

CWP No.8035 of 2021

2023:PHHC:055823-DB

-1-**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH****CWP No.8035 of 2021****Date of decision: 19.04.2023**

Modern Insecticides Ltd. and another

.....Petitioners

Versus

Commissioner, Central Goods and Service Tax and another

....Respondents

**CORAM:HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE KULDEEP TIWARI**

Present: Mr. Sanjay Kaushal, Senior Advocate,
with Mr. Saurabh Kapoor, Advocate,
for the petitioners.

Mr. Sourabh Goel, Sr. Standing Counsel,
for the respondents.

Ritu Bahri, J.

The petitioners are seeking direction to the respondents to refund an amount of Rs.2.54 crores and supply copy of Panchnama dated 05.03.2020 and 15.01.2021 along with other electronic gadgets, including mobiles, resumed from the premises of the petitioner.

As per the facts stated in the petition, on 05.03.2020, officials of the respondents searched the factory premises of the petitioner and resumed the entire record lying there. On 07.03.2020, they got deposited a sum of Rs.39,15,583/-. The respondents conducted the second search on 15.01.2021 and took away Director and Chartered Accountant of the petitioner to their office at Rishi Nagar, Ludhiana. They detained Mr. Avtar Singh (78 years old), Director and Mr. Sahil Sharma, Chartered Accountant of the petitioner till 1.00 A.M. They were released on the condition of deposit of Rs.2.15 crores, which were deposited through reversal of Input

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Tax Credit (for short ITC) from electronic credit ledger and surrender of refund already applied. The respondents did not supply copy of Panchnama, copy of resumed record and electronic gadgets, which are necessary to file returns and comply with the requirement of banks. In this backdrop, the present petition has been filed.

The petitioners have taken a plea that as per Section 16 of the CGST Act, 2017 read with Rule 36 of CGST Rules, 2017, a registered person may avail Input Tax Credit (ITC) of inputs which are used in the furtherance of business. The ITC under CGST is principally same with Cenvat Credit Scheme under Central Excise Act, 1944 read with Cenvat Credit Rules, 2004. The Cenvat Credit Rules recognized only two stage dealers i.e. first stage dealer and second stage dealer. There could be any number of manufactures, but Cenvat Credit could be availed on the basis of invoice of a manufacturer or first stage dealer or second stage dealer.

At the time of introducing GST, the Government had abolished restriction of number of dealers. As pr CGST Act and Rules, ITC can be availed on the basis of an invoice of a dealer though he may be any stage dealer. Abolition of restriction on number of stage of dealers coupled with lack of control on activities of dealers, including their registration, is source of temptation and prompted the unscrupulous dealers. Unscrupulous dealers have created firms in the name of their servants or employees, who are not aware about activities of actual owner of firms. These dealers are issuing invoices without payment of tax or partial payment of tax. Invoices move upto 4-5 stages and thereafter, one dealer buys goods from market and supply to actual user i.e. manufacturer of finished goods along with invoice issued by him. A buyer can check credentials of his supplier and ask him to

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supply his GST returns. He can further ensure that sale made to him is duly reflected in the return but beyond it, he has no control.

The petitioner is manufacturer of pesticides for the last more than 30 years and is purchasing inputs to manufacture finished goods. The petitioner is selling its product in domestic market as well as exporting out of country. Details of pesticides manufactured and sold during the last five years are given as under:-

Year	Domestic	Exports	Total Sale
2020-21	7.94	120	128
2019-20	3.60	127	131
2018-19	4.38	120	125
2017-18	20.05	107	128
2016-17	70.66	57.76	128.43

On the roll out of GST w.e.f. 01.07.2017, the petitioner migrated to GST and started paying tax under CGST, PGST and IGST Act, 2017. The petitioner exported goods worth more than 128 crores and average export of last 3 years was more than 125 crores. After the introduction of CGST Act, during 2018-19, 2019-20 and 2020-21, the petitioner purchased inputs worth approximately Rs.8.5 crores and cleared finished goods approximately worth Rs.382 crores. The domestic sale is negligible, whereas export turnover is substantial. At the time of purchase of inputs, the petitioner paid value of the goods plus GST to suppliers, who had filed their monthly returns and shown sale of goods to the petitioner. The suppliers have filed online returns. The petitioner has placed on record a set of documents of one transaction as Annexure P-1 to show that the purchased goods were accompanied with E-way bill apart from invoice. As and when goods moved in a truck, Goods Receipt (for short 'G.R.') is issued by the transporter. As per petitioner, in every case, it has received copy of G.R.

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On 05.03.2020, when officers of the respondents searched factory premises of the petitioner, they seized all the documents lying there. A Panchnama dated 05.03.2020 was prepared, however copy thereof, was not supplied to the petitioner. The respondents, without counting stock lying in underground tanks, work in progress created artificial shortage of goods involving GST at Rs.34,04,855/-. Under the pressure of respondents, the petitioner vide challan dated 07.03.2020, deposited Rs.34,04,855/- towards GST from Electronic Credit Ledger and Rs.5,10,728/- towards penalty from Cash Credit Ledger.

Vide letter dated 12.03.2020 (Annexure P-2), the petitioner had made a request to the respondents to supply copy of different documents, which were resumed during the course of search. Vide letter dated 16.06.2020 (Annexure P-3), the respondents directed the petitioner to submit voluminous documents, which included import and export documents of the last five years, balance sheet of last five years, Income Tax Returns of last five years, copy of licenses received from DGFT during last five years, detail of bank accounts in India and abroad. This was followed by another letter dated 17.07.2020 (Annexure P-4), whereby certain documents were added. Thereafter, vide summons dated 20.07.2020 (Annexure P-5), the respondents directed the petitioner to appear before the Superintendent (Preventive) on 28.07.2020 and tender his statement. Vide letter dated 21.07.2020 (Annexure P-6), the petitioner submitted all the documents, which were available with him and pointed out that a sum of Rs.39.15 Lakhs had been conditionally deposited, but the investigation was yet to be concluded. The petitioner further prayed to supply original documents along with copy of Panchnama. However, the respondents, vide summons

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dated 21.09.2020 and 01.10.2020 (Annexure P-8), summoned Production Manager and other officials of the petitioner-company. The petitioner made a detailed representation dated 09.10.2020/12.10.2020 (Annexure P-9). The respondents issued summons dated 22.12.2020 (Annexure P-11) to Mr. Sahil Sharma, Chartered Accountant of the company. The business premises of the petitioner was searched second time on 15.01.2021. Mr. Avtar Singh, Director of the company is 78 years old, but the respondents forcibly took him to their office and detained till 1.00 A.M. on 16.01.2021. The respondents pointed out that they had purchased goods from M/s Ralph Agri Science, M/s Best Agro Chem & M/s United Chemical and as per investigation carried out by other GST offices, the suppliers of aforesaid three entities were cancelled dealers. **Thus, the petitioner was liable to pay GST on inputs purchased from the aforesaid three entities.**

As per petitioner, the IGST involved with respect to purchase from the aforesaid three entities was Rs.3.77 crores. In the Electronic Credit Ledger, on 16.01.2021, credit of Rs.1.18 crore was lying. The respondent forced the Director of the petitioner to reverse aforesaid amount. The amount was reversed by way of DRC-3 dated 16.01.2021 (Annexure P-12). Thereafter, the petitioner filed a fresh application on 10.02.2021 (Annexure P-15) for refund of Rs.1.15 crores. Vide letter dated 28.01.2021 (Annexure P-16), the respondents directed the petitioner to deposit a sum of Rs.1 crore by DRC-03. On 15.01.2021, the respondent got typed statement of the Director of petitioner-company to the effect that he would not claim pending refund of Rs.1 crore. On the basis of said statement, notice in the form of RFD-08 (Annexure P-17) was electronically issued on 16.01.2021 (Saturday) and reply, which was required to be filed within 15 days, was

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filed on 16.01.2021. The refund was rejected in RFD-06 (Annexure P-18) on 17.01.2021 (Sunday), however, no attachment of order rejecting the refund was uploaded on the portal. Finally, vide letter dated 22.03.2021 (Annexure P-19), the petitioner was informed that no separate order regarding rejection of refund had been passed and refund had been rejected on the basis of RFD-08 and RFD-09 filed on the portal. Thereafter, the petitioner, vide letter dated 23.03.2021 (Annexure P-20), again asked the respondents to supply copy of documents resumed on 05.03.2020 and 15.01.2021. The petitioner vide letters dated 23.03.2021/25.03.2021 and 23.03.2021 (Annexures P-21 and P-22), requested the respondents to refund a sum of Rs.1.15 crore and Rs.2.15 crores respectively. In this backdrop, the present petition has been filed seeking direction to the respondents to return the amount of Rs.2.54 crores, which has been taken without issuing any show cause notice and passing any order.

Upon notice, written statement dated 18.09.2021 has been filed by the respondents. Along with the written statement, the respondents have placed on record copy of Panchnamas and list of documents resumed (Annexures R-1).

Learned counsel for the respondents has argued that the petitioner has voluntarily chosen to make payment of tax along with penalty. The petitioner was called upon to provide information about inputs procured and the final products manufactured, the petitioner never heeded to the queries raised by the department. As per the information received from Customs, Mumbai, it was found that the petitioner has mis declared the goods to the extent of their value, nature and description and also indulged in illegal import of Pesticides. The petitioner was indulged in clandestine clearance of

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imported goods and used domestic goods for manufacturing goods for exports. During Business Intelligence and Fraud Analytics (BIFA) analyzation, the party was found to be availing irregular Input Tax Credit from cancelled tax payer. In this badckdrop, premises of the petitioner was searched on 15.01.2021. On 16.01.2021, Sahil Sharma, Chartered Accountant of M/s Modern Insecticides Ltd. had made a statement that refund application will be withdrawn and amount will be re-credited to the ITC ledger, which will immediately be reversed by issuance of DRC 03. On that day, he had ensured that he would submit the proof of the same to the department. It is stated that this amount has not been debited by the petitioner so far. Copy of Panchnama dated 05.03.2020 and 15.01.2021 (Annexure R-1) along with resumed documents were handed over to the petitioner after conclusion of the search. It is stated that vide letter dated 05.11.2020, the petitioner was asked to supply certain information, but he did not answer each and every query of the respondents. With respect to the search conducted on 15.01.2021, it is stated that after issuing summons under Section 70 of the Central Goods and Services Tax Act, 2017, the Director of the petitioner-company had appeared before the proper officer at Rishi Nagar, Ludhiana. It is again reiterated that after conducting the search on 15.01.2021, amount of Rs.1.15 crore was reversed vide DRC-03 dated 16.01.2021, which was a voluntary deposit of the tax prior to the issuance of show cause notice under Section 74 of the CGST Act. The Director of the petitioner-company had also undertaken to withdraw the refund application in lieu of liability to be quantified by officers of Anti-Evasions branch. On the basis of statement of the petitioner, RFD-08 was issued, in response to which, the petitioner filed its reply vide FORM-GST-RFD-09 dated

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16.01.2021 stating that they want their refund amount because they want to deposit under GST search vide DRC-03. Accordingly, refund was rejected vide order dated 17.01.2021. **The petitioner has alternative remedy of filing an appeal against the rejection order dated 17.01.2021.** Finally, it has been clarified that the petitioner had deposited Rs.1.54 crores (Rs.0.39 crore through DRC-03 dated 07.03.2020 and Rs.1.15 crore through DRC-03 dated 16.01.2021). Since the amount has been voluntarily deposited by the petitioner, no case to return the same is made out, as the investigation is under process and necessary order under sub-section (9) and (10) of Section 74 would be issued after completing the same.

When this case was taken up on 23.02.2023, learned counsel for the respondents had informed that the investigation was near completion and they were in the process of issuing a show cause notice to the petitioner. A direction was given to the respondents to file an additional affidavit, explaining as to why DRC-04 has not been issued to the petitioner.

In compliance with the order dated 23.02.2023, an affidavit dated 10.03.2023 on behalf of the respondent, through Mr. Hemant Kumar, Assistant Commissioner, CGST, Ludhiana, has been filed in Court. Same is taken on record. As per this affidavit, the petitioner was summoned on 24.02.2023 under Section 70 of the CGST Act to appear on 02.03.2023. In response to the same, the petitioner, vide email dated 02.03.2023, intimated that Sh. Avtar Singh had travelled to Dubai in the month of January, 2023 and was not likely to return back as he was undergoing medical treatment over there. Thereafter, summons were issued to the petitioner-company on 02.03.2023 to appear on 06.03.2023. Thereafter, official of the petitioner had appeared, however, he had sought time till 14.03.2023 to provide the

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documents/detail.

Learned counsel for the respondents has referred to Section 74 (6) of the CGST Act, which provides that a proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder. While referring to Section 74 (6) of the CGST Act, learned counsel for the respondents states that in case of voluntary deposit by the assessee towards, tax, interest and penalty or any other amount, no notice under sub Section (1) of Section 74 is to be served by the proper officer. After making voluntary deposit, if the amount is short of the amount actually payable, then he can proceed to issue notice under sub-section (1) in respect of such amount, which falls short of the amount actually payable. Thereafter, he has referred to Rule 142 (2) of the CGST Rules, 2017, which provides that question of issuance of acknowledgment in form DRC-04 would come only when the assessee has discharged his liability towards tax, interest, penalty or any other amount. Since, in the present case, the petitioner had made entire payment of tax through DRC-03 and no interest or penalty was paid by him, there was no occasion to issue DRC-04. Upon issuance of of DRC-04, the system generates DRC-05, which is an intimation of conclusion of proceedings. Since, the proceedings have not been completed and investigation was still going on, DRC-04 has not been issued to the petitioner. He has further states that the department is likely to conclude the enquiry proceedings and issue a show cause notice under Section 74 (1) of the CGST Act.

The short question for consideration in this petition is, whether the amount paid by the petitioner on 16.01.2021, could be retained by the

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department without issuing the show cause notice under Section 74 (1) of the CGST Act that too after expiry of two years.

A perusal of Section 74 (5) of the CGST Act shows that if, any person chargeable with tax wants to pay the amount of tax along with interest, before service of notice under Section 74 (1) of the Act, on his own ascertainment of such tax, or the tax as ascertained by the proper officer, then he can deposit tax along with interest and inform the proper officer in writing of such payment. As per sub-section (6) of Section 74, proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder. As per sub-section (7) of Section 74, if the payment falls short of the actual amount due, he shall proceed to issue notice as provided in sub-section (1) with respect to the amount, which falls short of the amount actually payable. Sub-section (8) to Section 74 further provides, where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax, within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded. As per sub-section (9), the proper officer, after considering the representation made by the person chargeable with tax, will determine the amount of tax, interest and penalty due from such person and pass an order within five years from the date of furnishing annual return for the financial year, to which, the tax not paid or Input Tax Credit has been wrongly availed.

The above provisions of Section 74 have been examined by the Delhi High Court in **Vallabh Textiles vs. Senior Intelligence Officer and others**, 2022 SCC OnLine Del 4508. In that case, the Delhi High Court was

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examining the issue, where an amount of Rs.1,80,10,000/- was deposited on behalf of the petitioner, during search proceedings carried out between 16.02.2022 and 17.02.2022. The question for consideration was, whether the said deposit was voluntary act or not. During the search proceedings, an officer of the company was detained for several hours and was allowed to leave only when he appended his signatures on the documents. The Delhi High Court examined the provisions of Section 74 (1) of the CGST Act, 2017 along with Rule 142 of the CGST Rules. The Court also examined the Government instructions dated 25.05.2022 issued by the CBIC with respect to the GST investigation. These instructions were issued keeping in view the observations made by the Gujarat High Court in **Bhumi Associate vs. Union of India**, SCA No.3196 of 2021 (decided on 16.02.2021). As per said instructions, no recovery of tax should be made during search, inspection or investigation unless, it is voluntary. As per the judgment passed in **Bhumi Associate's** case (supra), even if the assessee wants 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. The above instructions and observations have been made so that no unnecessary harassment is caused to the assessee. The Delhi High Court, while allowing **Vallabh Textiles's** case (supra), had observed that deposit of tax made by the assessee during search was not voluntary and it was without following the provisions of Section 74 of the CGST Act. The respondents were directed to return the amount along with simple interest at the rate of 6% per annum from the date of deposit till the date of payment.

The ratio of the judgment passed by **Vallabh Textiles'** case (supra)

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is directly applicable to the facts of the present case. In the present case as well, from the date when the search was conducted and amount was deposited, no summons under Section 74 (1) of the CGST Act have been issued till date. Though the respondents can initiate proceedings under Section 74 (1) of the Act by issuing notice within the period of limitation, they cannot retain the amount of Rs.1.54 crore deposited by the petitioner, which as per respondent-department was voluntary. The amount was deposited during search and as as per judgment passed in **Vallabh Textiles'** case (supra), this deposit cannot be taken to be voluntary. Since no proceedings under Section 74 (1) of the CGST Act have been initiated till date, as per Rule 142 (1A) of CGST Rules, 2017, the department cannot even issue Form GST DRC-01A to ask the petitioner to make payment of tax, interest and penalty due.

The very fact that in two years' time, no notice has been issued, the deposit of tax during search cannot be retained by the department till the adjudication of notice, which can take more time in future.

In view of the above discussion, a direction is being given to the respondents to return the amount of Rs.2.54 crores to the petitioner(s) along with simple interest at the rate of 6% per annum from the date of deposit till the payment is made. This amount will be refunded to the petitioner within a period of 10 days from the date of receipt of certified copy of this judgment.

Petition stands allowed accordingly.

(RITU BAHRI)
JUDGE

(KULDEEP TIWARI)
JUDGE

19.04.2023
ajp

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