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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 26.02.2024

+ **W.P.(C) 15519/2023**

SUSHIL KUMAR

..... Petitioner

versus

DELHI STATE GST GOVT NCT OF DELHI AND ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner Mr. A. Kumar, Mr. Pravesh B., Advocates.

For the Respondents: Mr. Rajeev Aggarwal, ASC.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Petitioner seeks refund of the integrated GST amounting to Rs. 40,06,342/- (Rs.15,06,342/- towards stock variation and 25,00,000/- towards alleged wrongful input tax credit) recovered from the petitioner without authority of law.
2. Petitioner was engaged in business of manufacturing and trading of ferrous and non-ferrous metals.
3. Petitioner was subjected to search based on GST INS-01 dated 16.11.2023 issued by Respondents. The reasons mentioned in the FORM INS-01 were:



- “i. has suppressed transactions relating to supply of goods and/or services.*
- ii. has suppressed transactions relating to the stock of goods in hands.*
- iii. has indulged in the contravention of the provisions of this act or rules made there under to evade tax under this act.”*

4. The search operation started on 16.11.2023 at 5:30 P.M and continued till 17.11.2023 around 5 AM. During the search operation, documents and other records were inspected and consequently, as per the Petitioner, it was orally and vaguely alleged the Petitioner has evaded GST on its transactions. Further, the statement of the authorized representative of the petitioner was also recorded under duress and coercion.

5. Further, as per the Petitioner he cooperated and furnished all the statutory records maintained in the business premises.

6. As per the Petitioner, he was made to deposit an amount of Rs. 15,06,342 (towards alleged stock variation) and an amount of Rs. 25,00,000 (towards ITC reversal alleged to be illegible) totaling to Rs. 40,06,342 vide FORM GST DRC-03, without any statutory demand being raised by the Respondents and merely on the basis of alleged discrepancy noticed during the search operation.

7. Said amounts were deposited by the Petitioner at 3:10 AM and 3:18AM, during the course of search operation, in the presence of the Respondents at the premises of the petitioner.

8. As per the Petitioner, no intimation of Form GST DRC-04 was ever



issued by the Respondents, as prescribed under sub-section 2 of Rule 142 of CGSR Rules, acknowledging the acceptance of such payments.

9. Learned counsel for the petitioner relies upon the decision dated 20.12.2022 in W.P.(C) 9834/2022 titled '*M/s Vallabh Textiles vs. Senior Intelligence Officer*' wherein it was held that if the petitioner is coerced to make a deposit in an involuntary manner then the Petitioner is entitled to refund the said amount along with interest.

10. Learned counsel for petitioner submits that the deposit being made at 3:00 AM during course of search in the presence of the official, could not be termed a voluntarily deposit. He further submits that the petitioner was not given an opportunity to explain about the transactions and the stock position in question.

11. *Per contra* learned counsel for respondents submits that there was no coercion, and the amount was voluntarily deposited by the petitioner. He further submits that recovery proceedings under Section 73 of the Central Goods and Services Tax Act 2017 have been initiated by issuance of a Show Cause Notice and proceedings are underway.

12. It would be apposite herein to quote the decision in the case of *Vallabh Textiles vs. Senior Intelligence Officer (supra)*. A Co-ordinate bench of this court held as under:

“51. The 2017 Act and the 2017 Rules made therein, do make provisions for enabling a person chargeable with tax to pay tax, along with interest, before being served with a notice for payment of tax, which either has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized for any reason.



52. *Thus, if the person chargeable with tax takes recourse to such a route, the proper officer is restrained from serving any notice qua tax or penalty under the provisions of the 2017 Act or the 2017 Rules framed thereunder, unless the amount which is self-ascertained by the person chargeable with tax falls short of the amount payable as per law.*

53. *This leeway is also available, where the person chargeable with tax is served with a show cause notice and pays the tax, along with interest, under Section 50 of the 2017 Act within thirty [30] days of the issue of the show-cause notice. In such eventuality, a penalty is not leviable, and all proceedings in respect of such notice are deemed to be concluded.*

54. *This regime is set out in Section 73 of the 2017 Act.*

55. *Broadly, this regime also applies, where a notice has been issued under sub-section (1) of Section 73, and the proper officer serves a statement containing details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (1) of Section 73.*

56. *The important aspect to be kept in mind, is that the regime given in Section 73 of the Act operates in cases which do not involve fraud or wilful misstatement or suppression of facts to evade tax.*

57. *In cases which involve one or more of the aforementioned ingredients i.e., fraud, wilful misstatement or suppression of facts to evade tax, pari materia provisions are contained in Section 74 of the 2017 Act, with small variations.*

58. *In these cases as well, latitude has been given to the person chargeable with tax, to pay monies towards tax, along with interest, based on self-ascertainment, before issuance of notice under subsection (1) of Section 74 of the 2017 Act, with a caveat that fifteen per cent of such self-ascertained tax is required to be paid by way of penalty.*

59. *The penalty amount increases if amounts towards tax and interest are paid by the person chargeable with tax within thirty [30] days of the notice being issued by the proper officer under sub-section (1) of Section 74 of the 2017 Act. The person concerned is required to pay a penalty at the rate of twenty-five per cent within the aforesaid timeframe i.e., 30 days, upon which all proceedings in respect of such notice are deemed to be concluded.*

60. *These provisions have to be read alongside Rule 142, found in*



Chapter XVIII of the 2017 CGST Rules.

61. *The said chapter bears the heading “Demands and Recovery”.*

62. *Sub-rule (1) of Rule 142 of the 2017 Rules makes a provision for service of notice for raising a demand for recovery of tax; a provision which we are not concerned with in this matter, as it is not the case of the official respondents/revenue that a notice was served.*

63. *Besides this, the two sub-rules which are, perhaps, relevant are sub-rule (1A) and (2) of Rule 142, as they relate to the steps required to be taken before service of notice on the person chargeable with tax, interest and penalty under sub-section (1) of Section 73, or under subsection (1) of Section 74 of the 2017 Act.*

64. *Under sub-rule (1A) of Rule 142 of the 2017 Rules, where a proper officer, before service of notice under Section 73(1) or Section 74(1) of the 2017 Rules seeks to communicate details of tax, interest or penalty, he is required to do so in the prescribed form i.e., via Part A of Form GST DRC-01A.*

65. *Where, however, before service of notice or statement, the person chargeable with tax, based on self-ascertainment, seeks to make payment of tax and interest, in consonance with the leeway given under sub-section (5) of Section 73 [which relates to cases not involving fraud, wilful misstatement or suppression of facts to evade tax] or as the case may be, the payment of tax, interest and penalty under sub-section (5) of Section 74 [which relates to cases involving fraud, wilful misstatement or suppression of facts to evade tax], he is required to inform the proper officer of such payment made in the prescribed form i.e., GST DRC-03.*

66. *The proper officer thereafter, is required to issue an acknowledgement, accepting the payment made by the person, also in the prescribed form i.e., GST DRC-04.*

67. *This is also required to be done [i.e., the acknowledgement of acceptance of payment] where tax, interest and penalty are ascertained by the proper officer, under Rule 142(1A).*

76. *The malaise of officials seeking to recover tax dues (in contrast to voluntary payments being made by assesses towards tax dues) during search, inspection or investigation was sought to be addressed by the GST-Investigation, CBIC via Instruction No. 01/2022-2023 dated*



25.05.2022. For the sake of convenience, the said instruction is extracted hereafter:

“Date : 25 May, 2022

Instruction No. 01/2022-2023 [GST - Investigation]

Subject : Deposit of tax during the course of search, inspection or investigation-reg.

1. *During the course of search, inspection or investigation, sometimes the taxpayers opt for deposit of their partial or full GST liability arising out of the issue pointed out by the department during the course of such search, inspection or investigation by furnishing DRC-03. Instances have been noticed where some of the taxpayers after voluntarily depositing GST liability through DRC-03 have alleged use of force and coercion by the officers for making ‘recovery’ during the course of search or inspection or investigation. Some of the taxpayers have also approached Hon'ble High Courts in this regard.*

2. *The matter has been examined. Board has felt the necessity to clarify the legal position of voluntary payment of taxes for ensuring correct application of law and to protect the interest of the taxpayers. It is observed that under CGST Act, 2017 a taxpayer has an option to deposit the tax voluntarily by way of submitting DRC-03 on GST portal. Such voluntary payments are initiated only by the taxpayer by logging into the GST portal using its login id and password. Voluntary payment of tax before issuance of show cause notice is permissible in terms of provisions of Section 73 (5) and Section 74(5) of the CGST Act, 2017. This helps the taxpayers in discharging their admitted liability, self ascertained or as ascertained by the tax officer, without having to bear the burden of interest under Section 50 of CGST Act, 2017 for delayed payment of tax and may also save him from higher penalty imposed on him subsequent to issuance of show cause notice under Section 73 or Section 74, as the case may be.*

3. *It is further observed that recovery of taxes not paid or short paid, can be made under the provisions of Section 79 of CGST Act, 2017 only after following due legal process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order. No recovery can be made unless the amount becomes payable in pursuance of an order passed by*



the adjudicating authority or otherwise becomes payable under the provisions of CGST Act and rules made therein. Therefore, there may not arise any situation where “recovery” of the tax dues has to be made by the tax officer from the taxpayer during the course of search, inspection or investigation, on account of any issue detected during such proceedings. However, the law does not bar the taxpayer from voluntarily making payment of any tax liability ascertained by him or the tax officer in respect of such issues, either during the course of such proceedings or subsequently.

4. Therefore, it is clarified that there may not be any circumstance necessitating ‘recovery’ of tax dues during the course of search or inspection or investigation proceedings. However, there is also no bar on the taxpayers for voluntarily making the payments on the basis of ascertainment of their liability on nonpayment/ short payment of taxes before or at any stage of such proceedings. The tax officer should however, inform the taxpayers regarding the provisions of voluntary tax payments through DRC-03.

5. Pr. Chief Commissioners/Chief Commissioners, CGST Zones and Pr. Director General, DGGI are advised that in case, any complaint is received from a taxpayer regarding use of force or coercion by any of their officers for getting the amount deposited during search or inspection or investigation, the same may be enquired at the earliest and in case of any wrongdoing on the part of any tax officer, strict disciplinary action as per law may be taken against the defaulting officers.

(Vijay Mohan Jain)
Commissioner (GST-Inv.),
CBIC”

77. It appears that this Instruction was issued by the GST Investigation Wing, CBIC, in the backdrop of an order dated 16.02.2021, passed by the Gujarat High Court in the matter of Bhumi Associate v. Union of India, SCA No. 3196 of 2021, order dated 16-2- 2021 (Guj), whereby the following wholesome directions were issued-

“The Central Board of Indirect Taxes and Customs as well as the Chief Commissioner of Central/State Tax of the State of Gujarat are hereby directed to issue the following guidelines by way of suitable circular/instructions:

(1) No recovery in any mode by cheque, cash, e-payment or



adjustment of input tax credit should be made at the time of search/inspection proceedings under Section 67 of the Central/Gujarat Goods and Services Tax Act, 2017 under any circumstances.

(2) Even if the assessee comes forward to make voluntary payment by filing Form DRC-03, the assessee should be asked/advised to file such Form DRC-03 on the next day after the end of search proceedings and after the officers of the visiting team have left the premises of the assessee.

(3) Facility of filing [a] complaint/grievance after the end of search proceedings should be made available to the assessee if the assessee was forced to make payment in any mode during the pendency of the search proceedings.

(4) If complaint/grievance is filed by assessee and officer is found to have acted in defiance of the afore-stated directions, then strict disciplinary action should be initiated against the concerned officer.”

80. Clearly, the aforementioned direction, issued by the Gujarat High Court as far back as on 16.02.2021, is binding on the official respondents/revenue, which was not followed in the instant case.

81. The violation of the safeguards put in place by the Act, Rules and by the Court, to ensure that unnecessary harassment is not caused to the assessee, required adherence by the official respondents/revenue, as otherwise, the collection of such amounts towards tax, interest and penalty would give it a colour of coercion, which is not backed by the authority of law.

83. Failure to follow the prescribed procedure will, as in this case, have us conclude that the deposit of tax, interest and penalty was not voluntary.”

13. In in the instant case, the deposit made by the Petitioner was at 3:10 and 3:18 AM during the search operation being carried out which continued till 5:00 AM The fact that Petitioner was made to deposit the amount at



3:10 and 3:18 AM before the search ended and the officers left at 5:00 AM, shows that the deposit was not voluntary and contrary to the CBIC Instruction No. 01/2022-2023 dated 25.05.2022.

14. We are unable to accept the contention of learned counsel for the respondent that the deposit was voluntary for the reason that there is no material placed on record by respondent to show as to why petitioner would voluntarily deposit the said amount when there was no claim made against the petitioner as on the date of deposit.

15. Therefore, the amounts that were deposited on behalf of petitioner lacked voluntariness. Accordingly, said amount are liable to be returned with interest.

16. Relying upon the decision of a Coordinate Bench of this Court dated 05.12.2023 in W.P. (C) No. 158/2023, titled as '*Neeraj Paper Marketing Ltd. Vs. Special Commissioner, Department of Trade and Taxes, GNCTD & Ors.*', learned counsel for the respondents submits that since part of the amount deposited was by debit from the petitioner's Electronic Credit Ledger and the same is to be re-credited to the Electronic Credit Ledger of the Petitioner, no interest is liable to be paid as the amount standing in the Electronic Credit Ledger does not earn any interest and is available to a party to claim as a refund or as an adjustment towards the tax due by filing an appropriate application and in the absence of an application being filed, no interest would be liable to be paid on the credit amount in the Electronic Credit Ledger.



17. We find merit in the said submission of learned counsel for the Respondent and hold that no interest would be liable to be paid on the amount deposited by way of an adjustment of the credit amount standing in the Electronic Credit Ledger, unless an appropriate application had already been made, prior to the alleged non-voluntary deposit, claiming refund or as an adjustment towards tax due.

18. In view of the above, Respondents are directed to, within four weeks, refund the amount of Rs.15,06,342/- to the Petitioner alongwith statutory interest @ 6% p.a. from date of deposit till repayment and the amount of Rs. 25,00,000/- by forthwith re-crediting the same to the Electronic Credit Ledger of the Petitioner.

19. It is clarified that the refund would be without prejudice to the proceedings initiated by the respondents under Section 73 of the Act and the defense of the petitioner thereto.

20. Petition is disposed of in the above terms.

SANJEEV SACHDEVA, J

RAVINDER DUDEJA, J

FEBRUARY 26, 2024/ss