



2023:DHC:8978-DB



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Judgment Delivered on: 14th December, 2023*

+ **W.P.(C) 14572/2022**

SAPPHIRE INTREX LIMITED

..... Petitioner

versus

UNION OF INDIA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Yogendra Aldak & Mr. Kunal
Kapoor, Advs.

For the Respondents: Mr. Piyush Beriwal, Adv. for R2 to4.
Mr. Vinish Phogat, Adv. for R1.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

AMIT MAHAJAN, J.

1. The petitioner has filed the present petition, *inter alia*, praying as under:

- “a) *Issue a writ of mandamus or any other appropriate writ or order or direction in the nature thereof, directing the Respondents to refund an amount of Rs. 2,30,00,000/-, which was coercively recovered by them from the Petitioner, along with interest from the date of payment to the date of refund; and/or*
- b) *Alternatively, issue a writ of certiorari or any other appropriate writ or order or direction in the nature thereof,*



- quashing the impugned deficiency memo bearing C. No. GST EAST/MCIE/R-161/Refund/Sopphire Intrex Ltd/271/2022 dated 22.08.2022 (enclosed as ANNEXURE-1 to the writ petition) issued by the Respondent No. 2; and/or*
- c) *Issue a writ of certiorari or any other appropriate writ or order or direction in the nature thereof, quashing the impugned deficiency memo bearing C. No. GST EAST/MCIE/R-161/Refund/Sopphire Intrex Ltd/272/2022 dated 22.08.2022 (enclosed as ANNEXURE-2 to the writ petition) issued by the Respondent No. 2; and/or*
- d) *Issue a writ of certiorari or any other appropriate writ or order or direction in the nature thereof, quashing the impugned letter bearing C. No. II(3)GST East/MCIE/Range 161/Refund/Sapphire Intrex Ltd./271/2022 dated 17.10.2022 (enclosed as ANNEXURE-14 to the writ petition) issued by the Respondent No. 5; and/or*
- e) *Issue a writ of mandamus or any other appropriate writ or order or direction in the nature thereof, directing the Respondent No. 2 to process refund claims bearing ARN AA070822010019L (for an amount of Rs. 36,35,360/-) and AA070822010080W (for an amount of Rs. 1,93,64,642/) both dated 04.08.2022 filed by the Petitioner and grant refund expeditiously in a time bound manner; and/or*
- f) *Issue such further orders and other reliefs as the nature and circumstances of the case may require.”*

2. The petitioner is a public company engaged in supply of services such as trading in shares & securities, renting of immovable properties, commission, and brokerage, etc, in New Delhi. The petitioner is registered under the Central Goods and Services Tax Act, 2017 (hereafter ‘**the Act**’) with registration no. 07AAECS4651G1ZD.

3. It is the petitioner’s case that search operation was conducted at the premises of the petitioner on 20.10.2021, by the officers of GST Anti-Evasion department, under Section 67(2) of the Act. During search, the petitioner was allegedly made to deposit an amount of



₹2,30,00,000/-, which was coercively paid by it, and the payment details were intimated *vide* FORM GST DRC-03 bearing ARN AD071021006167P.

4. The petitioner, thereafter, wrote a letter and an email dated 21.10.2021, to the Inspector, Office of Joint Commissioner (Anti-evasion), Central Tax, Delhi East claiming that the payment made by the petitioner is under protest and that it reserves the right to apply for refund of the amount so deposited.

5. Respondent no.3 issued a Show Cause Notice (hereafter '**SCN**') dated 23.06.2022, *inter alia*, demanding the recovery of GST amounting to ₹36,35,359/- under Section 74(1) of the Act and Section 20 of the Integrated Goods and Services Tax Act, 2017, and further sought to appropriate the amount of ₹2,30,00,000/-, deposited by the petitioner during investigation, towards the proposed demand.

6. The petitioner, in terms of Section 54 of the Act read with Rule 89 of the Central Goods and Services Tax Rules, 2017 (hereafter '**CGST Rules**') filed two separate refund claims in FORM GST RFD-01 claiming refund of the amount of ₹2,30,00,000/-. The same is tabulated as under:

Period	Application Particulars	Dated	Amount (INR)
February 2019-2020	ARN AA0707220334677	13.07.2022	35,35,360/-
March 2019-2020	ARN AA0707220334768	13.07.2022	1,93,64,642/-
	TOTAL		2,30,00,002/-



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7. Respondent no.2 issued the following two deficiency memos dated 28.07.2022 (in FORM GST RFD-03) under Rule 90 (3) of the CGST Rules. The same is tabulated as under:

Period	Application Particulars	Deficiency particulars memo (first deficiency memos)	Dated	Deficiencies
February 2019-2020	ARN AA0707220334677 Dated 13.07.2022	C.No.GST EAST/MCIE/R-161/Refund/Sopphire Intrex/Ltd/272/2022	28.07.2022	a. self- declaration under Rule 89(2)(1) if amount claimed does not exceed two lakh rupees, certification under Rule 89(2)(m) otherwise-not uploaded
March 2019-2020	ARN AA0707220334768 Dated 13.07.2022	C.No.GST/EAST/MCIE/R-161/Refund/Sopphire Intrex Ltd/271/2022	28.07.2022	b. Documents in support of the claim are not sufficient.

8. The petitioner, in response to the first set of deficiency memos filed two separate rectified refund claims dated 04.08.2022 amounting to ₹36,35,360/-(period February 2019-2020) and ₹1,93,64,642/-(period March 2019-2020), enclosing along with DRC-03 dated 20.10.2021, under-protest payment letter dated 21.10.2021, SCN dated 23.06.2022, and the copy of certificates issued by a CA certifying that the amount paid the petitioner has not been claimed/adjusted against the regular liability of GST, and also not availed as input tax credit.

9. Respondent no.2 thereafter issued second set of deficiency memos dated 22.08.2022 (in FORM GST RFD-03) under Rule 90(3) of the CGST Rules allegedly pointing out the same deficiencies as were pointed out in the first set of deficiency memos dated



28.07.2022, and further advised the petitioner to once again file fresh refund claims after the rectification of the said deficiencies.

10. The petitioner filed a letter dated 07.09.2022 with Respondent no.2 requesting to process the rectified refund claims both dated 04.08.2022, along with applicable interest.

11. On 17.10.2022, Respondent no.5 issued the impugned letter dated 17.10.2022, intimating the petitioner that as the SCN dated 23.06.2022 issued to it has not been adjudicated, the refund claims filed by it cannot be processed. It further recommended the petitioner to file fresh refund claim after adjudication of the SCN.

12. Aggrieved by the impugned deficiencies memos dated 22.08.2022, and having no alternate efficacious remedy led the petitioner to approach this court by way of present writ petition.

Contentions of the Parties

13. The learned counsel for the petitioner has filed the present writ petition, essentially, on seven grounds.

14. First, the learned counsel submitted that it is a settled principle of law that no amount can be recovered by the department before the demand against the assessee is crystalised. It is contended by the learned counsel that the payment of ₹2,30,00,000/- made by the petitioner, while the search proceedings had not been concluded and



before issuance of SCN dated 23.06.2022, amounts to an illegal collection/recovery by the respondents and is in contravention of the Instruction No. 1/2022-2023 (GST Investigation) dated 25.02.2022 issued by the CBIC. [**Ref: *Union of India and Others v. Makemytrip (India) Private Limited : (2019) 11 SCC 765***]. Further, unless there is an assessment and demand, the amount deposited by the petitioners cannot be appropriated and department is liable to refund the said amount. [**Ref: *Century Metal Recycling Pvt. Ltd. and another v. Union of India and others : 2009 (234) ELT 234 (P&H)***]. He stated that the amount which is illegally collected and retained without issuance and adjudication of show cause notice is violative of Article 265 of the Constitution. [**Ref: *M/S Century Knitters (India) Ltd. v. Union of India and others : 2013 (293) ELT 504 (P&H)***].

15. Second, the learned counsel submitted that the payment of ₹2,30,00,000/- was not voluntary and the same was coercively recovered by the respondents from the petitioner. The learned counsel further contended that non-issuance of acknowledgement from the proper officer in FORM GST DRC-04 under Rule 142(2) of the CGST Rules vitiates the stand that the said payment was voluntary and the respondents are liable to refund the said amount, which was coercively recovered during the search proceedings along with interest. [**Ref: *Vallabh Textiles v. Senior Intelligence Officer and Ors. :2022 SCC OnLine Del 4508***]



16. Third, the learned counsel submitted that the impugned second deficiency memos both dated 22.08.2022 issued by the respondents are in contravention of the paragraph 11 of the Circular dated 18.11.2019 as the petitioner had rectified the deficiencies mentioned in the first deficiency memos both dated 28.07.2022 by attaching the relevant documents. The learned counsel submitted that the said circular issued by the CBIC stipulates that no second deficiency memo is to be issued in respect of refund application filed afresh, after rectification of deficiencies, unless the earlier deficiencies remain unrectified, or any other substantive deficiency is noted subsequently, and the same is binding on the respondents. [***Ref: Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries : (2008) 13 SCC 1 ; RDB Textiles v. Commissioner of Central Excise and Services Tax, Kolkata- IV Commissionerate : (2018) 14 SCC 42 ; Union of India and Others v. Arviva Industries India Limited and Others : (2014) 3 SCC 159***].

17. Fourth, the learned counsel submitted that the impugned second set of deficiency memos dated 22.08.2022 issued by the respondents are vague and contrary to principles of natural justice, without pointing out any new deficiency, much less a substantive one. It is obligatory on part of the respondents to issue an unambiguous and clear deficiency memo so as to enable the taxpayer to rectify the deficiencies. No reason was specified as to why the documents uploaded by the petitioner are not sufficient in support of the claim.



Furthermore, the said memos nowhere provide that the CA certificate uploaded by the petitioner is, allegedly, not as per the Rule 89(2)(m) of the CGST Rules. The respondents cannot supplement the vague impugned second deficiency memos both dated 22.08.2022 by way of their counter affidavits. [**Ref: Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others : (1978) 1 SCC 405 ; Rashmi Metaliks Ltd. and Anr. v. Kolkata Metropolitan Development Authority and Ors. : (2013) 10 SCC 95 ; Dipak Babaria and Another v. State of Gujarat and Others : (2014) 3 SCC 502 ; M/s Lupin Ltd. v. Union of India and Ors. : 2022 (9) TMI 115-Jammu and Kashmir High Court**]

18. Fifth, the learned Counsel submitted that the impugned second set of deficiency memos both dated 22.08.2022 issued by the respondents are time barred under Rule 90 of CGST Rules, which lays down the prescribed period of fifteen (15) days for the refund applications to be scrutinised and accordingly acknowledged by the proper officer. The learned counsel stated that essentially, if no deficiency memo is issued within the stipulated period, the refund application is presumed to be complete in all respects. [**Ref: Jian International v. Commissioner of Delhi Goods and Services Tax : 2020 SCC OnLine Del 2606**]

19. Further, the learned Counsel contended that the respondents are deliberately denying the petitioner an effective opportunity to file its



refund claims within the prescribed period of two years, as per the Circular dated 18.11.2019, by repeatedly issuing vague deficiency memos. The learned counsel submitted that the refund claims filed by the petitioner are not arising out of any adjudication order and therefore, the time limit to file such refund claims cannot be calculated from the date of passing of an adjudication order.

20. Lastly, the learned counsel submitted that the letter dated 17.10.2022, which in effect rejects the refund claims filed by the petitioner, without giving the petitioner any show cause notice and/or any opportunity of being heard, is illegal. It is issued in violation of the principles of natural justice and contrary to the binding Circular dated 18.11.2019. He stated that the adjudication of the SCN dated 23.06.2022 is immaterial and not a pre-requisite for processing of the refund claims filed by the petitioner under the residuary category as the refund is not arising as a result of any order or proceedings. He submitted that GST laws do not mandate that in case a show cause notice is issued to an applicant, his refund claims cannot be processed unless the said notice is adjudicated. Furthermore, it was also submitted that petitioner is not required to furnish an order (to evidence adjudication of the show cause notice) in support of refund claims filed under the residuary category as stipulated under the binding Circular dated 18.11.2019.

21. The learned counsel for the respondents, on the other hand,



submits that the petitioner's claim that ₹2,30,00,000/- was illegally collected from it during search proceedings is incorrect and there is no question of 'illegal collection' as the amount was voluntarily deposited by the petitioner *vide* FORM GST DRC-03, which is an intimation of payment made voluntarily or made against the show cause notice or statement under Section 142 of the CGST Rules.

22. The learned counsel further submitted that the second set of deficiency memos were issued in consonance with the guidelines of the Circular No. 125/44/2019-GST dated 18.11.2019 as the petitioner did not rectify the original deficiencies as pointed out in the first set of deficiency memos. The certificate provided by the petitioner from a Chartered Accountant is not as prescribed under Rule 89(2)(m) of the CGST Rules and the basic document in this case i.e. adjudication order on the basis of which refundable amount can be ascertained, was not uploaded by the petitioner.

23. He further submitted that the petitioner was well aware that the SCN dated 23.06.2022 issued to it, in which the entire amount of ₹2,30,00,000/- has been proposed to be appropriated against the tax/interest & penalty, is pending for adjudication. Therefore, the petitioner's liability cannot be ascertained until and unless the SCN dated 23.06.2022 is adjudicated/decided.

24. The learned counsel submitted that the second set of deficiency memos dated 22.08.2022, were issued in time and not time barred on



account of holidays from 19.08.2022 to 21.08.2022. He stated that delay in the issuance of deficiency memos cannot give rise to a presumption that the refund application is complete in all respect.

25. It was also submitted by the learned counsel that the amount under protest was deposited by the petitioner *vide* FORM GST DRC-03 on 20.10.2021, and as per the amended Rule 90 of CGST Rules, applicable refund, if any, can be claimed by the petitioner within two years of issuance of adjudication order in respect of SCN dated 23.06.2022, which is yet to be adjudicated.

26. Lastly, the the learned Counsel submitted that the petitioner had an alternative efficacious remedy to approach the proper officer against the deficiency memos.

Conclusion

27. The first and foremost question to be addressed is whether the petitioner is entitled to the refund of the amount that was made through its cash ledger. As noted above, according to the petitioner, it was coerced to make the deposit of tax through the cash ledger *vide* Debit Entry No. DC0710210203804 dated 20.10.2021 at 8:41pm while the search and inspection proceedings were continuing at the material time.

28. It is an admitted case that while the payment was made by the petitioner, it had not admitted the liability to pay the amount. It is also



not in dispute that there is no adjudication of the liability and the Show Cause Notice demanding the recovery of GST and the appropriation of the amount of ₹2,30,00,000/- deposited by the petitioner was issued on 23.06.2022, that is, much after the said deposit. The amount was deposited during the course of investigation. The learned counsel appearing for the respondents does not deny that an assessee cannot be forced to pay any amount during the course of investigation. If any amount is collected without any authority of law, the same amounts to depriving the person of its property and infringes its rights under Article 300A of the Constitution of India.

29. In the facts of the present case, we accept that the deposit was made by the petitioner under duress and compelling circumstances. The search operations started at around 3:45 p.m. on 20.10.2021 and went way beyond the normal business hours, that is, up to 00:30 a.m. on 21.10.2021. It is not in doubt that a tax payer can voluntarily pay tax prior to issuance of the Show Cause Notice in terms of Section 73(5) of the Act. In terms of Section 73(6) of the Act, in case a person chargeable with tax before service of notice under Section 73(1) or before giving any statement under Section 73(3) of the Act, makes a voluntary payment of tax with interest, the proper Officer is not to serve any notice in respect of tax so paid or any penalty payable under the provisions of the Act or the CGST Rules made thereunder. The provision is clearly for the benefit of the tax payer who voluntarily pays tax prior to issuance of any Show Cause Notice and, thus,



absolves himself of any liability to pay the penalty. These provisions do not empower the Department to compel the tax payer to pay any tax.

30. However, if the tax payer, after such payment, turns around and claims that the payment had not been made voluntarily and the circumstances, as mentioned above, also point out towards the same, it must be accepted that the payments were not made voluntarily. The tax payer, in such circumstances, will forfeit the immunity which he is entitled to, in terms of Section 73(6) of the Act from levy of any penalty. The authorities, in such cases, are not precluded from demanding any tax and also the penalty.

31. It is also important to note that the requisite procedure under Rule 142 of the CGST Rules, has also been complied with in the present case. It is not disputed that any voluntary deposit in Form GST DRC-03 is to be followed by an acknowledgement accepting the payment as being voluntarily made by issuance in Form GST DRC-04. The respondents, admittedly, have not issued Form GST DRC-04 as required under the CGST Rules.

32. This Court in the recent decision of ***Lovelesh Singhal Prop Shivani Overseas v. Commissioner, Delhi Goods and Services Tax & ors.*** :2023:DHC:8631-DB, relied upon the judgment passed by the coordinate Bench of this Court in ***Vallabh Textiles v. Senior Intelligence Officer and Ors.***(*supra*) and held as under:



“32. It is also important to note that the requisite procedure under Rule 142 of the CGST Rules has also not been complied with. Admittedly, the respondents have not issued any acknowledgement accepting the payment made by the petitioner in Form GST DRC-04 as required under the CGST Rules. In **Vallabh Textiles v. Senior Intelligence Officer and Ors.** (supra), a Coordinate Bench had held that failure to follow the prescribed procedure would also lead to the conclusion that the deposit made by the taxpayer was not voluntary.”

33. This Court also relied upon the judgment passed by the Gujarat High Court in **M/s Bhumi Associate v. Union of India: Manu/GJ/0174/2022**, decided on 16.02.2021 and held that the directions issued by the Gujarat High Court had not been followed. The Central Board of Indirect Taxes and Customs (‘CBIC’), has also issued directions emphasizing that tax must be collected only after following the due process of law. The relevant extract of the instructions dated 25.05.2022, are set out below:

“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.....”.*

34. The issue raised is covered by the aforementioned earlier decisions of this Court. Accordingly, we allow the petitioner's claim for refund and direct the respondents to forthwith process the same.

35. The petitioner has also raised the issue vis-à-vis the issuance of multiple deficiency memos and that the adjudication of the Show Cause Notice is not a pre-requisite for processing the refund for claim. It is submitted that the claim for refund cannot be withheld merely because the Department, pursuant to the deposit, issued the SCN and is proposing to demand GST.

36. Since the deposit made by the petitioner has been held to be involuntary and the respondents are directed to forthwith process the petitioner's claim for refund, we do not consider it apposite to adjudicate other issues raised by the petitioner. We, however, make it clear that this Court has not decided anything on the merits of the SCN or the liability of the petitioner, if any, to pay the GST.

37. It is also clarified that the respondents are not precluded from taking any other necessary steps in accordance with law. The Department is also not precluded from passing appropriate order including any order under Section 83 of the CGST Act, for protecting



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the interest of the Revenue in accordance with law, if the conditions for passing such orders are satisfied.

38. The writ petition is allowed in the aforesaid terms.

AMIT MAHAJAN, J

VIBHU BAKHRU, J

DECEMBER 14, 2023

UG/SS