (e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account

Penalty for failure to comply with track and trace mechanism – Sec 122(B) – For any Person

Offence	Penalty
Section 122(B) -	(a) where any person referred to in clause (b) of sub-section (1) of section 148A acts in contravention of the provisions of the said section, he shall, in **addition to any penalty under Chapter XV or the provisions of this Chapter**, be liable to pay a **penalty equal to an amount of one lakh rupees or ten per cent. of the tax payable on such goods, whichever is higher**.

Offences and Penalties – Section 123, 124, 125, 150 and 151

Nature of Offence	Prescribed Penalty
• Failure to Furnish information return u/s 150	**<u>Rs. 100/ day for the period during which such failure continues</u>** ***Subject to maximum penalty of Rs. 5,000***
• Failure to furnish any information or return under Sec 151— (a) without reasonable cause fails to furnish such information or return as may be required under that section, or (b) wilfully furnishes or causes to furnish any information or return which he knows to be false.	• **Upto Rs. 10,000 fine** • **in case of a continuing offence to a further fine which may extend to Rs. 100/ day after the first day during which the offence continues** • ***subject to a max limit of Rs. 25,000/-***
• General Penalty – contravention of any provisions of this Act or any rules for which no penalty is separately provided	• ***Upto Rs. 25,000***

General Discipline relating to Penalty – Sec 126

No Penalty for minor breach/mistake where the tax involved is less than Rs. 5,000/- and are easily rectifiable

No penalty will be imposed without issuing SCN or giving personal hearing

Penalty cannot be levied Suo-moto on contravention. Reasonable explanation needs to be provided by the Officer

Voluntary disclosure of non payment of tax to the prescribed officer before examination conducted by him shall be considered as mitigating factor.

Not applicable where the penalty is prescribed under the Act as either a fixed sum or expressed as a fixed percentage

Power to impose Penalty in certain cases – Sec 127

i. Person liable to a penalty when not covered under any proceedings under Section 62 or 63 or 64 or 73 or 74, the proper officer will issue an order.

ii. Order issued shall levy a penalty as determined by the proper officer.

iii. A **reasonable opportunity of being heard** will be granted before such issue of order.

Power to waive Penalty, Fees or Both – Sec 128

i. The Government may, by notification waive in part or full ,any penalty under section 122 or 123 or 125 or any late fee under section 47 .

ii. Such relief will be available to specified class of taxpayers and under such mitigating circumstances on recommendation of the council

Revision

Offence under GST -

Offence	Category
Fake Invoices	• Supply of any goods/services without any invoice or issues a false invoice by TP • Issuing any invoice or bill without supply of goods/services • Issuing any invoices using the identification number of another bona-fide TP
Fraud	• Submission of false information while registering under GST • Submission of fake financial records/documents or files fake returns to evade tax • Does not provide information/gives false information during proceedings
Evasion of Tax	• Collects any GST but does not submit it to the government within 3 months • After collection of any GST in contravention of provisions, but not depositing it to the government within 3 months. Failure to deposit such GST within 3 months is an offence under GST. • Obtaining refund of any CGST/SGST by fraud. • Avails and/ or utilizes input tax credit without actual receipt of goods and/or services • Deliberately suppressing sales to evade tax

Offence under GST -

Offence	Category
Supply/ Transport of Goods	• Transportation of goods without proper documents • Supply/transporting goods which is liable to confiscation • Destroy/tampering goods which have been seized
Any Electronic Commerce Operator	• Allows any supply through it by an URP other than a person exempted from registration • Allows any inter-State supply through it by a person not eligible to make inter-State supply • fails to furnish the correct details as per Sec 52 for any outward supply effected through it by a person exempted from obtaining registration
Other Categories	• Not registered under GST although required to by law • Non deduction of TDS or deducting less amount where applicable. • Non collection of TCS or collecting less amount where applicable. • Being an ISD, taking or distributing input tax credit in violation of the rules • Obstructing proper officer during his duty (for example, he hinders the officer during the audit by tax authorities) • Non maintaining all the books that he required to maintain by law • Destruction of any evidence

Illustration of some offences under GST and Penalty -

Offence	Penalty
Delay in filing GST Returns	Late fee is Rs. 100 per day per Act (Each under CGST and SGST) Total will be Rs. 200/day. Maximum is Rs. 5,000. There is no late fee on IGST.
Non filing GST Returns	Higher of (i) 10% of tax due; or (ii) Rs. 10,000
Committing a fraud	Higher of (i) 100% of tax due; or (ii) Rs. 10,000 **(High value fraud cases also have jail term)**
Assisting a person to commit fraud	Penalty extending upto Rs. 25,000
Not issuing invoice	Higher of (i) 100% of tax due; or (ii) Rs. 10,000
Incorrect invoicing	Rs. 25,000
Not registering under GST	Higher of (i) 100% of tax due; or (ii) Rs. 10,000
Any Electronic Commerce Operator	Higher of (i) 100% of tax due; or (ii) Rs. 10,000

Illustration of some offences under GST and Penalty -

Offence	Penalty
Opting for composition scheme even though not eligible	Demand & recovery provisions of sections 73, 74 or 74A will apply. **- Cases involving Fraud -** Higher of (i) 100% of tax due; or (ii) Rs. 10,000 **- Cases not Involving Fraud -** Higher of (i) 10% of tax due; or (ii) Rs. 10,000
Wrongfully charging higher GST rate than prescribed (For lower rate only Interest applicable)	Higher of (i) 100% of tax due; or (ii) Rs. 10,000 **(if the additional GST collected is not submitted with the govt)**
Any person retaining the benefit of transaction covered in some cases	**Penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on**

Cases where only Interest is applicable (no Penalty) -

Offence	Penalty
Payment of Incorrect type of GST (IGST instead of CGST/SGST or vice versa	No penalty. Pay the correct GST and obtain refund of the wrong type of GST paid earlier
Incorrect filing of GST Returns	Interest @18% on shortfall amount
Delay in payment of invoice of supplier	ITC will be reversed if payment is not made to supplier within 6 months from the date of invoice along with 18% interest
Wrongfully charging GST rate— charging lower rate	Interest @18% applicable on the shortfall

CONSEQUENCE OF NON CONFIRMATION OF RULES

Amendment to Sections 129 and 130 of the CGST Act, 2017 (Provisions related to E-Way Bills)-

The CBIC vide Notification No. 39/2021–Central Tax dated December 21, 2021 notified certain amendments in Section 129 and 130 of the CGST Act, 2017 w.e.f. January 01, 2022

A. Section 129 - detention, seizure and release of goods and conveyances in transit -

a. Enhancement of Penalty

Situation	Taxable Goods	Exempt Goods
When owner comes forward - Sec 129(1)(a)	Penalty equal to 200% of tax payable (earlier penalty – 100% Tax)	Lowest of 2% of the value of goods or Rs. 25,000/- (no change)
When owner does not come forward - Sec 129(1)(b)	Penalty equal to higher of 50% of value of goods or 200% of the tax payable on such goods (earlier penalty – 50% of value of goods)	Lowest of 5% of the value of goods or Rs. 25,000/- (no change)

CONSEQUENCE OF NON CONFIRMATION OF RULES

b. Period of issuance of notice and passing of order under Section 129(3) of the CGST Act:

The proper officer detaining/seizing the goods, have to issue a notice (GST MOV-07) within 7 days specifying the penalty payable and pass an order (GST MOV-09) within next 7 days after service of such notice (earlier there was no such time limit)

c. Opportunity of being heard before determination of penalty –

No penalty shall be determined without giving opportunity of hearing, where penalty is payable on detention or seizure of goods or conveyance

CONSEQUENCE OF NON CONFIRMATION OF RULES

B. <u>Amendment to Section 130 - confiscation of goods or conveyances and levy of penalty –</u>

Section 129 and Section 130 of the CGST Act, 2017 has been delinked.

- The goods or conveyance detained or seized shall become liable to be sold or disposed off in the manner prescribed, in case the payment of imposed penalty is not made within 15 days from the date of receipt of copy of the order imposing such penalty.

- Further, conveyance used for transportation of the goods may be released on payment of penalty or Rs 1 Lakh whichever is less

Prosecution and Compounding of Offences

Confiscation or penalty not to interfere with other punishments

- This is without prejudice to provisions contained in Code of Criminal Procedure, 1973

- Confiscation or penalty not to prevent infliction of any other punishment to which the person affected is liable

Punishment for Certain Offences – Sec 132

- Section 132 states the major offences under this act ***which warrant institution of criminal proceedings and prosecutions.***
- Offences such as
  - supply of goods without issuance of invoice,
  - issuance of bill without supply,
  - availment of ITC wrongly without receiving actual supply,
  - collects taxes but fails to pay,
  - fraudulently avails ITC or refund,
  - Evades payment of tax
  - falsification or substitution of financial records,
  - acquires or deals in goods liable to confiscation,
  - receives/concerned with services in contravention,
  - attempts to commit or abets commission of offence

Punishment for Certain Offences – Sec 132

Nature of Offence	Amount Involved	Period of Maximum Imprisonment and Fine
Tax evaded or Input Tax Credit wrongly taken or utilized, or refund wrongly taken	Exceeds Rs 1 crores but upto Rs 2 crores	1 year and with fine
	Exceeds Rs 2 crores but upto Rs 5 crores	3 years and with fine
	Exceeds Rs 5 crores	5 years and with fine
Commits or abets the commission of an offence specified in clause (f) or (g) or (j)		6 months or with fine or with both
For second or every subsequent offence u/s 132	No limit	5 years and with fine

without any specific and special reason as recorded in the order by the court the term of the **imprisonment** should **not be less than 6 months.**

All offences are **non-cognizable and bailable except** the cases where tax evasion is more than Rs. **500 Lakhs**.

Liability of Officers and Certain Other Officials – Sec 133

- Following person will be punishable if they wilfully disclose any information furnished in any return under this act :

i. Any person engaged in collection of statistics under Section 151 or compilation or computerisation ;

ii. Any officer of central tax having access to information specified under Section 150(1) ;

iii. Any person engaged in service on the common portal ;

iv. Agent of the common portal

- If information is disclosed for the following purpose they will not be punishable:

i. for the purpose of prosecution for an offence under this act or any other act;

ii. for execution of duties under the said section ;

Penalty Imposed :

- **Imprisonment upto 6 months;**
- **Fine upto Rs 25000 ;**
- **Both**

Liability of Officers and Certain Other Officials – Sec 133

- A person shall not be prosecuted for any offence under this section :

i. **In case of Government Servant** – Only with the previous sanction of the Government.

ii. **In case of Non-Government Servant** – Only with the previous sanction of Commissioner.

Prosecution and Compounding of Offences – Sec 134, 135, 136 & 137

COGNIZANCE OF OFFENCES [Sec 134]

- Courts inferior than Magistrate of the First Class shall not declare the judgment for any offence committed under this act .

PRESUMPTION OF CULPABLE MENTAL STATE [Sec 135]

- Any offence under this act will be **presumed to be done in a culpable mental state** by the court.
- However, the accused can defend himself by proving the fact he was not in such mental state.
- A fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a **preponderance of probability.**

Prosecution and Compounding of Offences – Sec 134, 135, 136 & 137

RELEVANCY OF STATEMENTS UNDER CERTAIN CIRCUMSTANCES [Sec 136]

A statement signed by a person during the course of proceeding is relevant for proving the truth of the facts in any prosecution for an offence under this act.

- When the person who made the statement is :
  - Dead or cannot be found
  - Incapable of providing evidences
  - Restricted by the adverse party
  - Presence of the person requires time or expenses involved for presenting the person, is considered unreasonable by the court .
- When the person who made the statement is considered as a witness by the court , the statement should be produced as a evidence in interest of the justice.

Prosecution and Compounding of Offences – Sec 134, 135, 136 & 137

OFFENCES BY COMPANIES [SEC 137]

- **Offence committed by a company**
- Every person who at the time of offence being committed was responsible for the conduct of the business of the company shall be deemed to be guilty .
- Proceedings shall be conducted accordingly.
- If proved that the offence was committed with the consent of the key managerial persons or negligence on their part , they shall also be deemed to be guilty.

Prosecution and Compounding of Offences – Sec 134, 135, 136 & 137

- **Offence by Partnership Firm or LLP or a HUF or a Trust**
- The partners or karta or the managing trustee shall be deemed to guilty for offence committed under this act.
- If proved the offence was committed without their knowledge or measures were exercised to stop such offence then they shall not be held liable

Compounding of Offences – Sec 138

Compounding **not available** in following circumstances:

- Compounding already allowed one time in respect of certain specified offences
- Compounding allowed once shall not be allowed again if in the previous compounding case, value of supplies > Rs. 1 Crore in offences not specified above
- A person accused of committing any offence under this act which is an offence under any other law
- A person convicted for an offence under this act by a court
- A person who obstructs any officer discharging duty, tampers material evidence, fails to supply information or supplies false information

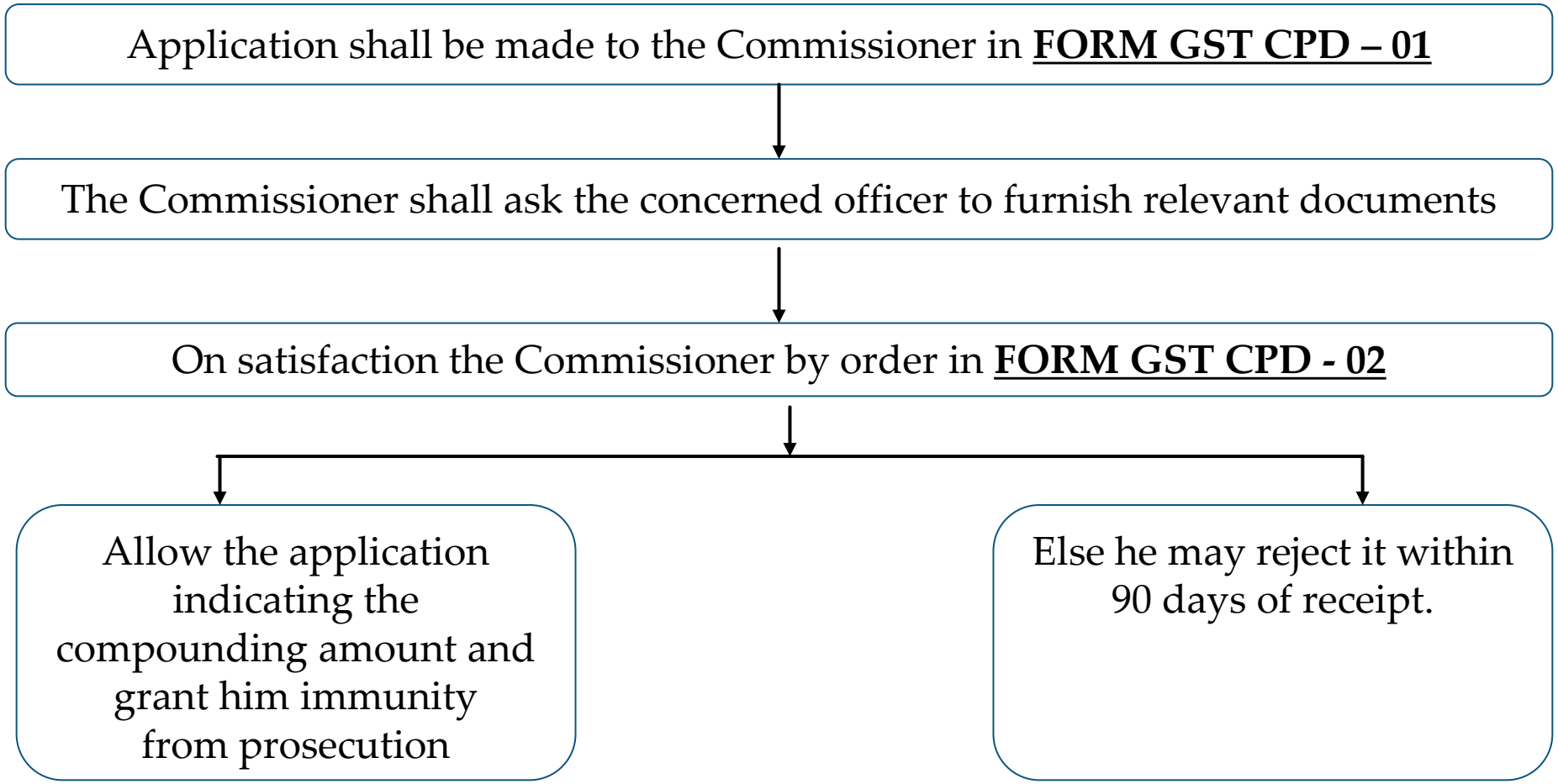
Compounding of Offences – Sec 138

General Rules regarding Compounding -

- Compounding not to affect proceedings instituted under any other law
- Compounding only after payment of taxes, interest, penalty for such offence is made
- Minimum Compounding amount = Higher of Rs. 10,000/- or 50% of tax involved
- Maximum compounding amount = Higher of Rs. 30,000/- or 150% of tax involved
- Upon payment, no further proceedings to be initiated & accused person will stand abated

Compounding of Offences – Sec 138 and Rule 162

Procedure for Compounding -



Compounding of Offences – Sec 138 and Rule 162

Procedure for Compounding -

- Compounding shall be allowed only after payment of taxes, interest and penalty
- Compounding amount shall be paid within 30 days from the date of receipt of order
- Failure to pay the compounding amount shall lead to order being void
- Immunity granted may be withdrawn anytime in case any material facts was concealed by the applicant

Select Case Laws & Critical issues

Sec 73 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful misstatement or suppression of facts

Forum	Parties & Case No	Brief
Odisha HC	Serajuddin& Co. v. UOI [2020] 114 taxmann.com 480 (Orissa) W.P. (C). NO. 386 OF 2020 January 9, 2020	**Held -** Where Competent Authority had passed order under section 73 on assessee without granting time to file reply to show cause notice and without giving an opportunity of personal hearing, ***impugned order had been passed in violation of statutory requirements as indicated in section 75(4)***

Sec 75 – General Provisions relating to determination of tax

Forum	Parties & Case No	Brief
Madras HC	M. R. Hitech Engineers (P) Ltd., v. The State Tax Officer, Office of the Deputy Comm (ST) (Intelligence)	**Issue:-** The Writ Petition was filed to call for the records of the respondent and quash the Order as it is violative of Sections 75(4) and 75(6) of TNGST Act, 2017 and **against the principles of natural justice** and further direct the respondent to look into the documents and details furnished by the petitioner and thereafter **direct the respondent to grant a reasonable opportunity of being heard**. **Held:** It is not in dispute that individual and separate personal hearing notice was not issued to the petitioner. On the ground of violation of statutory mandate under Section 75(4) of TNGST Act, 2017, the impugned orders have to be necessarily quashed. They are accordingly quashed. **The matters are remitted to the file of the respondent to pass orders afresh in accordance with law.**

Sec 79 – Recovery of Tax

Forum	Parties & Case No	Brief
Allahabad HC	Mohd. Yunushv v. State of U.P. [2018] 94 taxmann.com 171 (Allahabad) WRIT-C NO. 6392 OF 2018 APRIL 13, 2018	**Held:** The only dispute is to **the mode and manner of recovery of GST** for which the attention of the Court has been drawn to Section 79 of the Act, 2017. In particular he has drawn the attention of the Court to Section **79(a), (b) and (e),** to contend that liability of tax can be recovered from the person concerned, payable by him in terms of the aforesaid provisions and in default "Proper Officer" as defined under Section 2(9) can prepare the certificate and send it to the Collector of the District for realisation thereof as arrears of land revenue. It is therefore, clear from a perusal of these provisions that **recovery of GST can be make as arrears of land revenue by the Collector of the District on a requisition by the "Proper Officer".**

Sec 129 – Detention, Seizure and Release of Goods and Conveyances in Transit

Forum	Parties & Case No	Brief
Allahabad HC	Ashok Kumar Bhatia v. State of U.P.* [2019] 104 taxmann.com 453 (Allahabad)	**Held:** For application of sections 129 and 130 of CGST Act/UP GST Act, it is immaterial that person proceeded against is **not a registered person or a supplier or a taxable person or is not doing any business**; if such person is a transporter of goods and goods are being transported and have been seized in transit and if charge is made out against transporter, **revenue can proceed to seize such goods including conveyance**

Sec 129 – Detention, Seizure and Release of Goods and Conveyances in Transit

Forum	Parties & Case No	Brief
Raipur HC	K.P. Sugandh Ltd. and Ors. V. State of Chhattisgarh and Ors. WP Nos. 36 and 49 of 2020 March 16, 2020	**Issue:** Under valuation of goods cannot lead to seizure of goods u/s 129 of the CGST Act. **Held:** Given the said facts and circumstances of the case, this Court is of the opinion that under valuation of a good in the invoice cannot be a ground for detention of the goods and vehicle for a proceeding to be drawn under Section 129 of the CGST Act, 2017 read with Rule 138 of the CGST Rules, 2017. In view of the aforesaid the impugned order Annexure P/1 i.e. the order passed under Section 129 and the order of demand of tax and penalty both being unsustainable deserves to be and is accordingly set-aside/quashed

Queries Please

Thank you

Section - 122, Central Goods And Services Tax Act, 2017

CHAPTER XIX
OFFENCES AND PENALTIES

Penalty for certain offences. [23]

[24] **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;

(*ii*) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;

(*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;

(*iv*) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(*v*) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(*vi*) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(*vii*) takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(*viii*) fraudulently obtains refund of tax under this Act;

(*ix*) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(*x*) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(*xi*) is liable to be registered under this Act but fails to obtain registration;

(*xii*) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(*xiii*) obstructs or prevents any officer in discharge of his duties under this Act;

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

(*xv*) suppresses his turnover leading to evasion of tax under this Act;

(*xvi*) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(*xvii*) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(*xviii*) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(*xix*) issues any invoice or document by using the registration number of another registered person;

(*xx*) tampers with, or destroys any material evidence or document;

(*xxi*) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

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.

[24a][(1A) Any person who retains the benefit of a transaction covered under clause (*i*), (*ii*), (*vii*) or clause (*ix*) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.]

[24b] **[** *(1B)* [24c] **[** *Any electronic commerce operator, who is liable to collect tax at source under section 52,* **]**—

(i) *allows a supply of goods or services or both through it by an unregistered person other than a person exempted from registration by a notification issued under this Act to make such supply;*

(ii) *allows an inter-State supply of goods or services or both through it by a person who is not eligible to make such inter-State supply; or*

(iii) *fails to furnish the correct details in the statement to be furnished under sub-section (4) of section 52 of any outward supply of goods effected through it by a person exempted from obtaining registration under this Act,*

shall be liable to pay a penalty of ten thousand rupees, or an amount equivalent to the amount of tax involved had such supply been made by a registered person other than a person paying tax under section 10, whichever is higher.**]**

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,—

(*a*) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent of the tax due from such person, whichever is higher;

(*b*) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who—

(*a*) aids or abets any of the offences specified in clauses (*i*) to (*xxi*) of sub-section (1);

(*b*) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(*c*) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(*d*) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

(*e*) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account,

shall be liable to a penalty which may extend to twenty five thousand rupees.

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23. *See* rule 142 and Form Nos. DRC-01, DRC-07 and DRC-08 of the CGST Rules, 2017.
24. Enforced with effect from 1-7-2017.
24a. Inserted by the Finance Act, 2020, w.e.f. 1-1-2021.
24b. Inserted by the Finance Act, 2023, w.e.f. **1-10-2023**.
24c. Substituted for "Any electronic commerce operator who" by the Finance (No. 2) Act, 2024, w.r.e.f. **1-10-2023**.

Section - 123, Central Goods And Services Tax Act, 2017

Penalty for failure to furnish information return. [25]

[26] **123.** 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.

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25. *See* rule 142 and Form Nos. DRC-01, DRC-07 and DRC-08 of the CGST Rules, 2017.
26. Enforced with effect from 1-7-2017.

Section - 125, Central Goods And Services Tax Act, 2017

General penalty. [26c]

[26d] **125.** Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty five thousand rupees.

26c. *See* rule 142 and Form Nos. DRC-01, DRC-07 and DRC-08 of the CGST Rules, 2017.
26d. Enforced with effect from 1-7-2017.

Section - 126, Central Goods And Services Tax Act, 2017

General disciplines related to penalty.

[26e] **126.** (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.

26e. Enforced with effect from 1-7-2017.

Section - 127, Central Goods And Services Tax Act, 2017

Power to impose penalty in certain cases. [27]

[27a] **127.** 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 [28]**[***or section 74A***]** 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.

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27. *See* rule 142 and Form Nos. DRC-01, DRC-07 and DRC-08 of the CGST Rules, 2017.
27a. Enforced with effect from 1-7-2017.
28. Inserted by the Finance (No. 2) Act, 2024, with effect from a date yet to be notified.

Section - 128, Central Goods And Services Tax Act, 2017

Power to waive penalty or fee or both.

[28a] **128.** 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.

28a. Enforced with effect from 1-7-2017.

Section - 129, Central Goods And Services Tax Act, 2017

Detention, seizure and release of goods and conveyances in transit. [29]

[30] **129** [31] **.** (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 provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,—

[31a] **[** (a) *on payment of penalty equal to two hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such penalty;*

(b) *on payment of penalty equal to fifty per cent of the value of the goods or two hundred per cent of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such penalty;* **]**

(*c*) upon furnishing a security equivalent to the amount payable under clause (*a*) or clause (*b*) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) [31b]**[***]**

[31c] **[** *(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying the penalty payable, and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty under clause* (a) *or clause* (b) *of sub-section (1).***]**

(4) [31d]**[***No penalty***]** shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

[32] **[** *(6) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub-section (1) within fifteen days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):*

Provided *that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) or one lakh rupees, whichever is less:*

Provided further *that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer.* **]**

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29. *See* rule 142 and Form Nos. GST INS-04, DRC-01, DRC-03, DRC-05, DRC-07 and DRC-08 of the CGST Rules, 2017.
30. Enforced with effect from 1-7-2017.

31. For Clarification with respect to E-way Bill System, *see* Press Note, dated 31-3-2018.

For procedure for interception of conveyances for inspection of goods in movement and detention, release and confiscation of such goods and conveyances, *see* Circular No. 41/15/2018-GST, dated 13-4-2018.

For issues regarding "Bill to ship to" for e-way bill, *see* CBEC Press Release, dated 23-4-2018.

For Clarifications on certain issues under GST laws, *see* Circular No. 47/21/2018-GST, dated 8-6-2018.

For modification of procedure for interception of conveyances for inspection of goods in movement and detention, release and confiscation of such goods and conveyances, as clarified by Circular No. 41/15/2018-GST, dated 13-4-2018, *see* Circular No. 49/23/2018-GST, dated 21-6-2018.

For E-way bill in case of storing of goods in godown of transporter, *see* Circular No. 61/35/2018-GST, dated 4-9-2018.

For Clarification on certain issues (sale by government departments to unregistered person; leviability of penalty under section 73(11) of the CGST Act; rate of tax in case of debit notes/credit notes issued under section 142(2) of the CGST Act; applicability of Notification No. 50/2018-Central Tax; valuation methodology in case of TCS under Income-tax Act and definition of owner of goods) related to GST, *see* Circular No. 76/50/2018-GST, dated 31-12-2018.

31a. Substituted by the Finance Act, 2021, w.e.f. **1-1-2022**. Prior to their substitution, clauses (*a*) and (*b*) read as under :

"(*a*) on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

(*b*) on payment of the applicable tax and penalty equal to the fifty per cent of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;"

31b. Omitted by the Finance Act, 2021, w.e.f. **1-1-2022**. Prior to its omission, sub-section (2) read as under :

"(2) The provisions of sub-section (6) of section 67 shall, *mutatis mutandis*, apply for detention and seizure of goods and conveyances."

31c. Substituted by the Finance Act, 2021, w.e.f. **1-1-2022**. Prior to its substitution, sub-section (3) read as under :

"(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (*a*) or clause (*b*) or clause (*c*)."

31d. Substituted for "No tax, interest or penalty" by the Finance Act, 2021, w.e.f. **1-1-2022**.

32. Substituted by the Finance Act, 2021, w.e.f. **1-1-2022**. Prior to its substitution, sub-section (6), as amended by the Central Goods and Services Tax (Amendment) Act, 2018, w.e.f. 1-2-2019, read as under :

"(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within fourteen days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fourteen days may be reduced by the proper officer."

Section - 130, Central Goods And Services Tax Act, 2017

Confiscation of goods or conveyances and levy of penalty. [33]

[34] **130.** (1) [34a]**[***Where***]** any person—

(*i*) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder 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 thereunder 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 provisions of this Act or the rules made thereunder 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 authorised 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 [34b]**[***penalty equal to hundred per cent of the tax payable on such goods***]**:

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) [34c]**[*****]**

(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.

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33. *See* rule 142 and Form Nos. DRC-01, DRC-07 and DRC-08 of the CGST Rules, 2017.
34. Enforced with effect from 1-7-2017.

34a. Substituted for "Notwithstanding anything contained in this Act, if" by the Finance Act, 2021, w.e.f. **1-1-2022**.

34b. Substituted for "amount of penalty leviable under sub-section (1) of section 129" by the Finance Act, 2021, w.e.f. **1-1-2022**

34c. Omitted by the Finance Act, 2021, w.e.f. **1-1-2022**. Prior to its omission, sub-section (3) read as under :

"(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."

Section - 131, Central Goods And Services Tax Act, 2017

Confiscation or penalty not to interfere with other punishments.

[35] **131.** Without prejudice to the provisions contained in the Code of Criminal Procedure, 1973 (2 of 1974), no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force.

35. Enforced with effect from 1-7-2017.

Section - 132, Central Goods And Services Tax Act, 2017

Punishment for certain offences.

[35] **132.** (1) [35a][Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences], namely:—

(*a*) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(*b*) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

[35b][(*c*) avails input tax credit using the invoice or bill referred to in clause (*b*) or fraudulently avails input tax credit without any invoice or bill;]

(*d*) 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;

(*e*) evades tax [35c][***] or fraudulently obtains refund and where such offence is not covered under clauses (*a*) to (*d*);

(*f*) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(*g*) [35d] **[** *** **]**

(*h*) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(*i*) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(*j*) [35e] **[** *** **]**

(*k*) [35f] **[** *** **]**

(*l*) attempts to commit, or abets the commission of any of the offences mentioned in [35g]**[***clauses (a) to (f) and clauses (h) and (i)***]** of this section,

shall be punishable—

(*i*) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(*ii*) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(*iii*) in the case of [35h]**[***an offence specified in clause (b)***,]** where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(*iv*) in cases where he commits or abets the commission of an offence specified in clause (*f*) [35i]**[********]**, he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (*i*), (*ii*) and (*iii*) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) of sub-section (1) and punishable under clause (*i*) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Explanation.— For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.

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35. Enforced with effect from 1-7-2017.

35a. Substituted for "Whoever commits any of the following offences" by the Finance Act, 2020, w.e.f. 1-1-2021.

35b. Substituted by the Finance Act, 2020, w.e.f. 1-1-2021. Prior to its substitution, clause (*c*) read as under :

"(*c*) avails input tax credit using such invoice or bill referred to in clause (*b*);"

35c. Words ", fraudulently avails input tax credit" omitted by the Finance Act, 2020, w.e.f. 1-1-2021.

35d. Omitted by the Finance Act, 2023, w.e.f. **1-10-2023**. Prior to its omission, clause (*g*) read as under :

"(*g*) obstructs or prevents any officer in the discharge of his duties under this Act;"

35e. Omitted by the Finance Act, 2023, w.e.f. **1-10-2023**. Prior to its omission, clause (*j*) read as under :

"(*j*) tampers with or destroys any material evidence or documents;"

35f. Omitted by the Finance Act, 2023, w.e.f. **1-10-2023**. Prior to its omission, clause (*k*) read as under :

"(*k*) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or"

35g. Substituted for "clauses (*a*) to (*k*)" by the Finance Act, 2023, w.e.f. **1-10-2023**.

35h. Substituted for "any other offence" by the Finance Act, 2023, w.e.f. **1-10-2023**.

35i. Words, brackets and letters "or clause (*g*) or clause (*j*)" omitted by the Finance Act, 2023, w.e.f. **1-10-2023**.

(2025) 31 Centax 18 (All.) [29-05-2025]

(2025) 31 Centax 18 (All.)

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

SHEKHAR B. SARAF AND VIPIN CHANDRA DIXIT, JJ.

PATANJALI AYURVED LTD.

Versus

UNION OF INDIA

Writ Tax No. 1603 of 2024, decided on 29-5-2025

GST : Conclusion of proceeding under Section 73/74 against assessee shall not ipso facto abate penalty proceedings under Section 122 which are for completely different offences which include offence of issuance of fake invoices/circular trading of tax invoices.

Penalty - Circular trading of tax invoices - Proceedings under Section 74 v. penalty under Section 122 of CGST Act, 2017 - Period April, 2018 to March, 2022 - Investigation indicated that Petitioner Patanjali Ayurved, acting as a main person of its three units situated at Uttarakhand, Haryana and Maharashtra, indulged in circular trading of tax invoices only on paper without actual supply of goods - Three units of petitioner were issued notices under Sections 74 and 122 ibid - SCN was issued by DGGI proposing to levy penalty of Rs. 273.51 crore on petitioner firm under Section 122(1) ibid, clauses (ii) and (vii) - In meantime, respondent authority vide adjudication order had set aside demands and dropped proceedings under Section 74 ibid against petitioner and only penal action was proposed by department - Against two entities situated in Haryana and Maharashtra penal proceeding continued under Section 122 ibid - Petitioner challenged penalty under Section 122 ibid contending that without first determining tax under Section 73/74 ibid penal provision under Section 122 ibid cannot be invoked - It was also contended that a penalty under Section 122 ibid can only be imposed after a conviction under Section 132 ibid - HELD : Conclusion of proceedings on main person under Section 74 ibid shall not ipso facto abate proceedings under Section 122 ibid proposed to be imposed on main person - There may be scenarios where a proceeding under Section 73/74 ibid may get concluded against main person but penalty proceedings under Section 122 ibid for issue of fake invoices by main person may stand independent of proceedings under Section 74 ibid, and therefore, those proceedings under Section 122 ibid would not abate as per explanation 1(ii) of Section 74 ibid - Proceeding under Section 122 ibid is to be adjudicated by adjudicating officer and is not required to undergo prosecution; and also abatement of proceedings under Section 74 ibid does not ipso facto abate proceedings under Section 122 ibid which are for completely different offences - So far as contention that a penalty under Section 122 ibid can only be imposed after a conviction under Section 132 ibid is concerned, it is to be noted that Section 122 ibid is a provision specifically for imposition of penalty to be adjudicated by proper officer while provisions from sections 132 to 138 ibid deal with prosecution to be done by criminal courts [Section 122 read with Section 74 of Central Goods and Services Tax Act, 2017/Uttarakhand Goods and Services Tax Act, 2017/Haryana Goods and Services Tax Act, 2017/Maharashtra Goods and Services Tax Act, 2017, read with section 20 of Integrated Goods and Services Tax Act, 2017]. *[paras 52 to 54]*

Words and phrases - Words 'offence' and 'penalty' as used in Section 122 of Central Goods and Services Tax Act, 2017 *[para 10]*

In favour of revenue

CASES CITED

Associated Cement Co. Ltd. v. CTO — 1981 taxmann.com 253 (SC) — *Referred* [Para 14]

Asstt. Commissioner (ST) v. Satyam Shivam Papers (P.) Ltd — 2022 (57) G.S.T.L. 97 (S.C.) — *Referred* [Para 35]

Cape Brandy Syndicate v. Commissioner of Inland Revenue — (1921) 2 KB 403 — *Referred* [Para 20]

Chairman SEBI v. Shriram Mutual Fund — [2006] 68 SCL 216 (SC) — *Referred* [Para 3]

Chemmancherry Estates Co. v. ITO — [2019] 111 taxmann.com 66/[2020] 268 Taxman 29 (Mad.) — *Referred* [Para 37]

CST v. Shri Krishna Engg. Co — (2005) 2 SCC 692 — *Referred* [Para 22]

Director Of Enforcement v. Mctm. Corporation (P.) Ltd. — (1996) 2 SCC 471 — *Referred* [Para 3]

Film Exhibitors, Guild v. State of A.P. — AIR 1987 AP 110 — *Referred* [Para 21]

Gujarat Travancore Agency v. CIT — 1989 (42) E.L.T. 350 (S.C.) — *Referred* [Para 3]

Hindustan Herbal Cosmetics v. State of U.P. — 2024 (82) G.S.T.L. 409 (All.) = (2024) 14 Centax 80 (All.) — *Referred* [Para 34]

N.C. Dhoundial v. Union of India — AIR 2004 SC 1272 — *Referred* [Para 3]

Nalinakhya Bysack v. Shyam Sundar Haldar — AIR 1953 SC 148 — *Referred* [Para 16]

NHPC Ltd. v. State of Himachal Pradesh — 2023 SCC online SC 1137 — *Referred* [Para 4]

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Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. — (1983) 1 SCC 147 — *Referred* [Para 25]

SEBI v. Cabot International Capital Corporation — [2004] 51 SCL 307 (Bom) — *Referred* [Para 4]

Sheffield City Council v. Yorkshire Water Services — (1979) 2 All ER 91 — *Referred* [Para 24]

Shiv Dutt Rai Fateh Chand v. Union of India — 1983 taxmann.com 751 (SC) — *Referred* [Para 3]

Standard Chartered Bank v. Directorate of Enforcement — 2006 (197) E.L.T. 18 (S.C.) — *Referred* [Para 3]

State of Tamil Nadu v. K Shyam Sunder — (2011) 8 SCC 737 — *Referred* [Para 4]

State of Tamil Nadu v. M.K. Kandaswami — (1975) 4 SCC 745 — *Referred* [Para 23]

State of U.P. v. Sukhpal Singh Bal — [2005] 7 SCC 615 — *Referred* [Para 13]

Tata Power Company Ltd v. Maharashtra electricity Regulatory Commission — MANU/SC/932/2009 — *Referred* [Para 3]

Union of India v. Dharamendra Textile Processors — 2008 (231) E.L.T. 3 (S.C.) — *Referred* [Para 3]

Veena Estate (P.) Ltd. v. CIT — [2024] 158 taxmann.com 341 (Bom.) — *Referred* [Para 36]

Whitney v. Inland Revenue Commissioners — (1926) AC 37 — *Referred* [Para 17]

DEPARTMENTAL CLARIFICATIONS CITED

C.B.I. & C. **Circular No. 169/01/2022-GST, dated 12-3-2022** [Para 2]

C.B.I. & C. **Circular No. 171/03/2022-GST, dated 6-7-2022** [Paras 2, 51]

C.B.I. & C. **Circular No. 3/3/2017-GST, dated 5-7-2017** [Paras 3, 50]

NOTIFICATION CITED

Notification No. 2/2022-C.T., dated 11-3-2022 [Para 2]

REPRESENTED BY : S/Shri Arvind P. Datar, Learned Sr. Adv., Ashwarya Sharma, Nishant Mishra, Devansh Srivastava, Kinjal Shrivastava, Ms. Vedika Nath and Yashonidhi Shukla, Advs. for the Petitioner.

S/Shri N. Venkatraman, Learned Additional Solicitor General of India, Parv Agarwal, N.C. Gupta and Gaurav Mahajan, Advs. for the Respondent.

[Order per : Shekhar B. Saraf, J.]. -

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Relief Sought

1. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner has prayed for the issuance of a writ of certiorari quashing the impugned Show Cause Notice No.02/2024-25 issued on April 19, 2024 *vide* Form GST DRC-01 reference No.DGGI/INV/GST/2179/2020/GRU/634(S/L) by Directorate General of Goods and Services Tax Intelligence (DGGI), Ghaziabad Regional Unit, (hereinafter referred to as 'respondent no.2') bearing CBIC DIN-202404DNN40000555A8B, to the extent of exorbitant unexplained penalty of Rs. 2,735,113,681/- proposed to be levied against the petitioner firm under Section 122 (1), clause (*ii*) and (*vii*) of the Central Goods and Service Tax, Act 2017 (hereinafter referred to as 'CGST Act') and respective State Statutes namely Uttarakhand Goods and Services Tax Act, 2017, Haryana Goods and Services Tax Act, 2017 and the Maharastra Goods and Services Tax Act, 2017 read with Integrated Goods and Services Tax Act, 2017.

Factual Background

2. Factual matrix giving rise to the instant petition is delineated below:

(a) In the present lis, M/s Patanjali Ayurved limited (hereinafter referred to as 'petitioner') is a private limited company engaged in the manufacturing of Fast-Moving Consumer Goods (FMCG) such as Juices, Candies, Flour, Masala, Hair Oil/Conditioner, Detergent, Handwash, Soaps, Digestive Food items etc. It has three manufacturing units situated at Haridwar (Uttarakhand), Sonipat (Haryana) and Ahmednagar (Maharashtra), which are part of the investigation in the demand-cum-show cause notice. Its principal place of business is in Haridwar, Uttarakhand. Three units of the petitioner are registered at three different locations with same PAN number and distinct GSTIN number under the CGST Act and their respective State Goods and Services Tax Acts. The three units of the petitioner are covered under the common impugned demand-cum-show cause notice dated April 19, 2024 for the tax period April 2018 to March 2022.

(b) An information was received by the respondent authorities relating to M/s S.G Agro India Industry situated at Delhi with GSTIN number (07ASQPG3746B1ZT), that it was having an aggregate liability greater than two crore and Input Tax Credit (ITC) utilization over 99% with no income tax credential. Furthermore, information was also received relating to M/s Magic Traders situated at Delhi with GSTIN number (07MGNPS1227A1ZB), that it had taken recent registration and had issued e-way bills of more than Rs.50 lakhs to various firms.

(c) The aforementioned information created a suspicion which resulted in an investigation conducted against various firms/companies including the three aforementioned units of the petitioner which led to the issuance of the impugned demand-cum-show cause notice dated April 19, 2024 under Sections 74, 122 of CGST Act and Section 20 of Integrated Goods and Services Tax Act, 2017 for the tax period April 2018 to March 2022 by the respondent no.2 wherein it was alleged that the petitioner, acting as a main person, indulged in circular trading of tax invoices only on paper without actual supply of goods.

(d) A perusal of the impugned show cause notice shows that the three units of petitioner situated at Uttarakhand, Haryana and Maharastra were issued notices under Sections 74 and 122 of the CGST Act. It is to be noted that the show cause notice was cumulatively issued under both the provisions of the CGST Act and jurisdiction of the same lies before the respondent no. 2 in view of Circular No.169/01/2022-GST dated March 12, 2022, wherein the Additional/Joint Commissioners of Central Tax Commissionerate Lucknow has been empowered with All India jurisdiction *vide* Notification No. 02/2022-Central Tax dated March 11, 2022 to further adjudicate the matter. As this writ petition is in respect of the petitioner, only the relevant portion of the said show cause notice which runs into more than 150 pages wherein the penalty is imposed upon the petitioner is extracted below:

"13. Now, therefore M/s Patanjali Ayurved Ltd. (05AAECP4424C1ZX), Patanjali Food & Herbal Park Pvt. Ltd., Laksar Road, Padartha, Haridwar, Uttarakhand, 249404 is hereby required to show cause to the Additional/Joint Commissioner, Central GST Commissionerate, Office of the Commissioner, 7-A Ashok Marg, Block-E, Hazratganj, Lucknow, Uttar Pradesh-226001 as to why:

(i) The IGST amounting to Rs. 9,08,15,881/- (Rupees Nine Crore Eight Lakh Fifteen Thousand Eight Hundred and Eighty-one only) should not be demanded and recovered under the provision of Section 74(1) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017, as detailed in para 11.4.2;

(ii) Interest under the provision of Section 50(3) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 should not be demanded and recovered from them on the GST amount demanded at Sl.No. i;

(iii) Penalty should not be imposed upon them in terms of Section 74(1) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for wilful suppression of facts with intent to evade payment of GST on the amount demanded at Sl. No. i;

(iv) Penalty should not be imposed upon them in terms of Section 122(1)(*ii*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for issuance of tax invoices or bills for passing on irregular ITC amounting to Rs. 38,57,21,402/- (IGST Rs. 38,57,21,402/-) without concomitant supply of goods as detailed in para 11.4.2;

(v) Penalty should not be imposed upon them in terms of Section 122(1)(*vii*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for taking or utilizing Input Tax Credit amounting to Rs. 38,57,21,402/- (IGST Rs. 38,57,21,402/-) without actual receipt of goods as detailed in para 11.4.2;

(vi) Penalty should not be imposed upon them in terms of Section 122(1)(*x*) and (*xvi*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

13.1 Now, therefore M/s Patanjali Ayurved Ltd. (06AAECP4424C1ZV), G.T. Road, Unit-6, Rice Plant, 42-43 Km, Bahalgarh, Sonipat, Haryana, 131001 is hereby required to show cause to the Additional/Joint Commissioner, Central GST Commissionerate, Office of the Commissioner, 7-A Ashok Marg, Block-E, Hazratganj, Lucknow, Uttar Pradesh-226001 as to why:

(i) Penalty should not be imposed upon them in terms of Section 122(1)(*ii*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for issuance of tax invoices or bills for passing on irregular ITC amounting to Rs. 88,77,08,723/- (IGST Rs. 88,77,08,723/-) without concomitant supply of goods as detailed in para 11.4.3:

(ii) Penalty should not be imposed upon them in terms of Section 122(1)(*vii*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for taking or utilizing Input Tax Credit amounting to Rs. 86,26,05,155/- (IGST Rs. 86,26,05,155/-). without actual receipt of goods as detailed in para 11.4.3:

(iii) Penalty should not be imposed upon them in terms of Section 122(1)(*x*) and (*xvi*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

13.2 Now, therefore M/s Patanjali Ayurved Ltd. (27AAECP4424C1ZR), G.N.5. Khadaka, Tal, Newasa, Ahmednagar, Maharashtra, 414603 is hereby required to show cause to the Additional/Joint Commissioner, Central GST Commissionerate, Office of the Commissioner, 7-A Ashok Marg, Block-E. Hazratganj, Lucknow, Uttar Pradesh-226001 as to why:

(i) Penalty should not be imposed upon them in terms of Section 122(1)(*ii*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for issuance of tax invoices or bills for passing on irregular ITC amounting to Rs. 11,26,67,999/- (IGST Rs. 11,26,67,999/-) without concomitant supply of goods as detailed in para 11.4.4;

(ii) Penalty should not be imposed upon them in terms of Section 122(1)(*vii*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for taking or utilizing Input Tax Credit amounting to Rs. 10,06,89,000/- (IGST Rs. 10,06,89,000/-) without actual receipt of goods as detailed in para 11.4.4;

(iii) Penalty should not be imposed upon them in terms of Section 122(1)(*x*) and (*xvi*) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017. "

(e) With regard to the show cause notice, the petitioner is aggrieved in the present writ petition only with the imposition of exorbitant penalty of Rs.2,735,113,681/- under Section 122 (1), clause (*ii*) and (*vii*) of the CGST Act.

(f) This Court on October 18, 2024 had granted an interim stay to proceedings under Section 122 of the CGST Act and had given time to the petitioner to file its reply with regard to impugned show cause notice issued under Section 74 of the CGST Act.

(g) In the meantime, respondent authority *vide* adjudication order dated January 10, 2025 has set aside the demands and dropped the proceedings under Section 74 of the CGST Act against the petitioner. The department *vide* adjudication order dated January 10, 2025, at the very outset, decided to proceed under Section 74 of the CGST Act only with the unit of the petitioner situated at Uttarakhand for the reason that it had availed total ineligible ITC of IGST to the tune of Rs.47,65,37,283/- out of which it has passed on the ineligible ITC to the tune of Rs.38,57,21,402/- and exonerated the other two firms situated at Haryana which has availed ITC of Rs.86,26,05,155/- against which it has passed on ITC of Rs.88,77,08,723/- and Maharashtra which has availed ITC of Rs.10,06,89,000/-against which it has passed on ITC of Rs.11,26,67,999/-. Therefore, only penal action was proposed by the department against the two entities situated in Haryana and Maharashtra under Section 122 of the CGST Act.

(h) The department while deciding on the issue of proceedings under section 74 of the CGST Act for the unit of the petitioner situated at Uttarakhand has taken into consideration the product wise books of account of the petitioner showing details of purchased and sold quantities of the goods during the impugned period wherein it was observed by the department that for all the commodities, the quantities sold were always more than the quantities purchased from the suppliers, thereby making the observation that all the ITC which was availed in the impugned goods was further passed on by the petitioner. The department, with regard to show cause notice issued under section 74 of the CGST Act, has decided to exonerate the petitioner's unit situated at Uttarakhand on various other grounds such as:

(i) Show cause notice did not specify consignment of particular suppliers as fake, therefore, in absence of any physical verification report of particular stocks and the said irregular ITC cannot be attributed to a particular supplier in absence of which a demand of differential ITC is not legally sustainable.

(ii) All goods received from the suppliers have been accounted for by the petitioner and supplied in payment of GST thereby implying the passing on irregular ITC and the department has relied on a circular no. 171/03/2022-GST dated July 6, 2022 wherein it was clarified that proceedings under Section 74 cannot be initiated against taxpayers, if it has merely passed on irregular ITC on the outward supply and only penalty under Section 122 of the CGST Act, if any, could be imposed.

(iii) There is no any shortage and mismatch in stock of packing materials and the actual physical quantity of stocks in addition to the raw materials available. Furthermore, there is no adverse remark on any shortage or excess of stock packing materials found at the premises of the petitioner.

(iv) This is not a case of receiving supplies from a nonexistent suppliers as if this would have been the case, the department ought to have cancelled the registration of such fake firms and blocked the ITC immediately.

(v) Show cause notice has placed reliance on third party data like RTO records which is not in conformity with the mandatory procedure prescribed under Section 145 of the CGST Act, which requires a

certificate to authenticate the documents which are to be relied upon in departmental proceedings thereby making the said evidence as inadmissible.

(vi) On the issue of transportation, it was observed that it is not a requirement under the law that the vehicles should take only a fixed toll route and any route may be chosen to reach a destination.

(vii) Upon a request of cross examination by the petitioner, of persons on whose testimony reliance was placed upon in the show cause notice, all the suppliers have clearly declared on affidavit that they have made supplies to the petitioner based on genuine business transactions.

(i) The relevant concluding part of the adjudication order dated January 10, 2025 is provided herein below:

"6.21 As already discussed in the earlier part of this order, the facts are going in favor of the Noticee, in as much as, no findings as to the shortage of raw materials are there, proper consumption of packing materials is shown, CA has furnished certificate regarding further supply of goods on payment of taxes, favourable declaration of the L1 suppliers in favor of the Noticee, payment of tax in cash portion on value addition during the relevant period and quantitative co-relation between the inputs received and inputs supplied, evidencing that ITC has not been retained but passed on further. In view of this, I am left with no option except to hold that there can be no demand against the Main Noticee under Section 74(1) of the Act. Since demand of tax is not sustainable, question of charging of interest and imposition of penalty also does not arise.

****

6.26 Accordingly, I pass the following order:

ORDER

(1) I drop the demand of Rs. 9,08,15,881/- proposed under the provision of Section 74(1) of the CGST Act, 2017 read with Section 20 of the IGSTAct, 2017 against M/s Patanjali Ayurved Ltd, Uttarakhand. "

Contentions of The Petitioner

3. Mr. Arvind Datar, Senior Advocate appearing on behalf of the petitioner has made the following submissions:

(a) There are various indicia to point out that Section 122 of the CGST Act is criminal in nature and accordingly attracts criminal liability.

(b) Penalty for offences under Section 122 of the CGST Act states that a taxable person who commits any of the offences mentioned in its clause (*i*) to (*xxi*) shall be liable to penalty of ten thousand rupees or an amount equivalent to the tax evaded or ITC availed of or passed on or distributed irregularly whichever is higher. This imputes that first there has to be determination of tax under Section 73/74 of the CGST Act prior to invoking penal provision under Section 122 of the CGST Act. Moreover, heading to Section 122 of the CGST Act itself states 'Penalty for certain offences' that implies that there has to be a predicate offence of tax evasion for which demand of tax had to be made under Section 73/74 *of the CGST Act. In this regard, reliance has been placed upon N.C. Dhondial* v. *Union of India* reported in AIR 2004 SC 1272 *and Ramanna Dayaram Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489.

(c) Heading to Section 122 of the CGST Act reads as 'Penalty for certain offences'. The word 'offence' has not been defined in CGST Act, 2017 or under any other GST laws, therefore, General Clauses Act, 1897 should be looked into. The word 'offence' is defined under Section 2(38) of the General Clauses Act, 1897 as "any act or omission made punishable by any law for the time being in force". Moreover, 'offence' has also been defined in Section 2(*n*) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') and under Section 2(*q*) of Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as 'BNSS') as "any act or omission made punishable by any law for the time being in force." Section 4(2) of the CrPC/BNSS states that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions under the CrPC, if no separate provisions are envisaged in such other laws. Therefore, the offences under the CGST Act also necessarily need to be governed by Section 4(2) *of the CrPC. In this regard, reliance has been placed on Pradeep S. Wodeyar* v. *State of Karnataka* reported in (2021) 19 SCC 62.

(d) The mere fact that the fine is termed as 'penalty' will not ipso facto indicate that it is a civil wrong as even in IPC as well as CrPC, the word penalty had often been interchangeably used as fine which can be illustrated from the following examples:

(i) Section 136 of CrPC prescribes that if a person fails to obey or show cause in response to an order under Section 135, he/ she shall be liable to 'penalty' prescribed under Section 188 of the IPC. Section 188 IPC, however, imposes a fine.

(ii) Section 141 of the CrPC uses the word 'penalty' while describing fine under Section 188 of the IPC.

(iii) The interchangeable use of penalty and fine is also evident from a perusal of Section 136 and Section 137 of the IPC.

(iv) Even a perusal of prescribed acts under Section 122 of the CGST Act indicate that penalty is envisaged to be levied for actions which are criminal in nature; and therefore, to arrive at a determination of

whether or not the constituent elements of such provisions has occurred, a trial and due application of judicial mind is needed. This is most evident from the following sub-sections which indicate that prescribed acts are criminal in nature. A comparison is also drawn with similar sections in other penal legislations which further indicates that the prescribed acts under Section 122 of the CGST Act are identical to penal provisions under other statues further necessitating a trial.

(e) Section 74 of the CGST Act is already there to compensate for the loss of revenue under the head 'Demands and Recovery' which also contains reference to 'penalty' which is adjudicated by the proper officer and states that penalty payable is equivalent to tax payable under the notice. The purpose of framing Section 122 of the CGST Act by Parliament would not have been the same as for Section 74 of the CGST Act. It is contended that since penalty has already been dealt by the Parliament in Section 74 of the CGST Act there was no need to bring Section 122 of the CGST Act in the Statute for imposing penalty once again. Therefore, Section 122 of the CGST Act is for more serious offences and attracts criminal proceedings.

(f) A comparison between Section 122 (Penalty for certain offences) and 132 (Punishment for certain offences) of the CGST Act would reveal that several sub-sections are identical, which implies that a penalty under Section 122 can only be imposed after a conviction under Section 132. In relation to Section 132(6) which provides for sanction to be taken from Commissioner prior to prosecution (whereas there is no such reference in Section 122 as to who will adjudicate the matter under the said provision), it is submitted that the absence of a similar provision such as Section 132(6) in Section 122 will not convert Section 122 into a civil liability due to the presence of Section 134 that acts as a safeguard which applies to the whole Act, and therefore, also to Section 122.

(g) Sections 122 and 132 of the CGST Act are kept in the same chapter, that is, 'Chapter XIX: Offences and Penalties'. Before proceeding for the offences mentioned under Sections 122, 132 and 134 of the CGST Act has to be followed being in the same chapter that requires prior sanction from the Commissioner and states that the same will be triable by a Court not inferior to that of a Magistrate of the First Class. Hence, it is submitted that a penalty envisaged under Section 122 of the CGST Act can only be imposed pursuant to a trial under Section 134 of the CGST Act.

(h) Notes on clause of Section 122 of the CGST Act also makes it clear that this clause provides for a list of 'offences' and the definition of word 'offences' has to be as provided in General Clauses Act, 1897 and CrPC/BNSS. The notes on clause of Section 122 of the CGST Act is reproduced herein below:

> "This clause provides for a list of offences such as supply of goods without invoice, issue of invoice without supply etc. which shall be liable to penalty. The clause also provides for offences such as aiding or abetting offences specified, fails to appear on a summons etc will be liable of a penalty of twenty-five thousand rupees."

(i) The use of the phrase 'wilful misstatement or suppression of facts to evade tax' is clearly indicative of existence of mens rea requirement which implies that the proceedings ought to undergo a process of criminal trial. The doctrine of Mens rea serves as a crucial factor in establishing criminal culpability and indispensable in criminal law jurisprudence. Wilful misstatement has also been used in Section 122 and therefore, this proceeding has to undergo a criminal trial. Though Section 74 also requires mens rea but that is adjudicated by proper officer.

(j) In the CBIC Circular No.3/3/2017-GST dated July 7, 2017, the Board, assigns the proper officers for adjudication in relation to the various sections of the CGST Act but has intentionally excluded the proceedings under Section 122 for prosecution by criminal courts. Moreover, Section 122 of the CGST Act also does not contain any reference to proper officer; therefore it is implied that these proceedings ought to undergo prosecution by criminal courts.

(k) Petitioner's argument does not solely hinge on heading to Section 122 but also its substantive and operative part. Word 'aiding and abetting' is only found in criminal statutes. Subsection 3 of Section 122 of the CGST Act explicitly uses the word 'aiding and abetting', for offences therefore, these words used in the section makes the provision criminal in nature.

(l) The word 'penalty' has been used in the context of offence, even in the IPC and CrPC and does not automatically indicate that it is in the nature of civil liability. There is nothing in "tax jurisprudence" or any case law which specifically states, as a rule of law, that 'penalty' must necessarily relate to a civil liability. The character of the penalty, whether civil or criminal, will depend on the context, language, legislative intent and statutory structure. Penalty also has been defined in sixth edition of Pramanatha Aiyar's Law Lexicon which states that penalty can be punishment in taxation matters as it may attract civil liability or criminal liability. It is open to Parliament to prescribe punishment by way of imprisonment or fine or even a penalty, but whether its levy is in consequence either of a prescribed offence or of breach of other provisions that are not characterized as offences. A breach of law can attract both penalty by the adjudicated mechanism, that is, the department and imposition by the prosecution mechanism, that is, criminal courts. Learned Senior Advocate submitted that penalty means punishment and also drew the attention of this Court towards the definition of 'Penalty' as cited in Corpus Juris Secundum (Volume 85, para 580, para 1023) which is reproduced herein below as:

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or

penal laws. "

(m) There are 21 types of offences mentioned in Section 122 of the CGST Act that provide for 100% penalty and out of the same 11 attract punishment by way of imprisonment and fine under Section 132. This overlap is irrelevant, as the department has the option to launch prosecution under Sections 122 or 132, depending on the facts of each case. The exclusion of proceedings under Section 132 of the CGST Act cannot lead to an inference that proceedings under Section 122 of the CGST Act are relatable to civil penalty. Parliament could have intended that some of the offences mentioned under Section 122 need harsh punishment, and therefore, the punishment can be a traditional method of imprisonment subsequent to a criminal trial.

(n) Explanation 1(*ii*) to Section 74 of the CGST Act provides that if penalty proceedings under Section 74 stand concluded against the 'main person', criminal penalty under Section 122 and the general civil penalty under Sections 125 of the CGST Act should also stand concluded against 'all the persons'. Furthermore, closure of civil proceedings automatically results in closure of the criminal proceedings initiated for the same violation. Explanation 1(*i*) to Section 74 marks a departure from this general rule, by stating that closure of penalty under Section 74 will not result in abatement of the proceedings under Section 132. However, proceedings under Section 122 even though criminal, will stand concluded in consonance with the general rule. Proceedings under Sections 73 and 74 are different from Sections 122 and 132 of the CGST Act and, therefore, can never be clubbed together.

(o) There are 17 provisions in chapter XIX titled as 'Offences and Penalty' and there is reference to a proper officer in some of the provisions. Section 124 of the CGST Act is also a "criminal" provision, as it provides for punishment and refers to a continuing offence. Section 126 gives general guidelines relating to penalty and is intended to ensure that the penalty imposed by the Department officers is not disproportionate and unduly harsh. Section 127 also refers to 'proper officers'. Only Section 125 does not refer to 'proper officer' and is titled 'General Penalty'. It applies only where no specific penalty is provided for in the Act. However, it does not relate to any "offence" but only refers to "contravention" under the Act. The absence of any reference to 'proper officer' in Section 122 is deliberate, because the levy of penalty by way of "punishment" can only be done by the jurisdictional magistrate. Thus, Section 122 and Section 132 also do not refer to a 'proper officer' as these are criminal provisions. On the other hand, other sections like Section 129 (seizure of goods), Section 130 (confiscation) refer to 'officer' or 'proper officer'.

(p) It is also essential that the civil and criminal jurisdictions are to be kept separate under the principle of separation of powers, which are set out in Article 50 of the Constitution of India and also construed to be part of the basic structure of our Constitution.

(q) There is a constitutional convention that all offences are tried only by the established criminal courts which are part of the judiciary whereas the adjudication of penalty will be part of quasi-judicial proceedings. Thus penalty under Section 74 and other provisions can be levied by the appropriate officer. However, any penalty for offences can only be levied by the criminal courts.

(r) To buttress his arguments, counsel has placed reliance on the following cases:

(i) *Shiv Dutt Rai Fateh Chand & Others* v. *Union of India & Another* reported in (1983) 3 SCC 529 [para 34].

(ii) *Gujarat Travancore Agency, Coachin* v. *Commissioner of Income Tax, Kerela, Ernakulam* reported in (1989) 3 SCC 52 = 1989 (42) E.L.T. 350 (S.C.) [para 4].

(iii) *Directorate of Enforcement* v. *MCTM Corporation Pvt. Ltd.* (1996) 2 SCC 471 [paras 7, 8, 13]

(iv) *Chairman SEBI* v. *Shriram Mutual funds* [2006] 68 SCL 216 (SC)/(2006) 5 SCC 361. [paras 17, 19, 29, 33, 35].

(v) *Union of India* v. *Dharmendra Textile Processors* (2008) 13 SCC 369 = 2008 (231) E.L.T. 3 (S.C.) [paras 15,17,19].

(vi) *Tata Power Company Ltd.* v. *Maharashtra Electricity Regulatory Commission & Ors.* reported in MANU/SC/0932/2009 [para 122,123] regarding interpretation of headings to section.

(vii) *N.C. Dhoundial (supra)* [para 15]

(viii) *Standard Chartered Bank* v. *Directorate of Enforcement* reported in (2006) 4 SCC 278 [para 29] = 2006 (197) E.L.T. 18 (S.C.).

Contentions of Respondents

4. Mr. N. Venkatraman, learned Additional Solicitor General of India appearing on behalf of department has made the following submissions:

(a) Section 122(1) is for offences committed by a taxable person, and the penalty prescribed in Section 122(1) are different from the penalty prescribed under the Chapter XV Demands and Recovery that is Sections 73/74. Section 74 of the CGST Act deals with the determination of tax on account of fraud, wilful misstatement, or suppression of facts. On the other hand, Section 122(1) enumerates specific offences and penalties for various violations.

(b) Section 74 of the CGST Act are the outcomes resulting from the commission of the offences listed under Section 122 of the CGST Act. Therefore, the offences listed under Section 122 of the CGST Act need not necessarily cover the cases as those are covered under Sections 73, or 74 of the CGST Act.

(c) Tax Demand of Rs.9,08,15,881/- was issued under the provisions of Section 74 of the CGST Act as petitioner had wrongly availed or utilized ITC and penalty amounting to Rs.2,735,113,681/- under Section 122(*i*)(*ii*) and (*vii*) of CGST Act proposed in the notice, is not related with this demand but for issuing tax invoices without any actual supply of goods, and also for taxing/utilizing input tax credit without actual receipt of goods. Therefore, the demand invoked in the notice under the provisions of Section 74 of the CGST Act and penalty proposed under the provisions of Section 122 is for two separate offences and not interrelated.

(d) Penalty in taxation matters is only a civil liability and not a criminal liability and heading of section alone can not control the whole section. Section 122 of the CGST Act purports to preventing loss of revenue and imposes penalty whereas Section 132 of the CGST Act purports to impose punishment as a criminal offence. Mere addition of mens rea would not make the provision criminal in nature. If the Parliament chooses to add mens rea to the penalty in tax law, it will still be a civil liability read with mens rea. For criminal trial prosecution, there is no dilution in law, mens rea is indispensable. Therefore, Section 122 is a basket of both mens rea and non-mens rea contraventions.

(e) This is an anti-evasion section and should not be pushed to an interpretation to make it difficult to implement and promote evasion. This provision provides for 100% penalty as it aims to curb the practice of illegal trading by creation of fake invoices without actual and physical supply of goods.

(f) Jurisprudence in tax law says that penalty is nothing but civil liability. Sections 121, 122 and 132 are parallel provisions that talk about civil liability. The burden of proof as required in Section 122 is preponderance of probability and not beyond reasonable doubt. Whereas in Section 132 of the CGST Act for the criminal offence it has to be beyond reasonable doubt. Therefore, the texture of the whole case under Section 122 of the CGST Act is proving a civil liability based on the evidence, burden of which is preponderance of probability. In criminal courts for prosecution, the criminal court will put the benchmark beyond reasonable doubt. A criminal court in a criminal offence as set in criminal law would always requires proof of evidence that proves the guilt beyond reasonable doubt.

(g) Section 122 has twenty-one sub-clauses, wherein eleven subclauses have intention and ten sub-clauses do not have intention. Even for a civil liability/penalty one can require intention/mens rea. But sub-sections which do not contain elements of intention/mens rea cannot be given criminal motive to it (the vice-versa is also not applicable). Section 132 contains eleven offences, wherein mens rea is present which is a permanent and indispensable feature under criminal law. Whereas, mens rea is not always needed when it comes to civil liability under tax law. Consequently, Section 122 does not suffer from any unconstitutionality, it can have ten offences without mens rea and eleven with mens rea, it will still amount to penalty as a civil liability. Therefore, Section 122 and its subsections, is a basket which is a mixture of non-mens rea and mens rea offences. Mens rea is permissible under tax statute for penalty, but it is impermissible for criminal trial wherein all sub-sections require mens rea. It is settled law in taxing statue that one can have civil liability/penalty with mens rea, it will still be considered as a penalty.

(h) Attention is drawn to the Explanation 1 to Section 74 of the CGST Act. The said provision is 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 wilful misstatement or suppression of facts. Explanation 1 to Section 74 is as under:

"Explanation 1.- For the purposes of section 73 and this section,-

(*i*) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(*ii*) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under Sections 122 and 125 are deemed to be concluded. "

Explanation 1(*i*) makes it clear that the expression "all proceedings in respect of the said notice" shall not include proceedings under Section 132 of the CGST Act for the only reason that Section 132 is criminal in nature and deals with punishment for offences. If the legislative intent to Section 122 was also envisioned to be criminal, then Explanation 1(*i*) would have also contained Section 122 and the same would also have been benchmarked along with Section 132 in the said provision.

(i) Explanation 1(*i*) to Section 74 deems closure of all proceedings against all persons liable to penalty under Section 122 and Section 125, if the proceedings against the main person stands concluded under Section 73 or 74 of the CGST Act. Herein, Section 122 has been benchmarked with Section 125 and not with Section 132, and Section 125 deals with general penalty, which may extend to twenty five thousand rupees. The legislative intent of Section 122 is evident one more time that it is merely a penalty in the nature of civil liability and not a criminal offence as contended by the petitioner. Since, Sections 122 and 125 deal with penalty, the same have been equated together. It is well settled principle of law that closure of civil proceedings/civil liability does not result in automatic closure of criminal proceedings and this intention is reflected one more time *vide* Explanation 1 to Section 74 wherein it clearly conveys that the purpose of Section 122 is only a penalty in the nature of civil liability.

Furthermore, in relation to explanation 1 to Section 74 of the CGST Act it is submitted that these provisions shall apply in the situations where main persons to whom demand was made under the provisions of Section 74 of the CGST Act have deposited due tax along with applicable interest and penalty, and the proceedings against the main person have been concluded.

(j) With regard to the argument of the petitioner that there is no reference to "proper officer" under Section 122 of the CGST Act and it is therefore indicative of the fact that the provision is only criminal in nature and that in terms of Section 74, the proper officer is entitled to issue show-cause notice both for non-payment of taxes and also for wrong availment of input tax credit and its utilization, therefore the safeguard being available under Section 74, a penalty under Section 122 as a civil liability is misconceived and should therefore be held to be only criminal in nature. Counsel on behalf of respondent has rebutted the assumption of the petitioner as both factually and legally incorrect and which was demonstrated by an illustration:

> "A, a taxable person supplies goods worth Rs. 100 crores and issues valid invoices of Input Tax Credit (ITC) worth Rs. 20 crores. B receives the goods and accounts the entire value and the ITC.
>
> However, B chooses to use only goods worth Rs. 50 crores and illicitly removes the balance quantity of goods to the tune of Rs. 50 crores in the grey market to C and collects cash. B also issues a fake invoice for Rs 50 crores value and Rs 10 crores ITC to yet another person D.
>
> Section 74 would apply not to A, for A has paid the taxes, not to B who does not pay any taxes, but to D who had availed input tax credit wrongly and utilized. But on the other hand Section 122(1) would apply to B for having supplied goods without invoice to C and for issuing fake invoices to D. "

The other persons besides the main person in the transactions would not be governed by any proceedings under Section 74 but once proceedings are initiated under Section 74, the rest of the proceedings under Section 122 would arise as connected or consequential proceedings and therefore there was no need to refer to a 'proper officer' under Section 122. It is equally for the same reason that Explanation 1(*ii*) gives a deemed closure to the proceedings under Section 122, if proceedings under Sections 73 and 74 gets concluded against the main person.

(k) Furthermore, the aforesaid contention of the petitioner that since there is no reference to a proper officer in Section 122, the same should be construed as criminal in nature should also fail for the following reasons:

(*i*) Explanation 1(*ii*) to Section 74 makes the statutory intention very clear that the proper officer who initiates proceedings under Sections 73 and 74 can also initiate proceedings under Sections 122 and 125 thus, making it clear that once the proceedings gets concluded against the main person under Sections 73 or 74, the proceedings against all the persons liable to pay penalty under Sections 122 or 125 are deemed to be concluded. Consequently, whenever there is a need to invoke Section 74 along with Section 122, the proper officer under Section 74 can issue show cause notice and also adjudicate.

(*ii*) Sections 122 to 127 of the CGST Act deals with various types of penalties. These sections are general layout sections as to when a penalty can be imposed. In some of these sections there is a reference to proper officers or officers and it cannot therefore mean that absence of any reference will make the provision criminal in nature. Penalties are generally collateral or co-noticee proceedings and would therefore link or hook itself with the main adjudication and hence there is no separate reference or mention of a proper officer. The proper officer who adjudicates the main matter would also adjudicate the penal consequences.

(*iii*) Without prejudice to the above, even assuming penalty proceedings are stand alone, a reference or non-reference to a proper officer cannot decide whether a provision is a civil liability or criminal in nature. For example; Section 123 deals with failure to furnish information and the penalty is one hundred rupees a day and shall not exceed five thousand rupees. Section 125 deals with a general penalty of twenty-five thousand rupees. Merely because there is no reference to a proper officer, cannot be construed as making the provision criminal in nature.

(l) To buttress his arguments, counsel has placed reliance on the following cases:

(*i*) *Shiv Dutt Rai Fatehchand* (*supra*) [paras 30,31]

(*ii*) *Gujarat Travancore Agency* (*supra*) [para 4]

(*iii*) *M.C.T.M. Corporation Pvt. Limited* (*supra*) [paras 7,8,12]

(*iv*) *Chairman SEBI* (*supra*) [paras 29,33,52]

(*v*) *SEBI* v. *Cabot International Capital Corporation* 2004 SCC OnLine Bom 180 [para 47]

(*vi*) *Dharmendra Textile Processors* (*supra*) [para 18]

(*vi*) *M/s Raghunandan Prasad Mohal Lal* v. *The Income Tax Appellate Tribunal and Others* 1969 SCC Online All 286 [paras 9, 10, 11]

(*vii*) *NHPC Ltd.* v. *State of Himachal Pradesh* 2023 SCC Online SC 1137 [paras 35, 36, 37]

(*viii*) *State of Tamil Nadu* v. *K. Shyam Sunder and Others* (2011) 8 SCC 737 [paras 63, 64]

(m) In the light of the above, the respondents reiterate their prayer before this Court that the writ petition has to be dismissed in toto.

Issues

5. Considering the contentions canvassed by both the sides, the following issues arise for consideration before this Court, which are as follows:

(I) Whether the "Proper Officer/Adjudicating Officer" has the power to adjudicate on the penalty provision provided under Section 122 of the CGST Act?

(II) Whether dropping of proceedings under Section 74 of the CGST Act, 2017 will ipso facto abate the proceedings under Section 122 of the CGST Act?

Relevant Provisions

6. Before we assess the rival submissions canvassed by both the parties, it becomes necessary at the outset to refer to the relevant provisions of the CGST Act. They are delineated below:

"Section 2: Definitions. — In this Act, unless the context otherwise requires,-

(107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;

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 subsection (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.

Explanation 1.—For the purposes of section 73 and this section,—

(*i*) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(*ii*) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer. "

Section 83. Provisional attachment to protect revenue in certain cases. —

(1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed. "

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Section 122 : Penalty for certain offences. — *(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;

(*ii*) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;

(*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;

(*iv*) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(*v*) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(*vi*) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(*vii*) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(*viii*) fraudulently obtains refund of tax under this Act;

(*ix*) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(*x*) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(*xi*) is liable to be registered under this Act but fails to obtain registration;

(*xii*) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(*xiii*) obstructs or prevents any officer in discharge of his duties under this Act;

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

(*xv*) suppresses his turnover leading to evasion of tax under this Act;

(*xvi*) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(*xvii*) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(*xviii*) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(*xix*) issues any invoice or document by using the registration number of another registered person;

(*xx*) tampers with, or destroys any material evidence or document;

(*xxi*) disposes of or tampers with any goods that have been detained, seized, or attached under this Act,

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.

(1A) Any person who retains the benefit of a transaction covered under clauses (*i*), (*ii*), (*vii*) or clause (*ix*) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,—

(*a*) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

(*b*) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who—

(*a*) aids or abets any of the offences specified in clauses (*i*) to (*xxi*) of sub-section (1);

(*b*) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(*c*) receives or is in any way concerned with the supply of or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(*d*) fails to appear before the officer of central tax, when issued with a summons for appearance to give evidence or produce a document in an inquiry;

(*e*) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account,

shall be liable to a penalty which may extend to twenty-five thousand rupees.

(1B) Any electronic commerce operator who—

(*i*) allows a supply of goods or services or both through it by an unregistered person other than a person exempted from registration by a notification issued under this Act to make such supply;

(*ii*) allows an inter-State supply of goods or services or both through it by a person who is not eligible to make such interState supply; or

(*iii*) fails to furnish the correct details in the statement to be furnished under sub-section (4) of section 52 of any outward supply of goods effected through it by a person exempted from obtaining registration under this Act,

shall be liable to pay a penalty of ten thousand rupees, or an amount equivalent to the amount of tax involved had such supply been made by a registered person other than a person paying tax under section 10, whichever is higher. "

Section 124: Fine for failure to furnish statistics. — If any person required to furnish any information or return under section 151,—

(*a*) without reasonable cause fails to furnish such information or return as may be required under that section, or

(*b*) wilfully furnishes or causes to furnish any information or return which he knows to be false,

he shall be punishable with a fine which may extend to ten thousand rupees and in case of a continuing offence to a further fine which may extend to one hundred rupees for each day after the first day during which the offence continues subject to a maximum limit of twenty-five thousand rupees. "

Section 125. General penalty. — Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.

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.

Section 131: Confiscation or penalty not to interfere with other punishments. — Without prejudice to the provisions contained in the Code of Criminal Procedure, 1973 (2 of 1974), no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force.

Section 132 : Punishment for certain offences. — (1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely:—

(*a*) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(*b*) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(*c*) avails input tax credit using the invoice or bill referred to in clause (*b*) or fraudulently avails input tax credit without any invoice or bill;

(*d*) 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;

(*e*) evades tax or fraudulently obtains refund and where such offence is not covered under clauses (*a*) to (*d*);

(*f*) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

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(*h*) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(*i*) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

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(*l*) attempts to commit, or abets the commission of any of the offences mentioned in clauses (*a*) to (*f*) and clauses (*h*) and (*i*) of this section, shall be punishable—

(*i*) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(*ii*) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(*iii*) in the case of an offence specified in clause (*b*) where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(*iv*) in cases where he commits or abets the commission of an offence specified in clause (*f*), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (*i*), (*ii*) and (*iii*) of subsection (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) of sub-section (1) and punishable under clause (*i*) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Explanation.—For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.

Section 134: Cognizance of offences. — No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of a Magistrate of the First Class, shall try any such offence.

Section 138. Compounding of offences. — (1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case may be, of such compounding amount in such manner as may be prescribed:

Provided that nothing contained in this section shall apply to—

(*a*) a person who has been allowed to compound once in respect of any of the offences specified in clauses (*a*) to (*f*), (*h*), (*i*) and (*l*) of sub-section (1) of section 132;

(*b*) [Omitted]

(*c*) a person who has been accused of committing an offence under clause (*b*) of sub-section (1) of section 132;

(*d*) a person who has been convicted for an offence under this Act by a court;

(*e*) [Omitted]

(*f*) any other class of persons or offences as may be prescribed:

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

(2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than twenty-five per cent. of the tax involved and the maximum amount not being more than one hundred per cent. of the tax involved.

(3) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

Rule 142 of the CGST Rules. Notice and order for demand of amounts payable under the Act. - (1) The proper officer shall serve, along with the (*a*) Notice issued under section 52 or section 73 or section 74 or section 74A or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GST DRC-01,

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(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 74A or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty, as the case may be, payable by the person concerned. "

Analysis

7. We have considered the rival submissions and have perused the materials placed on record. Mr. Arvind Datar, learned Senior Advocate, appearing on behalf of petitioner has addressed his arguments meticulously before us and Mr. Venkataraman, learned ASGI has vehemently debunked the arguments placed by the counsel appearing on behalf of the petitioner.

8. The arguments canvassed by the learned Senior Advocate appearing on behalf of the petitioner is mainly based on two pillars. Firstly, he submits that levy of penalty under Section 122 of the CGST Act attracts criminal liability and does not impose civil liability. To buttress his arguments he has pointed out various indicia to depict the same and secondly, he submits that proceedings under Section 122 cannot uphold its integrity subsequent to dropping of proceedings against the same person, that is, the petitioner under Section 74 of the CGST Act in view of Explanation 1(*ii*) to Section 74.

9. Per contra, the learned ASGI appearing on behalf of the respondents confutes the aforesaid arguments of the petitioner mainly on two-fold points. Firstly, Section 122 of the CGST Act attracts civil liability and not criminal as penalty in taxation matters subsumes civil liability. Furthermore, penalty provision prescribed under Section 122(1) is for offences committed by a taxable person and is different from penalty prescribed under the head 'Chapter XV: Demand and Recovery' that includes Sections 73/74. Issuance of tax invoice without actual supply of goods and utilisation of input tax credit without actual receipt of goods are different acts of omission and commission and hence penalty provisions under Section 122(1) of the CGST Act would be attracted. Secondly, with regard to abatement of proceedings under Section 122 in view of the explanation (1)(*ii*) to Section 74, it is submitted that a taxable person is liable for penalty under Section 122(1), if it violates the provisions of the CGST Act. Merely because no tax is demanded subsequent to dropping of proceedings under Section 74 by the department, it cannot exonerate the taxable person from the penalty for the wrongs committed by it under any of the sub-sections in Section 122(1), and therefore, Section 122(1) can very well be imposed.

Meaning of 'Offence' and 'Penalty'

10. For the purpose of understanding, it is necessary to first deal with regard to the meaning of the words 'offence' and 'penalty' as used in Section 122 of the CGST Act. The myriad definitions of the words 'offence' and 'penalty' as given in Black's law dictionary, P Ramanatha Aiyar's, The Law Lexicon are quoted herein below:

Definition of 'Offence'

(*i*) Definition of ' Offence ' as per Black's Law Dictionary (9th Edition, page 1186) is quoted in verbatim as under:

"A violation of the law; a crime, often a minor one.

The terms 'crime', 'offence' and 'criminal offence' are all said to be synonymous, and ordinarily used interchangeably. 'Offense ' may comprehend every crime and misdemeanor, or may be used in a specific sense as synonymous with 'felony ' or with 'misdemeanor ' as the case may be, or as signifying a crime of lesser grade, or an act not indictable, but punishable summarily or by the forfeiture of a penalty. "

(*ii*) The word 'Offence' as has been defined in P Ramanatha Aiyar's 'The Law Lexicon' (4th Edition, page 1316) is quoted in verbatim as:

"OFFENCE, is an act committed against law, or omitted where the law requires it, and punishable by it. (Tomlin) 'Offence' is generally equivalent to a Crime (per COLLINS, J., Derbyshire Co., v. *Derby*, 65 LJQB 488). In its legal signification an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands. "

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"Offence: Crime. The word "offence" is another name for crime. Crimes in the broad sense include not only the major crime (indictable offences) but also summary offences. The Latter regulate many trades and special activities (the so-called "regulatory offences"), as well as the conduct of ordinary people in their daily life. "

Definition of 'Penalty'

(*iii*) The word 'Penalty' as has been defined in Black's Law Dictionary (9th Edition, page 1247) is quoted in verbatim herein below:

"Punishment imposed on a wrongdoer, usu. In the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss). Though usu. for crimes, penalties are also sometimes imposed for civil wrongs. "

(*iv*) The word 'Penalty' as has been defined in P Ramanatha Aiyar's, 'The Law Lexicon' (4th Edition, page 1404) is quoted in verbatim as herein below:

"The term 'penalty' is used very loosely in statutes in some cases, and might, without being much strained from its ordinary meaning, be held to embrace all the consequences visited by law on the heads of those who violate police requirements. "

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"A punishment imposed for any breach of law, rule or contract a sum named in a bond as the amount to be forfeited by the obligor in case he does not comply with the conditions of the bond; money recoverable by virtue of a penal statute; a sum agreed to be paid on breach of an agreement or some stipulation in it. "

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"The expression 'penalty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a penalty. When penalty is imposed by an adjudicating officer, it is done so in 'adjudicatory proceedings ' and not by way of fine as a result of prosecution of an accused for commission of an o ffence in a criminal Court. Director of Enforcement v. M/s MCTM Corpn. Pvt. Ltd., AIR 1996 SC 1100,1104, [Foreign Exchange Regulation Act (7 of1947), S. 23(1)(*a*)]"

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"Penalty and prosecution distinction. There is a marked distinction between prosecution for an offence punishable under the Act and proceedings to impose penalties under Chapter XXI. Penalty proceedings are not criminal proceedings in the strict sense. In a criminal charge, unless the prosecution proves beyond reasonable doubt the offence committed by the assessee under the Act, the delinquent is entitled to the benefit of doubt and thereby goes scot free. The acquittal is on the technical rule of presumed innocence. The standard of proof for imposition of penalty is not as rigorous as that for prosecution of an offence. The test in the case of penalty is totality of circumstances. Evidence may be oral, documentary or circumstantial. "

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"Penalty and punishment. 'Penalty is synonymous with 'punishment, in connection with crimes and is fixed by the law defining the criminal act. "

(*v*) The word 'Penalty' as has been defined in P Ramanatha Aiyar's, 'The Law Lexicon' (6h Edition, Volume 3, pages 4112- 4114) is quoted in verbatim as herein below:

"Whether or not a statute creates a criminal offence is a question of interpretation, e.g., if the word "penalty" as distinct from the word "fine" is used the general rule is that the penalty must be recovered as a debt in a civil Court. HALSBURY, 4th Edition, Vol. 11, para 2, p. 12, F.N. 5.

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"A penalty is a punishment inflicted by a law for its violation. "

"A penalty is defined as a temporary punishment or sum of money imposed by statute, to be paid as a punishment for the commission of a certain offence. "

"A penalty is a punishment imposed by law or contract for doing or failing to do something that it was the duty of a party to do. "

"A penalty is in the nature of a punishment for the nonperformance of an act, or the performance of an unlawful act, and in the former case stands in lieu of the act to be performed. "

"The words 'penal' and 'penalty' strictly and primarily denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offence against its laws. "

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"Penalty' ordinarily becomes payable when it is found that an assesse has wilfully violated any of the provisions of the taxing statute. [Associated Cement Co Ltd. v Commercial Tax Officer, (1981) 4 SCC 578,

600, para 23]"

"Penalty is ordinarily levied on an assesse for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. (Pratibha Processors v UOI, AIR 1997 SC 138). "

"Penalty' is a liability imposed as a punishment on the party committing the breach of contract. Karnataka Rare Earth v Senior Geologist, Deptt. of Mines & Geology, (2004) 2 SCC 783, 791, para 13. "

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"Creating circumstances for compelling the assesse to discharge his statutory obligation cannot be termed to be a 'penaty '. The collection of tax being an act of the State for providing protection, security and other amenities to the society, cannot, in all circumstances, be termed to be a 'penalty' or 'punishment [S. Reddappa v UOI, (1998) 232ITR 62 (Kar.)]"

"The 'penalty' is a punishment imposed on a wrongdoer. [Amin Chand Payarelal v Inspecting Asstt. CIT, (2006) 7 SCC 483, 486, para 9]. [Income-tax Act 43 of 1961), section 27(1)(*a*)]"

"The word 'Penaty' for the purpose of section 288(4) contemplates a penalty imposed for an actual infringement and not deemed infringement. "

"'Penalty' is always imposed on account ofpersonal fault of the person concerned. It is always relatable to an offender. It is a personal liability and it cannot be imposed on any person other then the offender. Tax and penalty are different concepts. [Bachan Singh v Road Transport Officer, Rourkela, AIR 2009 Ori 185, 188, para 9] [Orissa Motor Vehicles Taxation Act (39 of1975), section 20]"

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"Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication. Penalty under Section 10(3) of the Act is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act. [State of UP v Sukhpal Singh Bal, (2005) 7 SCC 615, 622, para 15] [UP Motor Vehicles Taxation Act (21 of 1997), section 10(3)]"

11. The Supreme Court judgment in *Standard Chartered Bank* (*supra*) relied upon by the petitioner has defined 'offences ' which is quoted verbatim as follows:

"29. Both, Section 50 providing for imposition of penalty and Section 56 providing for prosecution, speak of contravention of the provisions of the Act. Contravention is the basic element. The contravention makes a person liable both for penalty and for prosecution. Even though the heading to Section 56 refers to offences and prosecutions, what is made punishable by the section is the contravention of the provisions of the Act and the prosecution is without prejudice to any award of penalty. The award of penalty is also based on the same contravention. Section 63 confers the power of confiscation of currency, security or any other money or property in respect of which a contravention of the provisions of the Act has taken place conferred equally on the adjudicating authority and the court, whether it be during an adjudication of the penalty or during a prosecution. Whereas Section 64(1) relating to preparation or attempt at contravention is confined to Section 56, the provision for prosecution, subsection (2) of Section 64 makes the attempt to contravene or abetment of contravention, itself a contravention, for the purposes of the Act including an adjudication of penalty under the Act. Section 68 relating to offences by companies, by sub-section (1) introduces a deeming provision that the person who was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty along with the company of the contravention of the provisions of the Act and liable to be proceeded against and punished accordingly. The proviso, no doubt, indicates that a person liable to punishment could prove that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Sub-section (2) again speaks only of a contravention of the provisions of the Act and the persons referred to in that sub-section are also to be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly. *The word "offence " is not defined in the Act. According to Concise Oxford English Dictionary, it means, "an act or instance of offending". Offend means, "commit an illegal act" and illegal means, "contrary to or forbidden by law ". According to New Shorter Oxford English Dictionary, an offence is "a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault". Thus, an offence only means the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. It is an act committed against law or omitted where the law requires it and punishable by it. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands* (see P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn., 2005, p. 3302). This Court in Depot Manager, A.P. SRTC v. Mohd. Yousuf Miya [(1997) 2 SCC 699 : 1997 SCC (L&S) 548] stated that the word "offence " generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. In *Brown* v. *Allweather Mechanical Co.* [(1954) 2 QB 443 : (1953) 1 All ER 474 : (1953) 2 WLR 402 (DC)] it was described as: (All ERp. 476 A-B)

A failure to do something prescribed by a statute may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt.

The expression "offence" as defined in Section 3(38) of the General Clauses Act means an act or omission made punishable by any law for the time being in force. "Punishable " as noticed by this Court in *Sube Singh* v. *State of Haryana* [(1989) 1 SCC 235 : 1989 SCC (Cri) 101] is ordinarily defined as deserving of, or capable or liable to punishment. According to Concise Oxford English Dictionary, *"punish" means, "inflict a penalty on as retribution for an offence, inflict a penalty on someone for (an offence)*". In New Shorter Oxford English Dictionary (Vol. 2, 3rd Edn., reprint 1993), the meaning of punishment is given as, "infliction of a penalty in retribution for an offence; penalty imposed to ensure application and enforcement of a law ". Going by Black's Law Dictionary (8th Edn.) it is:

"A sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law.

" According to Jowitts Dictionary of English Law, Vol. 2, (2nd Edn. by John Burke), punishment is the penalty for transgressing the law. *It is significant to notice that Section 68, both in sub-section (1) and in sub-section (2) uses the expression, shall be liable to be proceeded against and punished accordingly. There does not appear to be any reason to confine the Operation of Section 68 only to a prosecution and to exclude its operation from a penalty proceeding under Section 50 of the Act,* since the essential ingredient of both is the contravention of the provisions of the Act. A company is liable to be proceeded against under both the provisions. Section 68 is only a provision indicating who all in addition can be proceeded against when the contravention is by a company or who all should or could be roped in, in a contravention by a company. Section 68 only clarifies the nature and mode of proceeding when the contravention of any of the provisions of the Act is by a company, whether it be by way of adjudication to impose a penalty or by way of prosecution leading to imprisonment and a fine. "

(Emphasis added)

12. The Supreme Court in *Shiv Dutt Rai Fateh Chand* (*supra*) relied upon by counsel appearing on behalf of both the parties has defined 'penalty' which is quoted verbatim as hereinbelow:

"25..... *The word "penalty" is a word of wide significance. Sometimes it means recovery of an amount as a penal measure even in a civil proceeding. An exaction which is not of compensatory character is also termed as a penalty even though it is not being recovered pursuant to an order finding the person concerned guilty of a crime....* "

(Emphasis added)

13. The Supreme Court in *State of U.P.* v. *Sukhpal Singh Bal* reported in 7 SCC 615, 622 with regard to the term 'penalty' has held that penalty does not precede offences but offences precede penalty. The relevant paragraph of the judgment is quoted herein below:

"15. In the light of the above judgments as applicable to the provisions of the said 1997 Act, we are of the view that the High Court had erred in striking down Section 10(3) as ultra vires Articles 14 and 19(1)(*g*) of the Constitution. *"Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication.* In our view, penalty under Section 10(3) of the Act is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act. Section 10(3) is enacted to protect public revenue. It is enacted as a deterrent for tax evasion. *If the statutory dues of the State are paid, there is no question of imposition of heavy penalty.* Everything which is incidental to the main purpose of a power is contained within the power itself. The power to impose penalty is for the purpose of vindicating the main power which is conferred by the statute in question. Deterrence is the main theme or object behind the imposition of penalty under Section 10(3). "

(Emphasis added)

14. Upon a careful perusal of the multifarious definitions in the legal dictionaries and judgments noted herein above, one would come to the following conclusions:

(*a*) The term 'offence' may have several meanings. It may be used in a statute to indicate a crime, a misdemeanour, felony or may be signifying a crime of lesser grade, or an act not indictable, but punishable summarily or by the imposition of a penalty. Any act committed against the law or any omission where the law requires a particular action would be equivalent to an offence.

(*b*) An offence is the transgression of a law or provision of law established for the protection of the public as distinguished from an infringement of mere private rights.

(*c*) The Supreme Court has also given a wide meaning to the term 'offence' and in Standard Chartered Bank (*supra*) affirmed the definition provided in earlier judgments of the Supreme Court by stating that the word "offence" generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. Furthermore, a failure to do something may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt.

(*d*) The term 'penalty' has also been given a broad definition by the law dictionaries and the Supreme Court

judgments wherein it is stated that the term 'penalty' is used very loosely in statutes in some cases and may be held to embrace all the consequences visited by law for an infringement of the law.

(*e*) Penalty ordinarily becomes payable in a taxing statutes when it is found that an assessee has wilfully violated any of the provisions of the taxing statute *Associated Cement Co. Ltd.* v. *CTO* 1981 taxmann.com 253 (SC) (1981) 4 SCC 578). Furthermore, penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute (*Pratibha Processors* v *UOI*, AIR 1997 SC 138 = 1996 (88) E.L.T. 12 (S.C.)).

(*f*) "Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication.

15. Principles enunciated above clearly indicate that the word 'offence' does not necessarily under all circumstances mean a crime that is required to be tried by the criminal court. A contravention of a rule/law wherein criminal proceedings are not initiated but only penalty is imposed for the purpose of deterrence would also amount to an offence. Similarly, 'penalty' is a slippery word and the same has to be understood in the context in which it is used in a given statute. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. However, there would be circumstances for certain offences, penalty may not be imposed and the same may be punishable by incarceration. Penalty may be imposed in cases where there is a simple violation of a law or for omission to do a particular act without there being any mens rea. On the other hand, penalty may also be imposed for serious contravention of the law with or without mens rea that may amount to an offence for the purpose of deterrence and punishment. A statute may provide for further punishment by prosecution for the same offence/contravention, if the legislature deems it necessary.

Interpretation of Statutes

16. Now, we will deal with the interpretation of the relevant provisions involved in the present case, specially Sections 74 and 122 of the CGST Act. Before interpreting a taxing statute, it is necessary to quote the observation of Justice Das in *Nalinakhya Bysack* v. *Shyam Sundar Haldar* AIR 1953 SC 148 that in construing a statutory or constitutional provision, the Court should not presume that the legislature has either committed a mistake or has omitted something which was very necessary and there should be no presumption of mistake of the legislature. The relevant extract from the judgement is quoted herein below:-

> "It must always be borne in mind, as said by Lord Halsbury in Commissioner for Special Purposes of Income-tax v. Pemsel, that it is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature, the Court cannot, as pointed out in Crawford v. Spooner, aid the Legislature's defective phrasing or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a casus omissus, it is, as said by Lord Russel of JKillowen in Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd., for other than the Courts to remedy the defect. "

17. A taxing statute consists of three stages, firstly, charging provision to ascertain the subject upon whom tax is to be imposed; secondly, machinery provision for assessment or quantification of the tax, interest and penalty to be imposed and thirdly, provisions for recovery of tax, interest and penalty assessed in the previous stage. Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* (1926) AC 37 in this regard has made the observations, which are quoted as under:

> ".....A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay. "

18. Section 74 of the CGST Act provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or wilful mis-statement or suppression of facts to evade tax. Section 74 in its characterization is an anti-evasion provision in nature as it is aimed at curbing evasion of tax. This is a provision which in itself consists of two stages of taxing statute. It is a charging provision for the reason, it fixes the liability upon the person chargeable with tax. It is a machinery provision as it provides for determination/quantification of tax and penalty. Ergo, Section 74 at once is a charging and a machinery provision for the recovery of tax assessed and imposition of penalty.

19. Section 122 of the CGST Act provides for penalty on taxable persons for committing offences as mentioned in twenty-one sub clauses. It is aimed at discouraging tax payers from indulging in unlawful activities with regard to supplying goods without invoice, issuing fake invoices, non payment of tax to Government after collection, non deduction or non remittance of tax, claiming wrongful input tax credits, fraudulently obtaining tax refunds, inter alia. Ergo, Section 122 is a penal provision aimed at curbing evasion of taxes.

20. For construing fiscal statutes, one must have regard to the letter of the law as the subject cannot be taxed by inference and analogy. Taxing statute aimed at exaction of any money should contain specific provisions for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly at the language used. It has

to be construed strictly as it is. Rowlatt, J. in *Cape Brandy Syndicate* v. *Commissioner of Inland Revenue* (1921) 2 KB 403 has observed as quoted herein:

> "In a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. "

21. *In Film Exhibitors, Guild* v. *State of A.P.* reported in AIR 1987 AP 110, with regard to the charging provision of a taxing statute, the Court held that it must be strictly interpreted and laid down following principles for interpretation of taxing statutes:

> "9. In the light of the above discussion in interpretation of the taxing provision, the following principles would emerge:
>
> (1) A taxing statute, if it professes to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language. The Court has to look at the language couched. Hunt into intention to find a charge is impermissible. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in and nothing is to be implied. No equitable construction of a charging section is to be applied. *The charging section is to be construed strictly* regardless of its consequences that may appear to the judicial mind to be. The burden is on the State to show that the subject is within the provisions of the Act.
>
> (2) But in construing the *machinery provisions for assessment and collection of the tax to make the machinery workable* ut res valeat potius quam pereat, *i.e.*, the Court would avoid that construction which would fail to relieve the manifest purpose of the legislation of the presumption that the legislature would enact only for the purpose of bringing about an effective result. It is not the function of the Court to hunt out ambiguities by strained and unnatural meaning; close reasoning is to be adopted; harmonious construction is to be adhered to; all the relevant provisions are to be read together to gather the intention from the language employed, its context, and give effect to the intention of the legislature. Ingenious attempt to avoid tax is to be thwarted. "
>
> *(Emphasis added)*

22. The Supreme Court in *CST* v. *Shri Krishna Engg. Co.* reported in (2005) 2 SCC 692 further held as follows:

> " 35. This Court in A. V. Fernandez v. State of Kerala [1957 SCR 837 : AIR 1957 SC 657] opined that, however great the hardship may appear to the judicial mind, (SCRp. 847)
>
> "In construing fiscal statutes and in determining the liability of a subject to tax *one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law.* If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. "
>
> A few years later another Constitution Bench in the case of *CST* v. *Modi Sugar Mills Ltd.* [(1961) 2 SCR 189 : AIR 1961 SC 1047] observed thus: (SCR p. 198)
>
> "In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. *The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed;* it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency. "
>
> *(Emphasis added)*

23. The Supreme Court in *State of Tamil Nadu* v. *M.K. Kandaswami* reported in (1975) 4 SCC 745 has held as follows:

> "26. It may be remembered that Section 7-A is at once a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax. In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability, and efficacy is to be preferred to the one which would render it otiose or sterile. The view taken by the High Court is repugnant to this cardinal canon of interpretation. "
>
> *(Emphasis added)*

24. The Court while interpreting a taxing statute in *Sheffield City Council* v. *Yorkshire Water Services Ltd.* reported in (1979) 2 All ER 91 held as under:

> "Parliament is taken not to intend the carrying out of its enactments to be unworkable or impracticable, so the Court will be slow to find in favour of a construction that leads to these consequences. This follows the path taken by Judges in developing the common law..... the common law of England has not always developed on strictly logical lines, and where the logic leads down a path that is beset with practical difficulties the Courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society. "

25. The Supreme Court in *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.* reported in (1983) 1 SCC 147, relied upon by the petitioner, has held that once the statute leaves the parliament, Court is the sole authority to interpret what the parliament intends through the language of the statute and other permissible aids. The relevant paragraph of the judgment is quoted herein below:

> "25. Shri Ashoke Sen drew pointed attention to the earlier affidavits filed on behalf of Bharat Coking Coal Limited and commented severely on the alleged contradictory reasons given therein for the exclusion of certain coke oven plants from the Coking Coal Mines (Nationalisation) Act. But, in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into court may speak for the parties on whose

behalf they swear to the statements. They do not speak for the Parliament. *No one may speak for the Parliament and Parliament is never be fore the court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court is the only authentic voice which may echo (interpret) the Parliament. This the court will do with re ference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of parliamentary intention by the executive Government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament.* Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has itself said. We have mentioned the facts as found by us and we do not think that there has been any infringement of the right guaranteed by Article 14. "

(Emphasis added)

26. Upon sifting through the various judgments quoted above, one may pen down the salient rules to be applied for interpretation of all statutes especially taxing statutes:

(*a*) A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.

(*b*) In a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. A taxing statute, if it professes to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language. The charging section is to be construed strictly regardless of its consequences that may appear to the judicial mind.

(*c*) However, in construing the machinery provisions for assessment and collection of the tax to make the machinery workable ut res valeat potius quam pereat, that is, the Court should avoid construction that would defeat the purpose of legislature behind enacting the particular legislation on the presumption that it was to bring about an effective result.

(*d*) Even while applying the strict rules of interpretation, the Court may interpret the construction of a provision in a harmonious manner by reading all the provisions together to gather the intention from the language employed, its context, and give effect to the intention of the legislature. Ingenious attempt to avoid tax is to be thwarted. The Supreme Court in *State of Tamil Nadu* v. *M.K. Kandaswami* (1975) 4 SCC 745 has categorically stated that where a particular section is a charging as well as a remedial provision, its main object is to plug leakage and prevent evasion of tax and in such circumstances in interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed.

27. Section 74 is clearly a charging and machinery provision for determination/quantification of tax and penalty while Section 122 is a penal provision in discouraging the tax payers from indulging in unlawful activities of various kinds, and accordingly, is a penal provision for deterring evasion of taxes.

28. Upon perusal of the various judgments and interpretation of statute, one may conclude that both Sections 74 and 122 being charging sections are required to be interpreted strictly and plain meaning to the word used therein should be provided by the courts. An absurd interpretation that makes the charging sections unworkable should be avoided. This does not mean that a person who is not liable to tax or to penalty should be roped into the charging provision simpliciter to curb evasion of taxes. However, the court is allowed to look at all the provision of the statute to bring about a harmonious construction and come to an interpretation which could make the statute workable. A word may have several meanings and the court may choose the meaning that could harmonise the entire statute instead of putting a meaning that would be contrary to the intention of the Legislature. At this stage, one is reminded of the famous quotation of Justice Oliver Wendell Holmes Jr., who aptly stated - a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used.

Penalty in Tax Delinquency Cases

29. The Supreme Court in *Shiv Dutt Rai Fateh Chand* (*supra*) relied upon by both the parties while dealing with legal scrutiny of a retrospective amendment made to Section 9(2)(A) of the Central Sales Tax Act has held with regard to taxation matters in relation to penalty proceedings under the Income Tax Act that it attracts civil liability. The relevant paragraph of the judgment is quoted herein below:

"30. On the other hand, a Full Bench of the High Court of Allahabad has held in *Raghunandan Prasad Mohan Lal* v. *ITAT* [AIR 1970 All 620 : [1970] 75 ITR 741 /(1970) 1 ITJ 195] that Article 20 of the Constitution contemplates proceedings in the nature of criminal proceedings and it does not apply to *penalty proceedings under the Income Tax Act, 1961 which have a civil sanction and are revenue in nature.* The High Court of Madhya Pradesh has held in Central India Motors v. Asst. CST [(1980) 46 STC 379 (MP).] that Article 20(1) is not attracted to the case of a levy of penalty made with retrospective effect under the Madhya Pradesh General Sales Tax Act, 1958.

31. After giving an anxious consideration to the points urged before us, we feel that the word 'penatty' used in Article 20(1) cannot be construed as including a 'penatty ' levied under the sales tax laws by the departmental authorities for violation of statutory provisions. *A penalty imposed by the Sales Tax Authorities is only a civil liability, though penal in*

character. It may be relevant to notice that sub-section (2-A) of Section 9 of the Act specifically refers to certain acts and omissions which are offences for which a criminal prosecution would lie and the provisions relating to offences have not been given retrospective effect by Section 9 of the Amending Act. The argument based on Article 20(1) of the Constitution is, therefore, rejected. "

(Emphasis added)

30. In *Sukhpal Singh Bal* (*supra*), the Supreme Court while pondering the vires of penalty imposed under Section 10(3) of the Uttar Pradesh Motor Vehicles Taxation Act, 1997, in relation to the object behind imposing penalty in tax statutes has held that the penalty provision is enacted to protect public revenue and deter tax evasion while serving a compensatory role for breaches of statutory tax duties. The relevant paragraph of the judgment is quoted herein below:

"18. In the case of *Rahimbhai Karimbhai Nagriwala* v. *B.B. Patel* [(1974) 97ITR 660 (Guj)] *penalty under Section 271(1)(c) of the IT Act, as it stood at the relevant time, was levied on the assessee at Rs 13,854, equal to 100 per cent of the alleged concealed income. The assessee challenged the constitutional validity of Section 271(1)(c)* on the ground that the provision was violative of Article 14 of the Constitution in as much as there was no classification at all though there was a difference between various types of tax evasions. It was urged that such a severe penalty of concealment of income was confiscatory in nature. It was urged that under Section 271(1) (*a*)(*i*) of the IT Act, the penalty for not filing a return was correlated to the amount of the tax evaded as against the correlation of penalty to concealed income under the impugned provisions of Section 271(1)(*c*)(*iii*) was totally arbitrary because so far as concealed income was concerned, the penalty for concealed income proceeded on a different footing from penalty for omission to file a return in time. It was also contended that the impugned penalty was disproportionate as there was no nexus between penalty imposed and the tax evaded and under the circumstances, it was urged that Section 271(1)(*c*)(*iii*) was violative of Articles 14 and 19(1)(*g*) of the Constitution. *This challenge was rejected by the Gujarat High Court observing that everything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject-matter and, therefore, the power to impose penalty is for the purpose of vindicating the main power, which is conferred by the Act. The object of the legislature in levying such penalty is to provide deterrence against tax evasion and to put a stop to a practice which the legislature considers to be against the public interest.* It has been further observed that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. The Supreme Court has permitted a very wide latitude in classification for taxation. The object of the legislature in enacting the impugned provision is not to provide for confiscation but to provide a penalty for concealment of income and that too by providing a deterrent penalty. "

19. In our view, the judgment of the Gujarat High Court in the case of *Rahimbhai Karimbhai Nagriwala* [(1974) 97 ITR 660 (Guj)] is squarely applicable to the present case. *Deterrence is the main theme or object behind the imposition of penalty* and, therefore, it is not possible to say that in the instant case the provision of Section 10(3) infringes Articles 14 and 19(1)(*g*) of the Constitution, as held in the impugned judgment.

(Emphasis added)

31. The Supreme Court in *Gujarat Travancore Agency* (*supra*), relied upon by both the parties while distinguishing between imposition of civil penalty under Section 271 (1)(*a*) and criminal penalty under Section 276-C of the Income Tax Act, 1961 has essentially held in relation to penalty in tax delinquency matters that such penalty is a civil liability being remedial and coercive in character and far distinct from the penalty imposed in criminal or penal laws. The Supreme Court has heavily relied on the definition of penalty as given in Corpus Juris Secundum. The relevant paragraph of the judgment is quoted herein below:

"4. Learned counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(*a*) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order to demonstrate that the proceedings by way of penalty under Section 271(1)(*a*) of the Act are quasi-criminal in nature and that therefore the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(*a*). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(*a*), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. *The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty.* In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(*a*) which requires that mens rea must be proved before

penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, Vol. 85, p. 580, para 1023:

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws. "

(Emphasis added)

32. The Supreme Court in *M.C.T. M. Corpn. (P) Ltd.* (*supra*) relied upon by both the parties has held that mens rea is an essential element in criminal law for prosecuting an accused whereas in civil matters such as taxation mens rea is irrelevant for imposing civil liability. The Court while dealing with civil liabilities imposed under Section 14B of the Foreign Exchange Regulation Act, 1947 has held that imposition of penalty does not require the traditional proof of mens rea, only the breach of statutory provision or blameworthy conduct of the recalcitrant tax payers is enough to trigger the penalty in such matters The relevant paragraphs of the judgment are quoted in verbatim herein below:

"7. "Mens rea" is a state of mind. Under the criminal law, mens rea is considered as the "guilty intention" and unless it is found that the 'accused' had the guilty intention to commit the 'crime ' he cannot be held 'guitly' of committing the crime. An 'offence' under Criminal Procedure Code and the General Clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force ". The proceedings under Section 23(1)(*a*) of FERA, 1947 are 'adjudicatory' in nature and character and are not "criminal proceedings ". The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to 'adjudicate ' only. Indeed they have to act 'judicially ' and follow the rules of natural justice to the extent applicable but, they are not 'Judges ' of the "Criminal Courts" trying an 'accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as 'courts' but only as 'administrators ' and 'adjudicators '. In the proceedings before them, they do not try 'an accused' for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his 'obiigations' imposed under the Act. They impose 'penatty' for the breach of the "civil obligations" laid down under the Act and not impose any 'sentence' for the commission of an offence. The expression 'penatty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penatty '. When penalty is imposed by an adjudicating officer, it is done so in "adjudicatory proceedings" and not by way of fine as a result of 'prosecution' of an 'accursed' for commission of an 'offence' in a criminal court. Therefore, *merely because 'penatty' clause exists in Section 23(1)(a), the nature of the proceedings under that section is not changed from 'adjudicatory ' to 'criminal ' prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender.*

8. It is thus the breach of a "civil obligation" which attracts 'penatty' under Section 23(1)(*a*), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of 'penatty ' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary guilty intention or in other words the requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his 'blameworthy ' conduct, attracting the provisions of Section 23(1)(*a*) of FERA, 1947 without any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(*a*) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence under the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts 'prosecution ' under Section 23-F and on conviction by the 'court ' for the said offence imprisonment may follow.

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12. In Corpus Juris Secundum, Vol. 85, at p. 580, para 1023, it is stated thus:

> "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws. "

13. We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" *equally holds good for the 'blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established.* The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence ", overlooking the position that the "blameworthy conduct" in the *adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the de faulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention.* Our answer to the first question formulated by us above is, therefore in the negative. "

(Emphasis added)

33. The Supreme Court has affirmed the view taken by the Bombay High Court in *Cabot International Capital Corporation* (*supra*), in its various judgments. The Bombay High Court in the said judgment has laid down the canons of interpretation. The relevant paragraph of the said judgment is quoted as under:

> "4 7. Thus, the following extracted principles are summarised:
>
> (A) Mens rea is an essential or sine qua non for criminal offence.
>
> (B) A straitjacket formula of mens rea cannot be blindly followed in each and every case. The scheme of a particular statute may be diluted in a given case.
>
> (C) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contradistinction to criminal or quasicriminal proceedings, the determination is of the breach of the civil obligation by the offender. The word 'penatty ' by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.
>
> (D) Mens rea is not essential element for imposing penalty for breach of civil obligations or liabilities.
>
> (E) There can be two distinct liabilities, civil and criminal, under the same Act. "

34. This Court in *Hindustan Herbal Cosmetics* v. *State Of U.P* (Neutral Citation No. - 2024:AHC:209) = 2024 (82) G.S.T.L. 409 (All.) = (2024) 14 Centax 80 (All.) has held that penalty in tax matters in some cases may require an element of mens rea. The relevant paragraph of the judgment is quoted hereinbelow:

> "8. Upon perusal of the judgments, the principle that emerges is that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty. A typographical error in the e-way bill without any further material to substantiate the intention to evade tax should not and cannot lead to imposition of penalty. In the case of M/s. Varun Beverages Limited (*supra*) there was a typographical error in the e-way bill of 4 letters (HR - 73). In the present case, instead of'5332', '3552' was incorrectly entered into the e-way bill which clearly appears to be a typographical error. In certain cases where lapses by the dealers are major, it may be deemed that there is an intention to evade tax but not so in every case. Typically when the error is a minor error of the nature found in this particular case, I am of the view that imposition of penalty under Section 129 of the Act is without jurisdiction and illegal in law. "

35. The Supreme Court in *Asstt. Commissioner CST* v. *Satyam Shivam Papers (P) Ltd.* 2022 (57) G.S.T.L. 97 (S.C.) has upheld the judgment of Telangana High Court wherein the Court has held in favour of assessee and underscored that authorities must not presume evasion of tax solely on procedural lapses such as expiry of an e-way bill, specially when valid reasons are provided. It is implied by the Court that penalty by the Assessing Officer under Section 129 of Telangana Goods and Services Tax cannot be imposed in absence of mens rea. The relevant paragraphs of the judgment are quoted herein below:

> "7. The analysis and reasoning of the High Court commends to us, when it is noticed that the High Court has meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the writ petitioner. However, as commented at the outset, the amount of costs as awarded by the High Court in this matter is rather on the lower side. Considering the overall conduct of Petitioner 2 and the corresponding harassment faced by the writ petitioner we find it rather necessary to enhance the amount of costs.
>
> 8. Upon our having made these observations, the learned counsel for the petitioners has attempted to submit that the questions of law in this case, as regards the operation and effect of Section 129 of the Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, it has precisely been found that there was no intent on the part of the writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic. "

36. In *Veena Estate (P.) Ltd.* v. *Commissioner of Income Tax* reported in [2024] 158 taxmann.com 341/461 ITR 483 (Bom.), the Bombay High Court while dealing with the procedural defects in furnishing notice under Section 274 of Income Tax Act, 1961 has upheld the view of Tribunal in imposing penalty against assessee for concealment of his income due to presence of mens rea.

37. *In Chemmancherry Estate Co.* v. *ITO* [2019] 111 taxmann.com 66/417 ITR 314 /[2020] 268 Taxmann 29, the Madras High Court has upheld the findings of Tribunal wherein the Tribunal has imposed penalty upon the assessee under Section 271(1)(*c*) for concealment of non-agricultural land and knowingly furnishing inaccurate particulars of income in return that the land sold was an agricultural land. The Court held that there was wilful concealment and penalty was appositely levied by the Tribunal under the said provision.

38. Upon perusal of the various judgments which have dealt with penalty in tax delinquency cases, one may summarise the same as follows:

> (a) The object of the legislature in levying a severe penalty is to provide deterrence against tax evasion and to put a stop to a practice which the legislature considers to be against the public interest. The object of the legislature in enacting a penalty provision is not to provide for punishment under criminal law but to provide a penalty for concealment of income and that too by providing a deterrent penalty.

(b) Deterrence is the main theme of object behind the imposition of penalty.

(c) Corpus Juris Secundum states that 'a penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature and is far different from the penalty for a crime or a fine or a forfeiture provided as punishment for violation of criminal and penal laws'.

(d) An order made by an adjudicating authority under the statute with regard to penalty is not that of conviction but of determination of the breach of the civil obligation by the offender [see *M.C.T.MCorp. (P.) Ltd.* (*supra*)].

(e) Blameworthy conduct in adjudicatory proceedings is established by proof only of a breach of the civil obligation under the statute, for which the defaulters are obliged to make amends by payment of the penalty imposed.

(f) As per Cabot *International Capital Corporation* (*supra*) the following principles are summarised:

(*i*) Mens rea is an essential or sine qua non for criminal offence.

(*ii*) A straitjacket formula of mens rea cannot be blindly followed in each and every case. The scheme of a particular statute may be diluted in a given case.

(*iii*) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contradistinction to criminal or quasi-criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word 'penalty' by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.

(*iv*) Mens rea is not an essential element for imposing a penalty for breach of civil obligations or liabilities.

(*v*) There can be two distinct liabilities, civil and criminal, under the same Act.

(g) In relation to Section 129 of the CGST Act, this court in *Hindustan Herbal Cosmetics* (*supra*) has held that the principle that emerges is that in certain cases the presence of mens rea for evasion of tax is a sine qua non for imposing of penalty.

39. Upon a perusal of the above principles, it is blatant that penalty may be imposed in cases where men rea is a requirement. It is the scheme of a particular statute that shall determine whether for imposition of penalty there is a requirement for men rea or not. However, when a taxing statute speaks of prosecution, for those offences mens rea or guilty intent is a sine qua non. As held in *Cabot International Capital Corporation* (*supra*), if from the scheme, objects and words used in the statute, it appears that the proceedings for imposition of penalty are adjudicatory in nature, in contradistinction to criminal and quasi-criminal proceedings, the determination is of the breach of civil obligation by the offender. The word penalty by itself will not be determinative to conclude the nature of proceedings being criminal or quasicriminal. It is crystal clear that in a particular statute penalty may be imposed for certain contraventions that do not require mens rea and in the same statute penalty may be imposed for contraventions which are far more serious in nature wherein mens rea would be a desideratum.

Dealing With The Submissions of The Petitioner

40. Keeping in mind the principles that have been culled out in the previous section with regard to the meaning of the words 'offence' and 'penalty', the manner of interpretation of taxing statutes specifically imposition of penalty in taxing delinquency cases, I shall proceed to examine the umpteen contentions raised by the counsel appearing on behalf of petitioner.

41. The crux of the argument of Mr. Arvind Datar on Issue (I) is that Section 122 of the CGST Act, 2017 specifically deals with 'offences' and therefore the same has to be read with Section 134 of the CGST Act. Hence, he argues that penalty for such offences would have to be imposed by the criminal courts and cannot be adjudicated by the proper officer. To support his arguments he submits that unless there is determination of tax under Section 73 and Section 74 of the CGST Act, no penal provision can be invoked under Section 122 of the CGST Act as there is a requirement for a predicate offence of tax evasion before any penal action can be taken under Section 122. Upon a reading of Section 2(107) of the CGST Act, it is clear that a taxable person means a person who is registered or liable to be registered under Section 22 and Section 24 of the CGST Act. Upon perusal of Section 22 and Section 24, it is clear that persons liable for registration would include persons who are exclusively in the supply of goods even if the same are exempted. Section 24, in fact provides for compulsory registration in certain cases. Accordingly, since the petitioner is registered under the CGST Act, he would fall under the definition of taxable person as mentioned in the very opening sentence of Section 122 of the CGST Act. The argument that one would have to be first taxed under Section 73/74 and only thereafter penalty can be imposed is fallacious in nature and is accordingly rejected. Under the present GST regime, persons who are not liable to pay tax under Section 73/74 of the CGST Act may very well be liable for penalties as described in the twenty-one sub-sections of Section 122(1) and under sub-sections 122(2) and 122(3).

42. The second argument raised by Mr. Datar is that, Section 122 of the CGST Act falls under the Chapter XIX: 'Offences and Penalties' and the very heading of Section 122 reads 'Penalty for certain offences'. He argues that the definition of offences is not made available in the CGST Act and therefore has to be imported from either the General Clauses Act, 1897 or the Code of Criminal Procedure, 1973. Upon a plain reading of Section 2(38) of the General Clauses Act, 1897, and Section 2(*n*) of CrPC it is clear that an offence is any act or omission made punishable by law for the time being in force. Punishment need not always be imposed by way of a criminal trial and it could very well be imposed by way of penalty.

43. Moreover, Section 4(2) of CrPC states that all offences under any law shall be investigated, inquired into, tried, and otherwise dealt with, according to the provisions under the CrPC, if no separate provisions are envisaged in other laws. In the

present case we find that for the offences enumerated under Section 122 of the CGST Act, punishment has been imposed in the form of penalty. Ergo, Section 4(2) of CrPC would not apply in the present case as a separate provision has been envisaged for the offences under Section 122 of the CGST Act by way of imposition of a penalty. Furthermore, if one were to give a plain meaning to the word 'penalty', the same normally refers to a civil liability and not a criminal liability. Various statutes like the Income Tax Act,1961 the erstwhile Central Excise Act, the Customs Act, all use the word penalty for imposition of a civil liability. The argument of Mr. Datar that penalty and fine are interchangeably used by giving reference to the two sections of CrPC, that is, Sections 136 and 141 which culminates in fines provided under Section 188 of the IPC do not assist his argument.

44. The next argument raised by Mr. Datar is that penalty is also being imposed under Section 74 of the CGST Act and therefore imposing a further penalty under Section 122 of the CGST Act for the same contravention would not have been the intention of the legislature. Upon a perusal of Section 74, it is crystal clear that the penalty imposed under this section is for non payment of tax or where tax had been short paid or erroneously refunded or where ITC has been wrongly availed of or utilised. Ergo, this penalty is very specific in nature in contradistinction to the penalties envisaged under Section 122 of the CGST Act that are far broader and for different actions/omissions that amount to contraventions, not necessarily covered under Section 74 of the CGST Act.

45. The next argument raised by Mr. Datar is that Section 122 (penalty for certain offences) and Section 132 (punishment for certain offences) of the CGST Act reveal that several sub-sections are identical and therefore the same can only be done by way of conviction under Section 122 of the CGST Act read with Section 134 of the CGST Act. At this stage, one may look at the scheme of the CGST Act and specifically Chapter XIX that starts from 122 and ends with Section 138. To give a purposeful meaning and interpretation to the various sections provided herein one finds that Section 122 to Section 130 deal with levy of penalty for various contraventions. Thereafter, Section 131, categorically states that without prejudice to the provisions contained in CrPC, no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force. Subsequent to this, is Section 132 of the CGST Act which relates to punishment for certain offences. The section that follows Section 132, all deal with punishments that are for serious offences enumerated under Section 132. Notably, Section 132 lists out only nine offences in contradiction to Section 122 of the CGST Act that enumerates twenty-one offences. Upon a perusal of these offences under Section 132, it is patently clear that these offences are far more serious in nature and therefore the legislature has chosen to impose criminal punishment for the same. One may also note that before imposing any such punishment, Section 132(6) specifically states that a person shall not be prosecuted for any of the offences provided in the section except with the previous sanction of the Commissioner. One may mark that this requirement is clearly absent in Section 122 of the CGST Act. Upon a further reading of the chapter, one finds Section 138 of the CGST Act relating to compounding of offences, which deals with offences that may be compounded but provides for a proviso that is delineated below:

"Section 138. Compounding of offences.-

(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:

Provided that nothing contained in this section shall apply to-

(*a*) a person who has been allowed to compound once in respect of any of the offences specified in clauses (*a*) to (*f*), (*h*), (*i*) and (*l*) of sub-section (1) of section 132;

(*b*) [Omitted]

(*c*) a person who has been accused of committing an offence under clause (*b*) of sub-section (1) of section 132;

(*d*) a person who has been convicted for an offence under this Act by a court;

(*e*) [Omitted] and

(*f*) any other class of persons or offences as may be prescribed: Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences. "

The above proviso is an indication that the legislature never intended to treat Section 122 as an offence prosecutable and punishable by way of a criminal trial.

46. The argument of Mr. Datar that Section 134 of the CGST Act envisages that no court shall take cognizance of any offence punishable under this Act without the previous sanction of the Commissioner and no court inferior to that of Magistrate of the First Class shall try any such offence would obviously include Section 122 as the word offence is used in the heading of the section as well as in Section 122(3)(*a*) is a plausible argument that we would have to reject with great humility for the reason that the words used in Section 134 are 'offence punishable under this Act'. On a proper interpretation of the heading of Section 122 of the CGST Act it is clear that penalty is being imposed for the offences enumerated therein whereas in Section 132 of the CGST Act punishment is being imposed for the offences enumerated therein. Coupled with the fact that Section 132 categorically states that previous sanction of the Commissioner is required which is once again reiterated in Section 134 that further clarifies that criminal court that shall try the offences under Sections 132 to 138.

47. Mr. Datar has further relied on the notes on clauses of Section 122 of the CGST Act to submit that the word 'offence' has been used in the said notes on clauses. However, the notes on clauses make it categorically clear that for the list of

offences enumerated under Section 122, the same shall only be liable to penalty. There is a stark omission in the notes on clauses with regard to any trial to be carried out before coming to the imposition of such a penalty. On a further reading of the sections provided in chapter XIX one may look at Section 128 of the CGST Act that provides for power provided to the Government to waive penalty or fees or both. It is seen that this provision empowers the GST Council to recommend waiver of any penalty referred to in Section 122, 123 and 125 or any late fee referred to in Section 147 of the CGST Act and upon such recommendation the Government may by notifications waive these penalties and late fees. Ergo, one would come to the conclusion that the above sections are clubbed in the same bracket and are of the same specie/genus and are clearly civil in nature and on these only penalty or late fees is leviable.

48. In fact the definition of 'penalty' as cited in Corpus Juris Secundum (Volume 85, page 580, para 1023) relied upon by the petitioner specifically states that a penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in nature. In a taxing statute, one has to give the plain meaning to a particular word and in a catena of judgments of the Supreme Court referred above it has been clarified that penalty for contravention/offences is distinct from prosecution for the same contravention/offences.

49. The argument of Mr. Datar that the exclusion of certain proceedings/offences under Section 132 of the CGST Act cannot lead to the inference that proceedings under Section 122 of the CGST Act are relatable to a civil liability only for the reason that Parliament could have intended that some of the offences mentioned under Section 122 needed harsher punishment is not acceptable as this submission appears to be contrary to the scheme of the Act. In fact culling out nine offences from Section 122 and creating a separate section for criminal prosecution with the heading punishment for offences itself leads to the inference that Section 122 relates to imposition of a civil liability by way of penalty by the department while for the chosen nine offences criminal proceedings with prior sanction from the Commissioner is contemplated under Section 132(6) of the CGST Act.

50. The final argument of Mr. Datar on this particular issue is that Section 122 of the CGST Act cannot be adjudicated by department and has to undergo prosecution as it nowhere refers to the word proper officer, and therefore, it has to be concluded that Section 122 is required to be read with Section 134 of the CGST Act and such penalty can only be imposed by way of a criminal trial. He has further referred to CBIC Circular No.3/3/2017-GST dated July 7, 2022 wherein the Board has assigned the proper officer for adjudication in relation to various sections of the CGST Act but has intentionally excluded the proceedings under Section 122 for prosecution by criminal courts. He has further submitted that Section 122 does not contain any reference to proper officer and therefore it implies these proceedings can only be carried out in a criminal court. This argument would have to be rejected on the following grounds:

(a) Powers under Section 74 of the CGST Act are undoubtedly exercised by a proper officer. Explanation 1(*ii*) to Section 74 of the CGST Act clearly indicates that it is the proper officer who initiates the proceedings under Sections 73 and 74 is also the person who is initiating the proceedings under Sections 122 and 125 as the explanation provides for proceedings against the persons liable to pay penalty under Sections 122 and 125 are deemed to be concluded when the proceedings against the main person charged under Sections 73 and 74 are concluded.

It may further be noted that Explanation 1(*i*) to Section 74 of the CGST Act categorically states that the expression "all proceedings in respect of the said notice" shall not include proceedings under Section 132 of the CGST Act. Inclusion of this particular sub-clause can only be interpreted to mean that the legislature's intention was to exclude the criminal proceedings which dealt with punishment for offences. On the other hand, it is an indication that a penalty under Section 122 of the CGST Act would fall within the proceedings in respect of a notice issued under Section 74, if so desired by the proper officer. Sub-clause (*ii*) of the explanation further buttresses the argument of the respondent that conclusion of a proceedings under Sections 73 or 74 against the main person would conclude proceedings against all other persons liable to pay penalty under Section 122 of the CGST Act.

(b) Furthermore, upon sifting through the various sections of the CGST Act and the Rules framed thereunder the picture becomes absolutely transparent. Section 83 of the CGST Act which categorically states that in certain events provisional attachment may be made by the revenue if the Commissioner is of the opinion that for the purpose of protecting the government revenue, he may by order in writing attach provisionally any property including bank accounts belonging to the taxable person or any person specified in Section 122(1A). Section 122(1A) provides that any person who retains the benefit of the transaction covered under clauses (*i*), (*ii*), (*vii*) or clause(*ix*) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on. In light of the same, it is clear that the penalty imposed under Section 122 is being imposed by the department as provisional attachment can be done for the same which would not have been possible if Section 122 was to be tried by the criminal courts.

(c) Rule 142(1)(*a*) of CGST Rules categorically states that a proper officer shall serve along with the notice issued under Sections 52/73/74/76/122/123/124/125/127/129/130, a summary thereof electronically in form GST DRC-01. Furthermore, Rule 142(5) provides that the summary of the order under Sections 52/62/63/64/73/76/122/123/124/125/127/129/130 shall be uploaded electronically in form GST DRC-07, specifying therein the amount of tax, interest and penalty, as the case may be, payable by the person concerned. The above clearly indicates the intention of the legislature that the proper officer is required to issue show cause and thereafter adjudicate and pass order under Section 122 of the CGST Act and nothing further remains in doubt. The arguments placed by Mr. Datar with regard to the above issue, though very eloquently presented do not seem to hold any water when one looks at the entire scheme of the Act as indicated above. In light of the same, one may

conclude that a proper officer/adjudicating officer has the power to adjudicate on the penalty provision provided under Section 122 of the CGST Act.

51. With reference to the issue (II), it is submitted by the petitioner that if the proceedings under Section 74 of the CGST Act is dropped/concluded against the main person, the proceedings under Section 122 of the CGST Act shall also abate against the main person. The petitioner had relied on the explanation 1(*ii*) to Section 74 in support of this argument. However, from a reading of the circular no. 171/03/2022-GST dated July 6, 2022, it is clear that the contravention under Section 73/74 need not necessarily be a contravention covered under Section 122 of the CGST Act. Explanation 1(*ii*) of Section 74 categorically states that when the proceedings against the main person under Section 73/74 are dropped then the proceedings under Section 122 against the other persons would also abate. However, in a particular case when a show cause notice is issued against the main person under Section 73/74 and also against the main person under Section 122, dropping of proceedings under Section 73/74 would not automatically result in dropping of proceedings under Section 122 against the main person as the proceedings are with respect to contravention of two different offences. One may explain this by way of the following example:

A sells goods to B, for a sum of Rs. 100 along with input tax credit of Rs.18. A however issues a tax invoice for a sum for a sum of Rs. 200 along with GST of Rs. 36. B thereafter supplies goods to C for a sum of Rs. 50 along with proper tax invoice. B further issues tax invoice with Rs. 50 to D without supply of any goods. In the said invoice, B passes on Rs.9 as GST. B further supplies goods worth Rs.100 to E but issues tax invoice for a sum of Rs.150 alongwith GST for the same.

(a) In the above example, A would be liable for issuance of fake invoices for the sum of Rs. 100 along with GST that has been passed on. So, A would be liable under Section 122(1)(*ii*) and B would be liable under Section 74 for improper utilization of ITC.

(b) With regard to transaction between B and C, no offence has been committed by either B or C as tax invoice is for the amount of goods supplied by B to C as B has supplied goods to C and issued invoice for the same amount.

(c) When B issues fake invoices of Rs.50 with Rs.9 as GST to D without any supply of goods, B would be liable under Section 122(1) (*ii*) for issuance of fake invoices and D would be liable under Section 74 for improper utilization of ITC without receiving goods.

(d) With regard to transaction between B and E, B has supplied goods of 100 and shows the supplies of 150, therefore, B is liable for issuance of fake invoices without supply of goods worth Rs.50 and therefore penalty would be imposed under Section 122(1)(*ii*) and E would be liable under Section 74 for utilization of ITC worth Rs.9 without receipt of goods.

52. In light of the above example, it is clear that there may be scenarios where a proceeding under Section 73/74 of the CGST Act may get concluded against the main person but the penalty proceedings under Section 122 of the CGST Act for issue of fake invoices by the main person may stand independent of the proceedings under Section 74, and therefore, those proceedings under Section 122 would not abate as per the explanation 1(*ii*) of Section 74.

Conclusion

53. After detailed analysis, it is clear that the proceeding under Section 122 of the CGST Act is to be adjudicated by the adjudicating officer and is not required to undergo prosecution and also abatement of proceedings under Section 74 of the CGST Act does not ipso facto abate the proceedings under Section 122 which are for completely different offences.

54. In light of the above discussions, one would come to the inexorable conclusion that Section 122 of the CGST Act is a provision specifically for imposition of penalty to be adjudicated by the proper officer while the provisions from Sections 132 to 138 deal with prosecution to be done by the criminal courts. Moreover, as discussed above, conclusion of proceedings on the main person under Section 74 of the CGST Act shall not ipso facto abate the proceedings under Section 122 of the CGST Act proposed to be imposed on the main person. The scheme of the CGST Act read with CGST Rules lead one to the inescapable conclusion that the arguments raised by the petitioner, though innovative and thought provoking, are fallacious as the interpretation given by the petitioner would lead to obfuscation of the very purpose and objective of the CGST Act. In light of the same, the contentions of the petitioner cannot be countenanced and, are accordingly, rejected.

55. The writ petition is dismissed. The respondent authorities are directed to continue with the proceedings under Section 122 of the CGST Act in line with the show cause notice issued.

56. I would like to acknowledge the consummate arguments made by counsel appearing on behalf of both the parties and thank the juniors appearing in the matter for the diligent spadework in preparation of the notes of arguments submitted by both sides. I would also go amiss if I did not appreciate my Research Associates Ms. Saumya Patel and Mr. Ashutosh Srivastava for their in depth research and assistance provided to me.

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2019 (27) G.S.T.L. 161 (All.) [30-05-2019]

2019 (27) G.S.T.L. 161 (All.)

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
Manoj Misra and Suresh Kumar Gupta, JJ.

GOVIND ENTERPRISES
Versus
STATE OF U.P.

Criminal Misc. Writ Petition No. 7303 of 2019, decided on 30-5-2019

GST - FIR for offences under GST - Lodging thereof under Indian Penal Code (IPC) by taking recourse to Cr.P.C. provisions whether justified when CGST/SGST Acts are a complete Code in themselves dealing with all kinds of offences under GST - Dealer obtaining GST registration fraudulently in the name of a bogus firm giving bogus address, receiving inward supply and passing on goods to end users without generating outward supply bills and receiving money in cash and depositing same in undisclosed bank account with a view to evade tax - Provisions of Sections 69, 134 and 135 of Uttar Pradesh Goods and Services Tax Act, 2017 applicable in respect of offences punishable under the said Act and not in respect of offences punishable under IPC - Since neither the provision of UPGST Act overrides or expressly or impliedly repeals the provisions of IPC nor is there any bar therein on lodging FIR under IPC for offences punishable both under the Code as well as under the said Act, keeping in view provisions of Section 26 of General Clauses Act, 1897, FIR lodged under IPC not liable to be quashed particularly when it discloses commission of cognizable offence under the Code - Moreover, Section 131 ibid impliedly saves IPC provisions by stipulating that no confiscation made or penalty imposed under the said Act or the Rules made thereunder shall prevent infliction of any other punishment to which person affected thereby liable under the said Act or under any other law for the time being in force - Contention of dealer that since Section 132(4) ibid renders all offences non-cognizable except those mentioned in Section 132(5) ibid thereof and therefore, no FIR can be lodged not acceptable as Section speaks of offences under the said Act and not under IPC. *[paras 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33]*

Prosecution under GST vis-à-vis prosecution under IPC - Mens rea - Section 135 of Uattar Pradesh Goods and Services Tax Act, 2017 stipulating that in any prosecution for an offence under the Act, Court shall presume existence of culpable mental state of the accused but in absence of any such provision in IPC, standard of proof to prove commission of offence thereunder is higher than required under the Act - Offences punishable under IPC are qualitatively different from those punishable under UPGST Act, 2017 - Section 132 of Central Goods and Services Tax Act, 2017/Uttar Pradesh Goods and Services Tax Act, 2017. *[para 31]*

Arrest for offences under GST - Stay on arrest not to be granted in economic fraud cases when prayer to quash FIR not accepted inasmuch as such stay may become a hurdle in thorough investigation particularly in tracing out money trail - Section 69 of Central Goods and Services Tax Act, 2017/Uttar Pradesh Goods and Services Tax Act, 2017. *[para 34]*

Petition dismissed

CASES CITED

Ajit Singh @ Muraha v. State of U.P. — 2006 (56) ACC 433 — *Relied on*..... [Para 34]
Ashok Kumar v. State of U.P. — 2000 UPTC 916 — *Relied on*..... [Paras 11, 29]
State of Delhi (NCT) v. Sanjay — (2014) 9 SCC 772 — *Relied on*..... [Paras 23, 24]
State of Maharashtra v. Sayyed Hassan Sayyed Subhan — Criminal Appeal No. 1195 of 2018, decided on 20-9-2018 by Supreme Court — *Relied on*..... [Para 24]
State of Rajasthan v. Hat Singh — (2003) 2 SCC 152 — *Relied on*..... [Paras 22, 24]
State of West Bengal v. Narayan K. Patodia — (2000) 4 SCC 447 — *Relied on*..... [Paras 11, 25]

REPRESENTED BY : Shri Anil Prakash Mathur, Counsel, for the Petitioner.
Shri C.B. Tripathi, G.A., for the Respondent.

[Judgment per : Manoj Misra, J.]. - Instant petition seeks quashing of first information report (for short FIR), dated 30-11-2018, lodged by Assistant Commissioner, Commercial Tax at police station Kosi Kalan, District Mathura, under Sections 420, 467, 468, 471, 34, 120B IPC.

2. The impugned FIR alleges that M/s. Govind Enterprises (the petitioner) applied for registration under the U.P. Goods and Services Tax Act, 2017 (for short U.P. Act) to conduct business in packing material, by showing its place of business on the First Floor, N.H.-2, in front of Gate No. 1, Anaj Mandi, Kosi Kalan, District Mathura. Upon which, on 9-3-2018, GST No. 09CBIPA0305H1Z7 was provided to it. At the time of obtaining registration, the applicant disclosed its e-mail ID as advocateonlyforgst@gmail.com and mobile No. 8533952295. Further, while applying for registration, it was declared that the office space for the firm was obtained on rent from Mahaveer Singh son of Ramesh Chandra at Rs. 1,000/- per month. The rent agreement and receipt of electricity connection, dated 17-2-2017, obtained from Dakshinanchal Vidyut Vitran Nigam Limited was also uploaded at the portal. It is alleged that on 27-9-2018, an inquiry about the dealer was conducted by Sri Narendra Kumar, Deputy Commissioner, Commercial Tax; Sri Gulab Chandra, Assistant Commissioner, Commercial Tax; and Ms. Isha Gautam, Assistant Commissioner. It was found that at the disclosed place of business, there was no display board to show the name of the firm; the disclosed place was just a room measuring 18 feet × 20 feet; that, at the time of inspection, the landlord Mahaveer Singh was found, who disclosed that, on 1-3-2018, the room was let out to Govind Agrawal (proprietor of the petitioner-firm) on a rent of Rs. 1,000/- per month; that he himself had applied for registration for the trader; and that he had been an Advocate for the firm. It is alleged that the room had no books of account relating to the firm; that only a computer and laptop with a printer was found, which, according to Mahaveer Singh, did not carry any data relating to the firm; that papers kept there were relating to his own legal practice; and that two persons found working on the computer, upon enquiry, disclosed that they were working for the Advocate in connection with his accountancy work. The inspection further revealed that there was no place or godown to maintain/keep stock. It was also disclosed to the team that M/s. Govind Enterprises conducted its entire business from Kanpur and that all books of account relating to the firm are maintained in its Kanpur Branch. Upon receipt of the above information, it is alleged, a survey/inspection of the branch at Kanpur was also conducted by Sri Chandra Shekhar, Deputy Commissioner, Commercial Tax on 27-9-2018 itself. Upon inspection of the Kanpur branch, a labour contractor, namely, Mukesh Sharma son of Ram Kumar Sharma, was found. The team was informed by the landlord - Indrapal that the concerned shop had been provided to one Dharmendra Gurjar son of Kali Charan. Dharmendra Gurjar informed that the premises was taken on rent on the request of accountant Manish; that the shop was taken on rent on 15-9-2018 at the rate of Rs. 7,000/- per month; that he is a Muneem in the firm on a salary of Rs. 10,000/- per month; that he does not know Govind Agrawal; that he had been sent by Ram Niwas Gurjar, who runs business by the name of Pitambar Transport. The team found that the shop concerned was just about 10 feet × 20 feet in dimensions and it appeared that it had not been opened for last several days. The team was also informed that since the time the premises had been taken on rent, only a truck load of goods had been received in which there were bundles of plastic films (*Panni*). When account books etc. were demanded, the team was informed that bills etc. were with the accountant who is at Mathura. The owner of the building was also queried who denied existence of any written agreement and who denied that it was given on rent to Govind Enterprises. He stated that only one month's rent had been paid so far, which was by Dharmendra Gurjar. The impugned FIR also alleges that at the time of registration, the firm had disclosed its bank account No. 04672121008171 in Oriental Bank of Commerce, Mathura. It was alleged that since the time of registration, the firm had shown an inward supply of laminated papers valued Rs. 35,02,28,642/- whereas the outward supply was by two e-way bills of Rs. 1,64,334/- and 14,94,774/-. It was alleged that as, despite such large quantity of inward supply, the outward supply was negligible, a deeper probe was made. Upon which, it was found that Govind Enterprises had obtained 295 e-way bills in respect of inward supply of goods worth Rs. 35,02,28,642/- by showing its place of business at Kosi Kalan, Mathura and Kanpur. The probe revealed that the disclosed bank account of the firm, which was in operation since 27-8-2009, up to 26-11-2018, had a balance of mere Rs. 6,448/-. It was further found that in between 27-8-2009 and 26-11-2018, the total amount deposited in the account was just Rs. 3,73,389/- whereas total withdrawal therefrom was of Rs. 4,00,017/-, which suggested that the firm's proprietor, namely, Govind Agrawal, had limited means to carry out such huge business as could be gathered from the inward e-way bills obtained by him. It is further alleged that upon inquiry another undisclosed bank account of Govind Enterprises came to light which was in Gwalior, Madhya Pradesh. The said bank account stood in the name of M/s. Govind Enterprises with address New Mahaveer Colony, Birla Nagar, Murar, Gwalior. It is alleged that upon going through the said bank account statement it was found that in between 11-7-2018 and 16-11-2018, on various dates, cash deposits were made totalling Rs. 9,39,07,715/- suggesting that the goods obtained through 295 inward e-way bills were disposed of without invoicing to evade taxes. It has been alleged that having an undisclosed bank account of the firm in Gwalior, when the office of the firm is shown at Mathura disclosed the dishonest intention of the dealer. It has also been alleged that laminated paper is essentially used as packing material in various industrial applications and therefore the accused must have passed on the material to industries, which, in absence of documentation, is suggestive of a large scale economic fraud. By narrating the background facts noticed above, it has been alleged that there is reason to believe that Sri Govind Agrawal in collusion with some unknown firm or person, by acting as their agent, had committed an economic fraud.

3. In a nutshell, the thrust of the allegations made in the impugned FIR is that the dealer fraudulenty, with a dishonest intention, by submitting false documents, with an intention to evade taxes, obtained registration, thereafter, took inward supply and passed on the goods to end users, without generating outward supply bills, received money in cash and deposited the same in bank account which was not declared at the time of seeking registration.

4. Sri A.P. Mathur, Learned Counsel for the petitioner, submitted that till date, no case has been registered under the provisions of the U.P. Act or under the Central Goods and Services Tax Act, 2017 (for short Central Act) and no recovery demand has been raised and, therefore, lodging of the first information report under the provisions of the Indian Penal Code is not legally sustainable. It was submitted that the Goods and Services Tax Act is a complete code in itself as it contemplates and deals with all kinds of situations and offences relating to registration of firms, tax evasion etc. and it prescribes a specific procedure for arrest and prosecution therefore lodging of the first information for offences punishable under the *Indian Penal Code (for short Penal Code)* by taking recourse to the provisions of the *Code of Criminal Procedure, 1973 (for short the Code*) is not legally justified.

5. By placing reliance on the provisions of Section 69 of the U.P. Act, Sri Mathur contended that the power to arrest is to be exercised only where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132 of the U.P. Act, and, by order, has authorized any officer of Sales tax to arrest such person. He submitted that, under the circumstances, first a proceeding has to be drawn under the provisions of the U.P. Act and, only, thereafter there could be arrest, that too, after recording satisfaction. Hence, lodging of the first information report straightaway is not legally permissible.

6. In the alternative, Sri Mathur submitted that even assuming that a first information report can be registered, as no demand for recovery has yet been issued, there is no justification to effect arrest of the petitioner pending investigation.

7. *Per contra*, Sri C.B. Tripathi, Learned Special Standing Counsel, representing Revenue, submitted that Section 131 of U.P. Act, which is *pari materia* Section 131 of Central Act, specifically provides that no confiscation made or penalty imposed under the provisions of the Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of the Act or under any other law for the time being in force. It has been submitted by him that phraseology of Section 131 clearly suggests that the provisions of the Act are without prejudice to the provisions of the Code and, therefore, in respect of any offence punishable under the provisions of the Penal Code, the provisions of the Code can be invoked and a first information report can be registered.

8. Sri Tripathi submitted that as the allegations made in the impugned first information report clearly disclose that a bogus firm, which had no significant business, was got registered, by submitting false documents and information, for making purchase and sale, without proper documentation, to evade taxes, and, thereafter, goods worth Rs. 35 odd crores were purchased/transported through self generated 295 inward e-way bills and, against them, sale of only few lacs was shown by generating just two outward e-way bills; and, upon inspection neither proper place of business nor godown with goods were found, rather cash deposits were discovered in undisclosed bank account, the dishonest intention of the petitioner is writ large. Hence, a case for registration of FIR in respect of commission of offences punishable under the Penal Code is made out. Therefore, neither the first information report nor investigation in pursuance thereof can be quashed.

9. By placing reliance on the averments made in paragraphs 14 and 15 of the counter affidavit, of which there is no denial in paragraph 11 of the rejoinder affidavit, Sri Tripathi submitted that after serving a show cause notice dated 4-10-2018, vide order dated 23-10-2018, the registration of the petitioner has been cancelled. Thereafter, the petitioner had filed application which was rejected vide order dated 13-12-2018.

10. Sri Tripathi further submitted that in matters pertaining to economic fraud, it would not be appropriate for the Court to grant stay of arrest, particularly, where first information report discloses commission of cognizable offence, as such relief may thwart investigation and discovery of further information as to who all are involved in such activity. Sri Tripathi thus prayed that the writ petition be dismissed.

11. In support of his contention that there is no legal restriction placed on lodging of FIR and the same could be lodged even where proceedings could be undertaken for recovery of tax etc., Sri Tripathi placed reliance on a decision of the Apex Court in the case of *State of West Bengal* v. *Narayan K. Patodia* - (2000) 4 S.C.C. 447 and on a division bench decision of this Court in the case of *Ashok Kumar* v. *State of U.P. and Others* reported in 2000 UPTC 916.

12. As parties had exchanged their affidavits, after hearing the counsel for the parties at length, we have proceeded to decide the matter finally at the admission stage itself.

13. Before we proceed to address the rival submissions, it would be apposite for us to examine the relevant provisions of the U.P. Act cited by the Learned Counsel for the parties.

14. Learned counsel for the petitioner has cited the provisions of Sections 69, 122, 132 and 134 of the U.P. Act. Section 122 of the U.P. Act is extracted below :-

"**122. Penalty for certain offences.** - (1) Here 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;
(ii)	issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;
(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;
(iv)	collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
(v)	fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;
(vi)	fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;
(vii)	takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;
(viii)	fraudulently obtains refund of tax under this Act;
(ix)	takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;
(x)	falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;
(xi)	is liable to be registered under this Act but fails to obtain registration;
(xii)	furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;
(xiii)	obstructs or prevents any officer in discharge of his duties under this Act;
(xiv)	transports any taxable goods without the cover of documents as may be specified in this behalf;
(xv)	suppresses his turnover leading to evasion of tax under this Act;
(xvi)	fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;
(xvii)	fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;
(xviii)	supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;
(xix)	issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;
(xxi) disposes of or tampers with any goods that have been detained, seized, or attached under this Act,
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.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised, -

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who -

(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);

(b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to twenty-five thousand rupees."

15. According to the Learned Counsel for the petitioner, the act of the petitioner for which the impugned FIR has been lodged is covered by various clauses of the provisions of Section 122 of U.P. Act and therefore at best a penalty could be imposed by taking recourse to the provisions of the U.P. Act.

16. *Section 132* of the U.P. Act provides for certain offences. The same is reproduced below :-

"**132. Punishment for certain offences.** - (1) Whoever commits any of the following offences, namely :-

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilization of input tax credit or refund of tax;

(c) avails input tax credit using such invoice or bill referred to in clause (b);

(d) 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;

(e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(g) obstructs or prevents any officer in the discharge of his duties under this Act;

(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(j) tampers with or destroys any material evidence or documents;

(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section, shall be punishable -

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Explanation. — For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act."

17. By referring to clauses (f) and (k) of sub-section (1) of Section 132, Learned Counsel for the petitioner submitted that the allegations in the impugned FIR, even if accepted as correct, may disclose offences specified in those clauses therefore, by virtue of the provisions of sub-section (4) read with sub-sections (5) and (6) of Section 132 of the U.P. Act, they would be non-cognizable. Hence, lodging of the impugned FIR is not legally justified as proceeding could be initiated only under the provisions of the U.P. Act and in the manner prescribed therein.

Section 69 of the U.P. Act provides as follows :-

"**69. Power to arrest.** - (1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.

(2) Where a person is arrested under sub-section (1) for an offence specified under sub-section (5) of Section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.

(3) Subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), -

(a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of Section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;

(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station. "

Section 134 of the U.P. Act provides as follows :

"**134. Cognizance of offences.** - No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of the Magistrate of the First Class, shall try any such offence."

18. By referring to the provisions of Sections 69 and 134 of the U.P. Act, the Learned Counsel for the petitioner contended that as a special procedure has been provided for arrest as well as prosecution of a person for offences punishable under the U.P. Act, recourse to general law, namely, the provisions of the Penal Code and the Code, is excluded.

19. On the other hand, Learned Counsel for the Revenue, in addition to stating that offences punishable under clauses (a) and (d) of sub-section (1) of Section 132 of the U.P. Act, which are cognizable under sub-section (5) of Section 132 of the U.P. Act, are also made out, placed reliance on the provisions of Sections 131 and 135 of the U.P. Act, which are extracted below :-

"**131. Confiscation or penalty not to interfere with other punishments.** — Without prejudice to the provisions contained in the Code of Criminal Procedure, 1973, no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force. "

"**135. Presumption of culpable mental state.** — In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. - For the purposes of this section, -

(i) the expression "culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;

(ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

20. Learned Counsel for the Revenue submitted that the provisions of the U.P. Act do not in any manner override the provisions of the Penal Code or prohibit the applicability of the provisions of the Code in respect of offences punishable under the Penal Code. He submitted that offences punishable under the Penal Code are to be dealt with as per provisions of the Code whereas offences punishable under the U.P. Act are required to be dealt with in a manner which does not violate the procedure specified for them in the U.P. Act. It was submitted that for offences punishable under the U.P. Act, by virtue of Section 135 of the U.P. Act, there is a presumption of culpable mental state whereas for offences punishable under the Penal Code there is no such presumption available to the prosecution therefore the offences punishable under the Penal Code are qualitatively different from those punishable under the U.P. Act even though an act may constitute an offence punishable under both the Acts, namely, Penal Code and U.P. Act.

21. Having noticed the submissions and the relevant provisions cited, before we proceed to weigh the rival submissions, it would be useful to refer to the provisions of Section 26 of the General Clauses Act, 1897 (for short G.C. Act) and few decisions of the Apex Court dealing with situations where an act may constitute offences punishable under separate statutes. Section 26 of G.C. Act provides as follows :

"**26. Provision as to offences punishable under two or more enactments.** - Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. "

22. In *State of Rajasthan* v. *Hat Singh*, (2003) 2 S.C.C. 152, the Apex Court had the occasion to examine the provisions of Section 26 of the G.C. Act with reference to the rule against double jeopardy enshrined under Article 20(2) of the Constitution of India and Section 300 of the Code. The Apex Court in paragraphs 8 to 11 of its judgment, as reported held as follows :

"8. Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. *To attract applicability of Article 20(2) there must be a second prosecution and punishment for the same offence for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct.*

9. The rule against double jeopardy is stated in the maxim *nemo debet bis vexari pro una et eadem causa*. It is a significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of *autrefois acquit* and *autrefois convict*. The manifestation of this rule is to be found contained in Section 26 of the General Clauses Act, 1897, Section 300 of the Code of Criminal Procedure, 1973 and Section 71 of the Indian Penal Code. Section 26 of the General Clauses Act provides :

"26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

(emphasis supplied)

Section 300 CrPC provides, *inter alia*, -

"300. (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof"

(emphasis supplied)

Both the provisions employ the expression "same offence".

10. Section 71 IPC provides -

"71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

11. The leading Indian authority in which the rule against double jeopardy came to be dealt with and interpreted by reference to Article 20(2) of the Constitution is the Constitution Bench decision in *Maqbool Hussain* v. *State of Bombay*. *If the offences are distinct, there is no question of the rule as to double jeopardy being extended and applied.* In *State of Bombay* v. *S.L. Apte* the Constitution Bench held that the trial and conviction of the accused under Section 409 IPC did not bar the trial and conviction for an offence under Section 105 of the Insurance Act because the two were distinct offences constituted or made up of different ingredients though the allegations in the two complaints made against the accused may be substantially the same. In *Om Parkash Gupta* v. *State of U.P.* and *State of M.P.* v. *Veereshwar Rao Agnihotri* it was held that prosecution and conviction or acquittal under Section 409 IPC do not debar the accused being tried on a charge under Section 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content. In *Roshan Lal* v. *State of Punjab* the accused had caused disappearance of the evidence of two offences under Sections 330 and 348 IPC and, therefore, he was alleged to have committed two separate offences under Section 201 IPC. *It was held that neither Section 71 IPC nor Section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences under Section 201 IPC though it would be appropriate not to pass two separate sentences.*

(emphasis supplied)

23. In *State (NCT of Delhi)* v. *Sanjay*, (2014) 9 S.C.C. 772, the principal question that arose for consideration before the Apex Court was whether the provisions contained in Sections 21, 22 and other sections of the Mines and Minerals (Development and Regulation) Act, 1957 operate as bar against prosecution of a person who has been charged with allegation which constitutes offences under Section 379 and other provisions of the Penal Code, 1860. In other words, the question for consideration was whether the provisions of the Mines and Minerals Act explicitly or impliedly exclude the provisions of the Penal Code when the act of an accused is an offence both under the Penal Code and under the provisions of the Mines and Minerals (Development and Regulation) Act. Deciding the issue, the Apex Court held as follows :

61. *Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence.*

62. Sub-section (1A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the Rules made thereunder. In other words no person will do mining activity without a valid lease or licence. Section 21 is a penal provision according to which if a person contravenes the provisions of sub-section (1A) of Section 4, he shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any Rule made thereunder except upon a complaint made by a person authorised in this behalf. It is very important to note that Section 21 does not begin with a *non obstante* clause. Instead of the words "notwithstanding anything contained in any law for the time being in force no court shall take cognizance....", the section begins with the words "no court shall take cognizance of any offence."

63 to 68 ……

69. Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.

70. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorised under the Act shall exercise all the powers including making a complaint before the Jurisdictional Magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorised officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. *In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person is sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitutes an offence under the Penal Code.*

71. However, there may be a situation where a person without any lease or licence or any authority enters into river and extracts sand, gravel and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Penal Code.

72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.

73. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-a-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."

(Emphasis Supplied)

24. In a more recent decision of the Apex Court, rendered in Criminal Appeal No. 1195 of 2018 arising out of Special Leave Petition (Criminal) No. 4475 of 2016, decided on September 20, 2018 (*State of Maharashtra and Another* v. *Sayyed Hassan Sayyed Subhan and Others*), the issue that had arisen for consideration was whether an accused could be prosecuted for an offence punishable under the Penal Code for which a proceeding can also be drawn under the provisions of the Food Safety and Standards Act. By relying upon the decision of the Apex Court in *State of Rajasthan* v. *Hat Singh* (supra) and *State of Delhi (NCT)* v. *Sanjay* (supra), the Apex Court, in paragraphs 7 and 8 of the judgment, held as follows :-

"7. *There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence.* The same set of facts, in conceivable cases, can constitute offences under two different laws. *An act or an omission can amount to and constitute an offence under the IPC and at the same time, an offence under any other law.* The High Court ought to have taken note of Section 26 of the General Clauses Act, 1897 which reads as follows :

"**Provisions as to offences punishable under two or more enactments**. - Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

8. In *Hat Singh's* case this Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the Respondent therein for offences under the Mines and Minerals (Development and Regulation) Act 1957 and Indian Penal Code, this Court in *State (NCT of Delhi)* v. *Sanjay* held that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the IPC merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point."

(Emphasis Supplied)

25. At this stage, it would not be out of place for us to notice the decision of the Apex Court in the case of *State of West Bengal* v. *Narayan K. Patodia* (supra) cited by the Learned Counsel for the Revenue.

26. In that case, the High Court of Calcutta had quashed the first information report on the ground that the person who forwarded the complaint to the police had no authority to do so. The FIR was registered for offences under the Indian Penal Code and the West Bengal Sales Tax Act, 1994. The FIR contained allegation that the accused submitted two applications before the Assistant Commissioner, Commercial Tax, Burdwan impersonating himself as one Mohan Agrawal who was a fictitious person and the application was submitted by obtaining forged document. It was alleged that on the basis of the fabricated document, the accused obtained registration under the Sales Tax Act which entitled him to make purchases at concessional rate of sales tax, and also to receive permits for importing spices from outside the State. It was alleged that on the strength of the registration so obtained, the respondent applied for issuance of five permits to import spices. The Bureau of Investigation of Government of West Bengal conducted discreet investigation and found that the accused had committed forgery and impersonation to defraud sales tax amount. The complaint was presented by the Assistant Commissioner, Commercial Tax to the Deputy Superintendent of Police, who was attached to the Bureau of Investigation formed under the Sales Tax Act. The Deputy Superintendent, in turn, forwarded the complaint to the officer in-charge of police station with a request to investigate the matter for offences punishable under Sections 403, 409, 465, 468, 471, 419, 420 read with 120B IPC and the provisions of the Sales Tax Act. Pursuant to the request, the first information report was registered. Upon registration of the first information report, the accused invoked the powers of the High Court for quashing the first information report.

27. The High Court quashed the first information report by expressing its opinion that under the Sales Tax Act only Bureau of Investigation constituted by the State Government can conduct the investigation or hold inquiry into any case of alleged or suspected evasion of tax as well as malpractices kept therein and hence no police officer can investigate into offences under the Indian Penal Code or any other Act read with section committed under the provisions of the Sales Tax Act.

28. The Apex Court took notice of the provisions of Section 4 of the Code, which provided that all offences under the Penal Code are to be investigated, inquired into, tried and otherwise dealt according to the provisions contained in the Code, and came to the conclusion that, as there was no provision in the Sales Tax Act which inhibited the powers of the police as conferred by the Code for investigation and trial of offences under the Penal Code, the order passed by the High Court was liable to be set aside and, accordingly, permitted the registration as well as investigation on the first information report.

29. A similar view has also been taken by a Division Bench of this Court in the case of *Ashok Kumar* v. *State of U.P*. (supra).

30. Upon careful consideration of the rival submissions, the decisions noticed above, the relevant provisions of the U.P. Act as also the Penal Code and the Code, we find that Sections 69, 134 and 135 of the U.P. Act are applicable in respect of offences punishable under the U.P. Act. They have no application on offences punishable under the Penal Code. Further, there is no provision in the U.P. Act, at least shown to us, which may suggest that the provisions of the U.P. Act overrides or expressly or impliedly repeals the provisions of the Penal Code. There is also no bar in the U.P. Act on lodging an FIR under the Code for offences punishable under the Penal Code even though, for the same act/conduct, prosecution can be launched under the U.P. Act. Rather, Section 131 of the U.P. Act impliedly saves the provisions of the Penal Code by providing that no confiscation made or penalty imposed under the provisions of the Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of the U.P. Act or under any other law for the time being in force.

31. The argument of the Learned Counsel for the petitioner that except for offences specified in sub-section (5) of Section 132, sub-section (4) of Section 132 of the U.P. Act renders all offences under the U.P. Act non-cognizable, therefore no FIR can be lodged, is not acceptable, because sub-section (4) speaks of offences under the U.P. Act and not in respect of offences under the Penal Code. It is noteworthy

that Section 135 of the U.P. Act makes a significant departure from general law by providing that in any prosecution for an offence under the U.P. Act, which requires a cuplable mental state on the part of the accused, the Court shall presume the existence of such mental state. The same does not hold true for offences punishable under the Penal Code. Hence, to prove *mens rea*, which is one of the necessary ingredients of an offence punishable under the Penal Code, the standard of proof would have to be higher to prove commission of an offence punishable under the Penal Code than what would be required to prove an offence punishable under the U.P. Act. As such, the offences punishable under the Penal Code are qualitatively different from an offence punishable under the U.P. Act.

32. In view of the reasons recorded above, and by keeping in mind the provisions of Section 26 of the General Clauses Act, 1897 as also the law laid down by the Apex Court in that regard, which we have noticed above, we are of the considered view that the contention of the Learned Counsel for the petitioner that no first information report can be lodged against the petitioner under the provisions of the Code of Criminal Procedure for offences punishable under the Indian Penal Code, as proceeding could only be drawn against him under the U.P. Goods and Services Tax Act, 2017, is liable to be rejected and is, accordingly, rejected.

33. Upon perusal of the impugned FIR, we find that, *prima facie*, necessary ingredients of an offence of cheating, by submitting false information and documents, are clearly spelt out. Because, according to the allegations a bogus firm was got registered by showing false and bogus addresses of business; and, by taking advantage of such registration, inward e-way bills were generated to make purchase of goods worth Rs. 35 odd crores and, thereafter, without generating outward supply bills, huge amount of money was deposited in cash in undisclosed bank account, suggesting that goods were sold without proper documentation, with a view to evade taxes. It cannot, therefore, be said that a bare reading of the impugned FIR does not disclose commission of cognizable offences punishable under the Penal Code. Hence, the impugned FIR is not liable to be quashed.

34. A Full Bench of this Court in *Ajit Singh @ Muraha* v. *State of U.P*., 2006 (56) A.C.C. 433 after considering various decisions has taken a view that where prayer to quash the FIR cannot be accepted there should not ordinarily be a stay on arrest. Although, in a few decisions of the Apex Court, it has been held that, in suitable cases, to ensure that a person’s liberty is not jeopardized, on account of false implication, protection from arrest, pending investigation, may be granted by superior courts but that power is not ordinarily to be exercised in matters relating to economic fraud. As, in such matters, stay on arrest may become a hurdle in thorough investigation of the matter, particularly in tracing out the money trail.

35. Under the circumstances, we do not find this to be a fit case where any relief should be granted to the petitioner in the writ jurisdiction. The petition is, therefore, dismissed. There is no order as to costs.

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(2024) 22 Centax 407 (M.P.) [30-08-2024]

(2024) 22 Centax 407 (M.P.)

IN THE HIGH COURT OF JUDICATURE OF MADHYA PRADESH AT INDORE

SUSHRUT ARVIND DHARMADHIKARI AND DUPPALA VENKATA RAMANA, JJ.

DEEPAK SINGHAL

Versus

UNION OF INDIA

W.P. No. 21645 of 2024, decided on 30-8-2024

GST : Where complaint was made and FIR was registered against one Shreenath Soya's proprietor in which petitioner had been implicated later on, penal provisions of IPC invoked without invoking penal provisions of section 132 of CGST Act, no sanction before launching prosecution taken from Commissioner as required under section 132(6) of CGST Act, FIR and consequential proceedings emanating therefrom were to be quashed, as against petitioner

Punishment for certain offences - Invoking penal provisions of IPC without invoking provisions under GST - Permission of Commissioner before invoking prosecution - Petitioner was proprietor of firm Agrawal Soya - On 11-8-2021, summon was issued to petitioner under section 70 of GST Act read with section 174 of MPGST Act pursuant to which statements of petitioner were recorded - Thereafter, GST authority in exercise of power conferred under section 67(2) of GST Act, conducted search and seizure operations on premises of Shreenath Soya - In inspection report it had been alleged that Shreenath Soya was bogus firm and was fraudulently registered, which had issued invoice/bill without supply of goods/services leading to wrongful availment or utilization of input tax credit - Complaint was made and FIR was registered against Shreenath Soya's proprietor in which petitioner had been implicated later on - HELD: There was no allegation against petitioner of forming bogus firm and even if allegations therein were taken at their face value, same constituted offence which were squarely covered by penal provision of section 132 of GST Act - No sanction before launching prosecution i.e., registration of FIR, was taken from Commissioner as required under section 132(6) of GST Act - No justification existed on part of authorities to invoke penal provisions of IPC without invoking penal provisions under GST - Accordingly, instant petition was to be allowed and FIR and consequential proceedings emanating therefrom were to be quashed, as against petitioner [Section 132(6) of Central Goods and Services Tax Act, 2017/Madhya Pradesh Goods and Services Tax Act, 2017]*[paras 8 to 12]***

In favour of assessee

CASE CITED

Sharat Babu Digumarti v. Government (NCT of Delhi) — 2017 (2) SCC 18 — *Relied on*

REPRESENTED BY : Shri Shashwat Seth, Adv. for the Petitioner.
Shri Sudeep Bhargava, Dy. Adv. General for the Respondent.

[Order per : Sushrut Arvind Dharmadhikari, J.]. - Heard finally at motion stage with consent of the parties.

1. The petitioner herein has filed the present petition seeking following reliefs from this court:-

"7.1 To issue a writ of Mandamus thereby quashing the entire proceedings and ancillary proceedings in pursuance to the summons issued on 11/08/2021 against the petitioner.

7.2. To issue a writ of mandamus thereby quashing the proceedings instituted against the petitioner in the Crime No. 61/2022 and its ancillary proceedings.

7.3. To issue a writ thereby seeking a clarification from the GST department and the police authority to explain its stance as to why the petitioner has been implicated in the whole proceedings of the Crime No. 61/2022.

7.4. To allow the petition with costs.

7.5. To issue or pass any such orders or direction as this Hon. Court may deem fit to pass in the matter in hand."

2. Brief facts of the case necessary for the disposal of present petition are as hereunder:-

i. Petitioner is a proprietor of the proprietor firm named as M/s. Agrawal Soya Extracts Pvt Ltd carrying out its business of trade of Soya beans seeds and Soya De-Oiled Cakes.

ii. On 11.08.2021, summon was issued to petitioner herein by Respondent No. 5 under Section 70 of GST Act, 2017 read with Section 174 of M.P GST Act, 2017 pursuant to which statements of petitioner were recorded.

iii. On 14.02.2022, Respondent No. 5 in exercise of power conferred under Section 67(2) of GST Act, 2017, conducted search and seizure operations on the premises of M/s. Shreenath Soya Exim Corporate and prepared inspection report dated 04.07.2022 in which it has been alleged that M/s. Shreenath Soya Exim Corporate was bogus firm and fraudulently registered, which issued invoice/bill without supply of goods/services leading to wrongful availment or utilization of input tax credit/refund of tax.

iv. Complaint dated 25.12.2022 was made by Respondent No.5 to Respondent No. 6, on the basis of which FIR No. 61/2022 under Section 420, 467, 468, 471 was registered by Respondent No. 6 on 26.12.2022 against M/s. Shreenath Soya Exim Corporate's proprietor Sachin Pateria in which petitioner has been implicated later on, on the basis of memorandum under Section 27 of Evidence Act.

v. Aggrieved of the same, petitioner has approached this court.

3. Learned Counsel for the Petitioner has submitted that GST Act, 2017 is a complete code which provides for procedure to be adopted by GST Authorities, penalties in case of breach of provisions of GST Act and punishment for offences committed under GST Act. It is further submitted that admittedly in the case at hand, search and seizure operations conducted by GST Authorities under Section 67(2) of GST Act revealed commission of offence which is punishable under Section 132 of GST Act and hence, GST being a special statute, any offence which is squarely covered by the GST Act, provisions of IPC could not have been invoked without invoking the provisions of GST Act and hence registration of FIR at the instance of GST Authorities under provisions of Indian Penal Code without invoking penal provisions under GST Act is bad in law and the FIR and consequential proceedings are liable to be quashed on this ground. It is further submitted that Section 132(6) of GST Act requires previous sanction of the Commissioner before a person can be prosecuted for offences committed under Section 132 of GST Act and GST Authorities in order to bypass such procedural safeguard have gotten FIR registered under the penal provisions of IPC without invoking penal provisions under GST Act which cannot be permitted and hence on this ground also, FIR and consequential proceedings are liable to be quashed. In support of his submission, Learned Counsel for the petitioner has placed reliance on judgment of hon'ble apex court in *Sharat Babu Digumarti* v. *Government (NCT of Delhi)* 2017 (2) SCC 18.

4. Per Contra, Learned Counsel for Respondents has submitted that offence under GST Act and IPC are distinct and there is no prohibition registration of offences under IPC by Police authorities on complaint being made by GST Authorities.

5. Heard learned counsel for the parties and perused the record.

6. Upon hearing learned counsel for the parties, following issue arises for consideration before this court:-

"Whether the GST Authorities can launch prosecution invoking penal provisions under Indian Penal Code, without invoking the penal provisions of GST Act, when the alleged offences are covered under the provisions of GST Act and that too without obtaining Sanction under Section 132(6) of GST Act? If not, then whether the prosecution so launched is hit by legal bar against the institution or continuance of the proceedings so as to warrant quashment?

7. Before adjudicating the present petition on merits, fruitful reference can be made to relevant statutory provisions under the GST Act which are liable to be referred to for adjudication of the present petition:-

"67. Power of inspection, search and seizure.—

(1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that—

(*a*) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(*b*) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) *Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things*:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission o f such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

(4) The officer authorised under sub-section (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

(5) The person from whose custody any documents are seized under subsection (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

(6) The goods so seized under sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

(7) Where any goods are seized under sub-section (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

(8) The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (2), be disposed of by the proper officer in such manner as may be prescribed.

(9) Where any goods, being goods specified under sub-section (8), have been seized by a proper officer, or any officer authorised by him under sub-section (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

(10) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word —Magistrate, wherever it occurs, the word —Commissioner were substituted.

(11) Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.

(12) The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.

69. Power to arrest.—

(1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) of sub-section (1) of section 132 which is punishable under clause (*i*) or (*ii*) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.

(2) Where a person is arrested under sub-section (1) for an offence specified under sub- section (5) of section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty four hours.

(3) Subject to the provisions of the Code of Criminal Procedure, 1973,—

(*a*) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;

(*b*) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station.

70. Power to summon persons to give evidence and produce documents.—

(1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908.

(2) Every such inquiry referred to in sub-section (1) shall be deemed to be a —judicial proceedings within the meaning of section 193 and section 228 of the Indian Penal Code.

122. Penalty for certain offences.—

(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*;

(*ii*) *issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder*;

(*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;

(*iv*) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(*v*) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(*vi*) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(*vii*) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(*viii*) *fraudulently obtains refund of tax under this Act*;

(*ix*) *takes or distributes input tax credit in contravention of section 20, or the rules made thereunder*;

(*x*) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(*xi*) is liable to be registered under this Act but fails to obtain registration;

(*xii*) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(*xiii*) obstructs or prevents any officer in discharge of his duties under this Act;

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

(*xv*) suppresses his turnover leading to evasion of tax under this Act;

(*xvi*) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(*xvii*) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(*xviii*) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(*xix*) issues any invoice or document by using the registration number of another registered person;

(*xx*) tampers with, or destroys any material evidence or document;

(*xxi*) disposes off or tampers with any goods that have been detained, seized, or attached under this Act, 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.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised—

(*a*) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such

person, whichever is higher;

(*b*) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who—

(*a*) aids or abets any of the offences specified in clauses (*i*) to (*xxi*) of subsection (1);

(*b*) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(*c*) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(*d*) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

(*e*) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to twenty-five thousand rupees.

132. *Punishment for certain offences*—

(1) *Whoever commits any of the following offences, namely*:—

(*a*) *supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax*;

(*b*) *issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax*;

(*c*) *avails input tax credit using such invoice or bill referred to in clause (b);*

(*d*) 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;

(*e*) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (*a*) to (*d*);

(*f*) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(*g*) obstructs or prevents any officer in the discharge of his duties under this Act;

(*h*) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(*i*) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(*j*) tampers with or destroys any material evidence or documents;

(*k*) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(*l*) attempts to commit, or abets the commission of any of the offences mentioned in clauses (*a*) to (*k*) of this section, shall be punishable—

(*i*) *in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine*;

(*ii*) *in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds wo hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine*;

(*iii*) *in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine*;

(*iv*) *in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.*

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (*i*), (*ii*) and (*iii*) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in subsection (5) shall be non- cognizable and bailable.

(5) The offences specified in clause (*a*) or clause (*b*) or clause (*c*) or clause (*d*) of sub-section (1) and punishable under clause (*i*) of that sub-section shall be cognizable and non-bailable.

(6) *A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner*.

8. Upon perusal of record, it is apparent that the petitioner herein had been summoned under Section 70 of GST Act *vide* Summon dated 11.08.2021 and he had given his statement with GST Authorities and thereafter no action under GST Act was taken against the petitioner by GST Authorities. GST authorities conducted search and seizure operations while exercising powers under Section 67(2) of GST Act, on the premises of M/s. Shreenath Soya Exim Corporate and prepared inspection report dated 04.07.2022, in which it has been alleged that Shri Vaibhav Laxmi Industries was bogus firm and has been fraudulently registered, which issued invoice/bill without supply of goods/services leading to wrongful availment or utilisation of input tax credit/refund of tax. Upon perusal of inspection report dated 04.07.2022 along with FIR, it becomes quite apparent that there is no allegation against the petitioner of forming the bogus firm and even if the allegations therein are taken at their face value, the same constitutes offence which are squarely covered by the penal provision of Section 132 of GST Act, 2017. It is not disputed that no sanction before launching prosecution *i.e.* registration of FIR, was taken from Commissioner as required under Section 132(6) of GST Act and no justification exists on part GST authorities to invoke penal provisions of IPC without invoking penal provisions under GST bypassing the procedure as prescribed under GST Act and in the considered opinion of this court, such justification is mandatory especially when uncontroverted allegations in the inspection report dated 04.07.2022 and FIR, constituted offence squarely covered under the provisions of GST Act, 2017, specifically Section 132 of GST Act.

9. In the considered opinion of this court, GST Act, 2017 is a special legislation which holistically deals with procedure, penalties and offences relating GST and at the cost of repetition this court cannot emphasise more that the GST Authorities cannot be permitted to bypass procedure for launching prosecution under GST Act, 2017 and invoke provisions of Indian Penal Code only without pressing into service penal provisions from GST Act and that too without obtaining sanction from commissioner under Section 132(6) of GST Act especially when the alleged actions squarely fall within the precincts of offence as enumerated under GST Act, 2017. This would defeat the very purpose of enacting a special statute such as GST Act, 2017, as the GST Authorities instead of conducting search and seizure and conducting proceedings as prescribed under GST Act, 2017 themselves would be delegating the same to local police authorities which cannot be said to be the intent of the legislature while enacting GST Act, 2017.

10. In view of the above, this court has no hesitation in holding that GST Authorities cannot bypass procedure prescribed under GST Act for launching prosecution by simply invoking penal provisions under IPC without invoking penal provisions under GST Act especially when the allegations so revealed as a result of search and seizure conducted by GST Authorities constituted offence covered under the penal provisions of GST Act as that would amount to bypassing procedural safeguards as provided under Section 132(6) of GST Act which requires sanction of the commissioner prior to initiation of prosecution, which is to the prejudice of the petitioner herein. Letting GST Authorities to adopt such course of action would amount to abuse of process of law which cannot be permitted by this court.

11. At this juncture, fruitful reference can be made to judgment of hon'ble apex court in *Sharat Babu Digumarti* v. *Government (NCT of Delhi)* 2017 (2) SCC 18, in which it has been held as hereunder:-

> "32. The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. *Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.* "

12. Resultantly, this petition deserves to be allowed and is hereby allowed. Ex Consequenti, FIR in Crime No.61/2022 under Section 420, 467, 468 and 471 registered with Respondent No. 6 and consequential proceedings emanating therefrom are hereby quashed, as against the petitioner. No order as to costs.

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