NEUTRAL CITATION
2025:GUJHC:27848-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 2234 of 2025
With
R/SPECIAL CIVIL APPLICATION NO. 2236 of 2025

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MARCOWAGON RETAIL PVT. LTD. & ANR.
Versus
UNION OF INDIA & ORS.

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Appearance:
UCHIT N SHETH(7336) for the Petitioner(s) No. 1,2
MS SHRUNJAL SHAH, AGP for the Respondent(s) No. 2,3
MR ANKIT SHAH(6371) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR.JUSTICE D.N.RAY

Date : 24/04/2025

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. By these petitions under Articles 226 and 227 of the Constitution of India, the petitioners have prayed for quashing and setting aside the order dated 19/11/2024 passed under Section 129 of the Central/State Goods and Services Tax Act, 2017 (for short 'the Act').

2. Learned advocate Mr. Uchit Sheth for the petitioners has tendered the draft amendment. The same is allowed in terms of the draft. The same to be carried out forthwith.

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3. Rule, returnable forthwith. Learned advocates appearing for the respective parties waives service of notice of rule on behalf of the respective respondents.

4. At the outset, it is required to be noted that the petitioners have not stated correct facts in the memo of the petitions and subsequently in affidavit-in-reply, it was pointed out about the transactions. The petitioners have provided the correct facts in the affidavit-in-rejoinder and therefore the facts as emerges from the record are narrated herein below.

5. The petitioners received an export order from a buyer located at United Arab Emirates (UAE) for purchase of sports related apparels and accessories on 28/08/2024. The petitioners thereafter placed an order.

6. The petitioners placed further order upon a vendor located in Gurugram through its sister concerns Modatach E-commerce Private Limited for the purpose of complying with the purchase order for export transactions.

7. The goods were dispatched from Gurugram on

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29/10/2024. The petitioners duly generated e-invoice as well as e-way bill for the transactions.

8. In the invoice and the e-way bill, it was specifically mentioned that the goods were to be exported and were being transported from Gurugram to Mundra. The drivers of the conveyances carrying the goods were having copies of e-invoice, e-way bill as well as shipping bill.

9. It was a case of the petitioners that there was a break-down of a vehicle and due to Diwali Festival during the said period, the delivery could not be completed within the time as mentioned in the e-way bill which was valid up to 04/11/2024. Respondent no.3, State Tax Officer, Mobile Squad, Gandhinagar intercepted the conveyances at the check-post at Gundari on 08/11/2024 and found that the e-way bill with the driver of the vehicle expired on 04/11/2024.

10. Respondent no.3 issued the requisite Form MOV-1 after recording statement of the driver, Form MOV-2 as per the provisions of the GST Act and the Rules and the goods and conveyances were detained under Section 129(1) of the Act on

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11/11/2024 and notice in Form GST MOV-7 was issued proposing to impose the penalty on the ground that the e-way bill had expired when the goods were intercepted on 08/11/2024.

11. The petitioners filed the reply on 18/11/2024 objecting to imposition of the penalty solely on the basis of the expiry of the e-way bill considering the fact that it was an export made against the letter of LUT for which the applicable rate of tax under the GST Act was Nil. The petitioners also prayed for opportunity of personal hearing.

12. Respondent no.3, however, passed an impugned order dated 19/11/2024 in Form GST-MOV-9 rejecting the submissions of the petitioners and confirming the demand of penalty at the rate of 200% of tax leviable on the goods which were meant for export.

13. It is the case of the petitioners that as the petitioners were in urgent need of goods released for the purpose of the fulfillment of the export order, the petitioners furnished bank guarantee on 26/11/2024 of the tax penalty levied under

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Section 129(1)(a) of the Act and the goods and conveyances were released accordingly and thereafter the petitioners exported the goods generating fresh shipping bills on 28/11/2024.

14. Being aggrieved by the impugned order dated 19/11/2024, the petitioners have preferred these petitions on the ground that no penalty could have been levied under Section 129(1)(a) of the Act as no tax was payable on the zero rated supply as per the provisions of Section 16 of the Integrated Goods and Services Tax Act, 2017 (for short 'the IGST Act').

15. Learned advocate Mr. Uchit Sheth for the petitioners submitted that inadvertently the petitioners have not stated correct facts in the petitions as it does not make any material effect on the controversy with regard to the quantum of penalty to be paid by the petitioners under Section 129(1)(a) of the Act as the petitioners are not disputing the contravention of the provision of Rule 138 of the CGST Rules, 2017 as admittedly the e-way bill expired on 04/11/2024 and there was no valid e-way bill along with the goods and

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conveyances when the same were intercepted by respondent no.3 on 08/11/2024.

16. It was submitted that there is no dispute with regard to the fact that the goods in questions were meant for export to UAE and therefore the same were zero rated supply. It was submitted that considering the provisions of Sections 16(1) and 16(3) of the IGST Act, the petitioners had an option to export the zero rated supply either on furnishing the undertaking or on payment of tax which is subsequently to be refunded as per the provisions of Section 16(4) of the IGST Act read with Rule 96 of the CGST Rules, 2017.

17. It was therefore submitted that as per the provisions of Section 129(1)(a) of the Act, no tax was payable by the petitioners. No penalty could have been levied at the rate of 200% of the alleged tax liability on the transactions as no tax was leviable the same was not payable on such zero rated supply.

18. In support of his submissions, reliance was place on a decision of this Court in case of **Atul Auto Limited vs. State**

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of Gujarat rendered on 05/11/2015 in Tax Appeal No.1337 of 2006 and other allied matters wherein this Court has held that additional tax under the sales tax cannot be recovered when the sales tax is not payable under the provisions of Sections 3 and 4 of the Act.

19. Reliance was also placed on the decision of the Hon'ble Apex Court in case of **J. K. Synthetics Limited vs. Commercial Taxes Officer** reported in (**1994) 4 SCC 276** and it was submitted that the expression "tax payable" cannot be the same as tax due. And, therefore, the Hon'ble Apex Court held that the interest could not have been levied, inasmuch as, the tax becomes due.

20. Reliance was also placed on the decision of this Court in case of **M/s. Boron Rubbers India vs. Union of India and others** rendered on 27/03/2025 in Special Civil Application No.9617 of 2023 wherein the goods were supplied for job work and during the course of supply, there was contravention of Rule 138 of the Rules and the provision of Section 129 of the Act was invoked by the authority, this Court has put such lapse or contravention akin to the goods

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which are exempt from payment of tax as no tax was payable on the goods which were supplied in job work. It was therefore submitted that at the best the petitioner may be subjected to pay the penalty of Rs.25,000/- as per the provision of Section 129(1)(a) of the Act treating such zero rated supply of the goods akin to exempted goods attracting Nil rate of tax. It was submitted that when the petitioners are not liable to pay any tax on the zero rated supply, though the tax is leviable under the IGST Act treating such supply as interstate supply, the tax rate would be Nil rate of tax and therefore the respondent could have imposed the penalty not exceeding 25,000/- only.

21. On the other hand, learned AGP Ms. Shrunjal Shah for the respondents State authorities has vehemently opposed these petitions and referred to and relied upon the exhaustive affidavit-in-reply filed on behalf of the respondents. It was submitted by learned AGP Ms. Shrunjal Shah that as per the provision of Section 129(1)(a) of the Act, the petitioners are liable to pay the penalty at the rate of 200% on the tax payable on goods which is equivalent to the tax which is prescribed under the HSN. Learned AGP invited attention of

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the Court to the tax invoice at page-38 of the paper-book which was found at the time of interception to point out that the all description of the goods clearly shows the invoices with tax and therefore, the petitioners were liable to pay 200% of penalty on the tax payable on the goods.

22. In support of her submissions, reliance was placed on the following averments of the affidavit-in-reply.

> *"13. It is submitted that the Petitioners in their reply dated 18.11.2024 and the Present Petition have raised various issues which are answered hereinunder:*
>
> *a. It is submitted that the primary case of the Petitioners is that the E-Way bill had expired due to vehicle breakdown coupled with the fact that the period in question involved Diwali Festival. Therefore, there was no malafide intention to evade payment of tax and therefore the imposition of penalty u/s 129 is illegal.*
>
> *i. In this regard, it is submitted that the E-Way bill was generated on 29.10.2024 at 3.26 PM and was valid upto 04.11.2024. In the facts of the present case, it is not a scenario where the conveyance was in movement during such dates and there was a breakdown due to which there was a delay of few hours. Rather it is a case where the conveyance commenced its movement only on 07.11.2024 in absolute disregard to the provisions of the GST Act. A copy of the RFID Report for the said conveyance evidencing that the movement commenced 2 days after the expiry of E Way bill is attached herewith as* ***Annexure R3.***
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> *ii. Further, the statement of the Driver evidences that*

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even when the said fact was within the knowledge of the Petitioners, no action was taken to ensure due compliance of the provisions of the law. Therefore, the Petitioners have willfully not complied with the provisions of the Act. It is further submitted that Circular No 64/38/2018 issued by Central Board of Indirect Taxes and Customs dated 14th September, 2018 provide for the circumstances under which provisions of sec. 129 of the Act may not be initiated. However, the said circular clearly states that when a valid e-way bill is not carried, there is no doubt a contravention takes place of sec. 129. A copy of the Circular No 64/38/2018 dated 14th September, 2018 is attached herewith as ***Annexure R4****.*

iii. It is further submitted that when there is malafide intention to evade payment of taxes, sec. 130 invoked. The sole pre-requisite for invoking sec. 129 is that the goods and conveyance were being transported in contravention of the provisions of the Act. Rather, the present case exactly falls within the purview of sec. 129 since in blatant disregard to the provisions of the Act, willfully and intentionally, the transport of the goods was commenced when the Petitioners were well informed that the E-Way bill had expired. It was not a case where due to enforceable consequences, while in transit, due to some delay, the E-Way bill expired."

23. Referring to the Sub-Rule(10) of Rule 138 of the CGST Rules, it was submitted that the petitioners had admittedly not generated the e-way bill after 04/07/2011 or any fresh e-way bill was generated and therefore there is clear contravention of Rule 138 and hence the petitioners are liable to pay the penalty as per the provision of Section 129(1)(a) of the Act. It was also therefore submitted that when the tax is payable on

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the goods and not on the supply of the goods, and therefore, it is evidence from the facts that the tax was payable by the petitioners on the goods which were zero rated supply and therefore the respondents were justified in imposing penalty at the rate of 200% on the tax which was payable on the goods which may be zero rated supply or otherwise.

24. Learned AGP Ms. Shrunjal Shah thereafter submitted that there is a difference between the tax payable on the goods and the exempted goods. Reliance is placed on Annexure-R-9 at page-140 of the paper-book wherein the Directorate General of Taxpayer Services, Central Board of Excise and Customs has issued the explanation with regard to zero rating of supplies wherein the difference between exempted supplies and zero rated supplies is explained as under:

Exempted Supplies	**Zero rated Supplies**
“exempt supply” means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11 of CGST Act or under section 6 of the IGST Act, and includes	“zero-rated supply” shall have the meaning assigned to it in section 16

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non-taxable supply	
No tax on the outward exempted supplies, however, the input supplies used for making exempt supplies to be taxed	No tax on the outward supplies; Input supplies also to be tax free
Credit of input tax needs to be reversed, if taken; No ITC on the exempted supplies	Credit of input tax may be availed for making zero-rated supplies, even if such supply is an exempt supply ITC allowed on zero-rated supplies
Value of exempt supplies, for apportionment of ITC, shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.	Value of zero rated supplies shall be added along with the taxable supplies for apportionment of ITC
Any person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax under the CGST or IGST Act shall not be liable to registration	A person exclusively making zero rated supplies may have to register as refunds of unutilised ITC or integrated tax paid shall have to be claimed
A registered person supplying exempted goods or services or both shall issue, instead of a tax invoice, a bill of supply	Normal tax invoice shall be issued

25. Referring to the above difference in exempted supplies and zero rated supplies, it was submitted that admittedly the petitioners have transported the goods from Gurugram for export and therefore the same would be zero rated supplies

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and therefore normal tax invoice is required to be issued instead of bill of supply. It was submitted that the petitioners were having an option either to export such goods on giving an undertaking as provided under Section 16(3) of the IGST Act or to pay an IGST to get the refund as per the provision of Rule 96 of the Rules. It was submitted that in the facts of the case, in either case, supply of the goods was liable to pay the tax and as such the respondent was justified in levy of penalty at the rate of 200% on the tax payable on such goods and therefore no interference is called for. It was submitted that the petitioners are also having an alternative efficacious remedy to challenge the impugned order dated 19/11/2024 by preferring an appeal under Section 107 of the Act and the petitions should not be entertained while exercising extra ordinary jurisdiciton under Article 227 of the Constitution of India. Reliance was placed on order dated 23/12/2024 in case of **M/s. Rayzon Solar Private Limited vs. State of Gujarat and others** in Special Civil Application No.13745 of 2024 wherein, in similar facts, the petitioner did not press the petition so as to avail alternative remedy.

26. Considering the submissions made by learned advocates

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for both the sides, the petitions are entertained against the order passed under Section 129(1)(a) of the Act though alternative remedy is provided under Section 107 of the CST Act only because the impugned order dated 19/11/2024 imposing penalty at the rate of 200% on the allegedly tax payable on the goods which are being transported as zero rated supply would be without jurisdiction as on plain reading of Section 129(1)(a) of the Act, no penalty could have been imposed when no tax is payable on the zero rated supply and the computation of penalty would fail.

27. In order to determine as to whether any penalty leviable could have been imposed upon the breach of provision of Rules 138 by the petitioners for not carrying the valid e-way bill along with the zero rated supply of goods, it would be germane to refer the relevant provisions of the GST Act and the Rules which read as under:

27.1. Section 2(47) of the CGST Act reads as under:

> *"2(47) "exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or*

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under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply."

27.2. Section 2(78) of the CGST Act reads as under:

"2(78) "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act."

27.3. Section 2(108) of the CGST Act reads as under:

"2(108) "taxable supply" means a supply of goods or services or both which is leviable to tax under this Act."

27.4. Section 7(1)(a) of the CGST Act reads as under:

"7. Scope of supply
(1) For the purposes of this Act, the expression "supply" includes-

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business."

27.5. Section 129(1)(a) of the CGST Act, 2017 reads as under:

"(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any

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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,--

(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."

27.6. Relevant provisions of the IGST Act reads as under:

27.6.1. Section 2(5) of the IGST Act reads as under:

"(5) "export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India."

27.6.2. Section 2(23) of the IGST Act reads as under:

"(23) "zero-rated supply" shall have the meaning assigned to it in section 16."

27.6.3. Section 5(1) of the IGST Act reads as under:

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*"5. **Levy and collection***

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods [other than the goods as may be notified by the Government on the recommendations of the Council] imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962)."

27.6.4. Section 7 of the IGST Act reads as under:

"Inter state supply.

(1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in––
(a) two different States;
(b) two different Union territories; or
(c) a State and a Union territory,
shall be treated as a supply of goods in the course of inter-State trade or commerce.

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

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(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in––
(a) two different States;
(b) two different Union territories; or
(c) a State and a Union territory,
shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

(5) Supply of goods or services or both,––
(a) when the supplier is located in India and the place of supply is outside India;
(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or
(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce."

27.6.5. Section 16(1) of the IGST Act reads as under:

"16. Zero rated supply.-

(1) "zero rated supply" means any of the following supplies of goods or services or both, namely:––
(a) export of goods or services or both; or
(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such

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supply may be an exempt supply.

[(3) A registered person making zero rated supply shall be eligible to claim refund of unutilised input tax credit on supply of goods or services or both, without payment of integrated tax, under bond or Letter of Undertaking, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder, subject to such conditions, safeguards and procedure as may be prescribed:

***Provided** that the registered person making zero rated supply of goods shall, in case of non-realisation of sale proceeds, be liable to deposit the refund so received under this sub-section along with the applicable interest under section 50 of the Central Goods and Services Tax Act within thirty days after the expiry of the time limit prescribed under the Foreign Exchange Management Act, 1999 (42 of 1999.) for receipt of foreign exchange remittances, in such manner as may be prescribed.*

(4) The Government may, on the recommendation of the Council, and subject to such conditions, safeguards and procedures, by notification, specify-

> *(i) a class of persons who may make zero rated supply on payment of integrated tax and claim refund of the tax so paid [in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder];*
> *(ii) a class of goods or services [or both, on zero rated supply of which, the supplier may pay integrated tax and claim the refund of tax so paid, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder].]*

[(5) Notwithstanding anything contained in sub-sections (3) and (4), no refund of unutilised input tax credit on account of zero rated supply of goods

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or of integrated tax paid on account of zero rated supply of goods shall be allowed where such zero rated supply of goods are subjected to export duty.]"

27.6.6. Section 138(1) of the CGST Rules, 2017 reads as under:

"1. EVERY REGISTERED PERSON WHO CAUSES MOVEMENT OF GOODS OF CONSIGNMENT VALUE EXCEEDING FIFTY THOUSAND RUPEES—

(i) in relation to a supply; or

(ii) for reasons other than supply; or (iii) due to inward supply from an unregistered person,

shall, before the commencement of such movement, furnish information relating to the said goods as specified in Part A of FORM GST EWB-01, electronically, on the common portal along with such other information as may be required on the common portal and a unique number will be generated on the said portal:

Provided that the transporter, on an authorization received from the registered person, may furnish information in Part A of FORM GST EWB-01, electronically, on the common portal along with such other information as may be required on the common portal and a unique number will be generated on the said portal:

Provided further that where the goods to be transported are supplied through an e-commerce operator or a courier agency, on an authorization received from the consignor, the information in Part A of FORM GST EWB-01 may be furnished by such e-commerce operator or courier agency and a unique number will be generated on the said portal:

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Provided also that where goods are sent by a principal located in one State or Union territory to a job worker located in any other State or Union territory, the e-way bill shall be generated either by the principal or the job worker, if registered, irrespective of the value of the consignment:

Provided also that where handicraft goods are transported from one State or Union territory to another State or Union territory by a person who has been exempted from the requirement of obtaining registration under clauses (i) and (ii) of section 24, the e-way bill shall be generated by the said person irrespective of the value of the consignment."

28. In view of the above provisions of the Act, it emerges that, in the facts of the case, the petitioners after receiving the purchase order from the UAE, purchased the goods from Gurugram through its sister concern so as to export the same to UAE and therefore the goods in questions are meant for export outside India.

29. As per Section 2(47) of the Act, a supply is said to be exempt when it attracts Nil rate of duty or specifically exempted by notification or kept out of the purview of the levy of tax i.e. non GST supply, however, if the goods or services exempted from payment of tax, same would not become a zero rated supply because the inputs which are used for making

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the goods for manufacture of the goods or providing services had already suffered a tax and only the final product is exempt and when the goods are exempted goods, the assessee is not entitled to avail or utilize credit on inputs used for supply of the exempted goods or services only because the goods which are exported suffers no tax and inputs have suffered the tax the availment of tax on input side is not permitted which become the cost for the supplier. Therefore, the zero rated supply is only remedy to such anomaly. The Directorate General of Taxpayer Services of Central Board of Excise and Customs as explained in detail “What is Zero Rating?” as under:

> *“What is Zero Rating?*
>
> *By zero rating it is meant that the entire value chain of the supply is exempt from tax. This means that in case of zero rating, not only is the output exempt from payment of tax, there is no bar on taking availing credit of taxes paid on the input side for making/providing the output supply. Such an approach would in true sense make the goods or services zero rated.*
>
> *All supplies need not be zero-rated. As per the GST Law exports are meant to be zero rated the zero rating principle is applied in letter and spirit for exports and supplies to SEZ. The relevant provisions are contained in Section 16(1) of the IGST Act, 2017, which states that "zero rated supply" means any of the following supplies of goods or services or both, namely:--*

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(a) export of goods or services or both; or
(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.
As already seen, the concept of zero rating of supplies requires the supplies as well as the inputs or input services used in supplying the supplies to be free of GST. This is done by employing the following means:

a) The taxes paid on the supplies which are zero rated are refunded;
b) The credit of inputs/ input services is allowed;
c) Wherever the supplies are exempted, or the supplies are made without payment of tax, the taxes paid on the inputs or input services i.e. the unutilised input tax credit is refunded.

The provisions for the refund of unutilised input credit are contained in the explanation to Section 54 of the CGST Act, 2017, which defines refund as below:

"refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).

Thus, even if a supply is exempted, the credit of input tax may be availed for making zero-rated supplies. A registered person making zero rated supply can claim refund under either of the following options, namely: -
a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or
b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54

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of the CGST Act, 2017 or the rules made thereunder."

30. Section 16(4) of the IGST Act provides for refund as per the provision of Section 54 of the CGST Act of the inputs or inputs services which are used for the purpose of zero rated supply as per the provisions of Section 54(3) and the assessee is entitled to get the refund if the IGST is paid along with the export or if no tax is paid and the goods are exported under LUT then proportionate credit is given in the electronic credit ledger. Therefore, considering the scheme of the GST Act and the Rules, the zero rated supply is admittedly not an exempted supply and it has the same meaning as assigned to Section 16 of the IGST Act and no tax in outward supplies is payable, however, the credit of input tax is provided for making zero rated supplies even if such supply is an exempt supplies by adding the value of zero rated supply along with the taxable supplies for apportionment of such input tax credit. If the assessee pays the tax on the zero rated supply, the same is refunded as per provision of Rule 96 of the CGST Rules. Therefore, in the facts of the case when it is not in dispute that the goods in question being transported as a zero rated supply no tax was payable by the petitioners on such goods

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and as such though the tax was leviable as per Section 5(1) read with Section 7(5) of the IGST Act. This Court, in case of **Atul Auto Limited (supra)** has explained what is payable in jesta position what is leviable as under:

> *"18. ..... The question that therefore, arises for consideration, is whether in the facts of the present case any sales tax, general sales tax or purchase tax is payable by the dealers. Insofar as the expression "payable" is concerned, reference may be made to the decision of the Bombay High Court in the case of Tata Engineering and Locomotive Company Ltd. v. State of Maharashtra (supra) wherein it has been held that the expression "payable" according to the dictionary meaning is the sum of money payable when a person is under an obligation to pay it. The expression "payable" refers to that which is to be paid, justly due or legally enforceable and the sum is said to be payable when a person is under an obligation to pay. There is a difference between the expression "payable" and "leviable".*
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> *19. In Black's Law Dictionary, Sixth Edition, the expression "payable" has been defined as "Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. Payable may therefore signify an obligation to pay at a future time, but, when used without qualification, term normally means that the debt is payable at once, as opposed to "owing"". In the Concise Oxford Dictionary, Ninth Edition, the expression payable has been defined as "that must be paid; due".*
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> *20. Thus, the expression "payable" connotes an obligation to pay and that the amount should be justly due and legally enforceable. Under the second part of section 4A of the Act, levy of additional tax is at the rate*

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of ten paise in the rupee (10%) on the sales tax, general sales tax or purchase tax payable by a dealer. It, therefore, follows that the dealer must be under an obligation to pay such tax, and it is on such tax which he is obliged to pay that additional tax at the rate of ten paise on the rupee is to be collected. Accordingly, when the sales and purchase of goods are wholly exempted from payment of sales tax, general sales tax or, as the case may be, purchase tax, there is no obligation upon the dealer to pay such tax, and consequently, the sales tax, general sales tax or, as the case may be, purchase tax payable by the dealer would be nil and resultantly, the additional tax at the rate of 10% thereof would also be nil. This court is of the view that the legislature, appears to have consciously provided for additional tax to be computed at the rate of 10% of the sales tax, general sales tax or, as the case may be, purchase tax payable by a dealer, so as to ensure that such tax is payable only when the sale/purchase of goods is otherwise exigible to tax. In other words, in case where no tax is payable on the sale or purchase of goods, the legislature did not intend that additional tax should be collected thereon. Otherwise, there was no need to add the words "on the sales tax, general sales tax or, as the case may be, purchase tax, payable by such dealer". When the additional tax is to be computed on the tax payable, in the absence of any tax being payable, the question of computing additional tax at the rate of 10% thereof would not arise."

31. The Hon'ble Apex Court also in case of **J. K. Synthetics Limited (supra),** while considering the provisions of Section 7(1) of the Rajasthan Sales Tax Act, 1954, has drawn the distinction within tax payable and tax due in para-17 which reads as under:

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"17. ..... The requirement of Section 7(1) is undoubtedly a statutory requirement. The prescribed return must be accompanied by a receipt evidencing the deposit of full amount of 'tax due' in the State Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2-A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of 'tax due' shown in the return. When Section 11-B(a) uses the expression "tax payable under sub-sections (2) and (2-A) of Section 7", that must be understood in the context of the aforesaid expressions employed in the two sub-sections. Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which becomes due ex hypothesi on the turnover and taxable turnover "shown in or based on the return". The word 'payable' is a descriptive word, which ordinarily means "that which must be paid or is due or may be paid" but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2-A) and 11-B of the Act leaves no room for doubt that the expression 'tax payable' in Section 11-B can only mean the full amount of tax which becomes due under sub-sections (2) and (2-A) of the Act assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to visit him with the liability to pay interest under clause (a) of Section 11-B. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do

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the near impossible."

32. Therefore, though the tax is leviable as per the provision of Section 17(1) on the interstate supply as per Section 7 of the IGST Act, and the goods which are exported outside India is to be treated as interstate supply, as per provision of the Section 16(1) of the IGST Act, the same would be zero rated supply and the exporter is not liable to pay any tax on such supply. Therefore, no tax is payable on the zero rated supply though leviable as per provision of the IGST Act and therefore, the option is given to the petitioner assessee either to give an undertaking or to pay tax which is adjusted by way of credit ledger or refunded as per Rule 89 and/or Rule 96 of the CGST Rules, 2017.

33. Considering the scheme and the scope of the GST Act and the Rules when there is a contravention of Rule 138 which is procedural in nature, without intention to evade tax, Section 129 provides for levy of penalty whereas in the facts of the case though there is a contravention computation of penalty would fail in absence of any tax payable by the assessee - the petitioner. Therefore, this Court in case of **M/s.**

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Boron Rubber India (supra) in a situation similar to the present case when the goods were supplied for job work and there was contravention of Rule 138 attracting penalty under Section 129 in absence of any tax payable considered such supply akin to exempted goods for tax payable as a nil rate and the petitioner was subjected to penalty of Rs.25,000/- by observing as under:

> *"10. Considering the above circular issued by the CBIC, it is true that the case of the petitioner does not fall in any of the situations specified in clauses (a) to (f) of the paragraph No.5 of the said Circular. However, in the facts of the case, as the petitioner has generated Part-A of the E-Way Bill which also contains the GST Number and name of the transporter accompanied by the Delivery Challan for job work stating the vehicle number which is not disputed by the respondent-Authorities, we are of the opinion that the benefit of the Circular No.64/38/2018-GST is required to be given to the petitioner too. However, we are of the opinion that as the petitioner is not falling within any of the situations specified in clauses (a) to (f), the petitioner may be saddled with a penalty of Rs.25,000/- only as the goods (in question) were not liable to tax under the provisions of the GST Act and therefore, we consider the same at par with the exempted goods though technically the tax could be leviable when the goods are returned by the job worker but for the purpose of interpretation of the levy of the penalty, the petitioner is saddled with the penalty of Rs.25,000/- only in the facts of the case."*

34. Considering the above conspectus of law as well as the facts of the case and in view of the foregoing reasons, the

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petitions are partly allowed.

35. Impugned order dated 19/11/2024 passed in Form GST MOV-9 is hereby modified by reducing the penalty to Rs.25,000/- only and the respondents are directed to release the bank guarantee submitted by the petitioners for release of the goods and conveyances after impugned order was passed.

36. As the petitioners have suppressed the relevant facts of placing the order through its sister concerns which was subsequently sought to be amended is also not appreciated and the petitioners are also liable to pay cost of Rs.10,000/- for each petition to the respondents for such suppression.

37. With the aforesaid directions, the petitions are disposed of. Rule is answered accordingly.

(BHARGAV D. KARIA, J)

(D.N.RAY,J)

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