

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-23788-2021

Date of Decision:-14.03.2023

Diwakar Enterprises Pvt. Ltd.

....Petitioner

vs.

Commissioner of CGST and anr.

....Respondents

**CORAM:- HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Present:- Mr. Naveen Kumar Bindal, Advocate,
for the petitioner

Mr. Anshuman Chopra, Advocate
For respondent No. 1

Ms. Mamta Singla Talwar, DAG, Haryana

Ritu Bahri, J.

The petitioner-assesee has approached this Court by filing the present writ petition for issuance of writ in the nature of mandamus for issuance of direction to respondent No. 1 to refund a sum of Rs.1,99,90,000/- along with interest. Further prayer of the petitioner is for issuance of direction to respondent No. 2 to unblock input tax credit amounting to Rs.24,18,516/-.

The facts as stated in the petition are that petitioner is engaged in manufacturing of lead and lead related products. Respondent No. 2 blocked input tax credit amounting to Rs.,24,18,516/- lying in electronic ledger of the petitioner, to which he filed his objections. Respondent no. 1 searched premises of the petitioner on 14.01.2021 and Mr. Abhinav Sahaya, director was questioned throughout the search and thereafter, he was forcibly taken to their office where he was kept detained for two days. He was pressurized to deposit the amount and due to this, he deposited Rs.1,99,90,000/-. The petitioner lodged protest regarding the

said deposit. Respondent No. 2 thereafter further searched the premises of the petitioner and got deposited another Rs.25 lakhs forcibly from the petitioner.

Petitioner was then issued a show cause notice raising demand of Rs.4,04,42,761/-, to which he filed his reply and respondent No. 2 confirmed the demand of Rs.2,34,47,685/-.

Now the present petition has been filed seeking refund of Rs.1,99,90,000/- along with interest which was recovered forcibly from the petitioner.

On 08.02.2023, this Court passed the following order:-

“Learned counsel for the petitioner submits that as far as the matter involving respondent no.2 is concerned, the same now stands infructuous as no claim survives whereby after blocking his account, they have unblocked his account after a period of one year and consequential steps have already been taken against the demand raised by the respondent and an alternate remedy has been availed. As far as unblocking of the account, the issue has come to an end.

Now with regard to respondent no.1, the search was conducted on 14.01.2021 in the office of the petitioner and the Director of the petitioner-Company, as alleged by the petitioner, was taken to the office of respondent No.1.

The matter is being adjourned to 14.02.2023, so as to enable the counsel for respondent No.1 to find out after the issuing the summons (Annexure P17), what further steps have been taken till date.

On notice of this petition, a by way of affidavit of Sophia Martin Joy, Commissioner, CGST, Faridabad was filed in this Court and in para No. 1, it has been stated that it is wrong to say that Rs.1,99,90,000/- were forcibly got deposited by respondent No. 1. The petitioner voluntarily deposited the impugned amount

and the said fact is clear from the FORM GST DRC-03 (P-4) wherein against Sr. No. 3-Cause of payment, the petitioner has stated as 'Voluntary'. It is further denied that Mr. Sahaya, Director of the petitioner-company was forcibly taken to the office of respondent No. 1. The demand of GST of Rs.2,34,47,685/- was confirmed in the Assessment order passed by respondent No. 2. It has been further averred that there are sufficient prima facie evidences collected/resumed by respondent which indicate huge amount of illegal availment of ITC on the basis of invoices received from the units other than those mentioned in the assessment order of respondent No. 2. It has been found that the petitioner took wrong ITC in respect of invoices issued by M/s Grover Metal Industries, M/s Server Metal Industries. The investigation conducted by respondent No. 1 is not in respect of the purchases from these units but is in respect of other units. Now respondent No. 1 is investigating regarding purchase from M/s Vasuka Metals, M/s Khali Tradi Company, M/s Jay Trading Co, M/s Shiv Shakti Industry, M/s Shree Shyam Enterprises, which has nothing to do with the investigation and order passed by respondent No. 2. It has been stated the return of the impugned amount is not warranted, keeping in view the judgments of Hon'ble Gujrat High Court in a case of *M/s S.S. Industries vs. Union of India, 2020 (12) TMI 1120*, *M/s Bhawani Textiles vs. Additional Director General, 2020 (3) TMI 478* and judgment of this Court in a case of *Kaushal Kumar Mishra vs. Addl. Director General, Ludhiana Zonal Unit and another, 2021 (2) TMI 699* wherein investigation by two authorities in respect of ITC availed in respect of invoices issued by different suppliers were held, as investigating different matters and investigation by two authorities was held to be correct.

In the present case, a separate written statement of Ashok Sharma, Excise and Taxation Officer, Haryana was filed on 04.02.2022 in this Court.

Learned counsel for the respondent No. 1 has informed the Court that pursuant to summons dated 28.09.2021 (P-17), the department has issued letter again to the petitioner-Company on 02.01.2023 directing him to pay the amount along with interest and penalty by 11.01.2023. The summons were also issued to Rajiv Nandan Sahaya and Abhinav Sahaya under Section 70 of CGST Act 2017 but none has put in appearance.

Now the question for consideration in the present writ petition would be that whether respondent No. 1 is liable to refund a sum of Rs.1,99,90,000/- along with interest.

Reference at this stage can be made to judgment of Delhi High Court in a case of **Vallabh Textiles vs. Senior Intelligence Officer and others, 2022 SCC Online Del 4508** where the sole question which arises for consideration is that whether a cumulative sum of Rs. 1,80,10,000/- deposited on behalf of the petitioner-concern, during search proceedings carried out between 16.02.2022 and 17.02.2022, was a voluntary act or not. The writ petition was disposed of and in para No. 77 to 79, it has been observed as under:-

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."

78. It is important to note, that while in line with the directions contained in Bhumi Associate, the aforementioned Instruction i.e., Instruction No. 01/2022-2023 dated 25.05.2022 inter alia, provides, as noticed above, that no recovery of tax should be made during search, inspection or Investigation unless it is voluntary-it does not elaborate on various modes for collection adopted In such circumstances, for example via cheque, cash, e-payment or even via adjustment of Input tax credit.

79. Furthermore, the Instruction falls short, inasmuch as it sidesteps direction number two (2) contained in Bhumi Associate, which states that even if the assessee comes forward to make voluntary payment In the prescribed form i.e., GST DRC-03, he/she should be advised to file the same the day after the search has ended and the concerned officers have left the premises of the assessee.

Reference at this stage can further be made to judgment of Karnataka High Court in a case of ***Union of India and others vs. Bundl Technologies Pvt. Ltd and others, ILR 2022 Karnataka 3077***, wherein the question was that whether the amount was voluntarily paid during investigation by a company under Section 74 (5) of Act. The appeal was dismissed and it was held that Article 264 of the Constitution of India mandates that collection of tax has to be by authority of law. If tax is collection without any authority of law, the same would amount to depriving person of his property without any authority of law and would infringe his right under Article 300A of Constitution. The only provision which permits deposit of amount during pendency of investigation is Section 74 (5) of Act, which is not attracted. The amount collected from company is in violation of Article 265 and 300A of Constitution. The contention of the department that amount under deposit be made subject to outcome of pending investigation, cannot be accepted.

The department was held liable to refund amount to Company. In para No. 30 and 31, it has been observed as under:-

“30. In the backdrop of well settled legal principles and the statutory provision we may advert to the facts of case in hand. The Company deposited a sum of Rs.15 Crores at about 4.00 a.m. on 30.11.2019 and a sum of Rs.12,51,44,157/- on 27.12.2019. The company filed an application seeking refund on 29.09.2020. Thereafter the company filed an application seeking refund on 16.12.2020 on 16.12.2020 before jurisdictional GST authority. The Company requested the department to refund the amount. When the attempts of the company to seek refund did not yield any result, the writ petition was filed on 25.02.2021. Section 54 of the CGST Act provides for a time limit of two years to claim refund. The company not only filed the claim for refund within two years but the writ petition as well. No rights have accrued to the department, as the claim for refund made by the company is well within time. Therefore in the light of legal principles referred to in the preceding paragraph, it can not be said that there was any delay or laches in filing writ petition. Therefore the fourth issue is answered by stating that there is no delay or laches in filing the writ petition.

31. The submission by the company that Green Finch is neither a non-existent entity nor that the company has rightly availed input tax credit is concerned need not be adverted to in this proceeding, as the same is pending investigation. [Article 265](#) of the Constitution mandates that collection of tax has to be by the authority of law. If tax is collected without any authority of law, the same would amount to depriving a person of his property without any authority of law and would infringe his right under [Article 300A](#) of the Constitution of India as well. In the instant case, the only provision which permits deposit of an amount during pendency of an investigation is section 74(5) of CGST Act, which is not attracted in the fact situation of the case. Therefore, it is evident that amount has been collected from Company in violation of [Article 265](#) and [300-A](#) of the Constitution. Therefore, the contention of the Department that amount under deposit be made subject to the outcome of the pending investigation can not be accepted. The Department, therefore, is liable to refund the amount to the Company.

Now reference at this stage can be made to Section 74 (5) of CGST Act, 2017 which reads as under:-

“74 (1)xxx

xxx

xxx

- (2) xxx xxx xxx
- (3) xxx xxx xxx
- (4) xxx xxx xxx

(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 percent 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.”*

Now reference can be made to Section 142 (2) of CGST Rules, 2017 which lays down:-

142 (1) xxx xxx xxx

(2) *Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act 471. whether on his own ascertainment or, as communicated by the proper officer under sub- Tule (1A).] he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.*

In the present case, as per the department, the petitioner has deposited the impugned amount voluntarily and the proper procedure has been followed. But Article 265 of the Constitution of India lays down that collection of tax has to be by the authority of law. If tax is collected without any authority of law, the same would amount to depriving a person of his property without any authority of law and would infringe his right under Article 300 A of the Constitution of India as well. In the present case, no receipt was given by the Proper Officer after accepting the impugned amount. Thus, the amount deposited by the petitioner under protest were liable to be refunded in view of the above mentioned judgments, as the petitioner has been deprived of his right.

In view of the above, the writ petition is partly allowed and respondent No. 1 is directed to refund a sum of Rs.1,99,90,000/- along with 6 % interest.

(RITU BAHRI)
JUDGE

14.03.2023
G Arora

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No