

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 4026 of 2022

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M/S SHREE GANESH MOLASSES TRADING CO. THROUGH SHRI
NIRANJANBHAI GOVINDLAL THAKKAR

Versus

SUPERINTENDENT, OFFICE OF THE COMMISSIONER

=====

Appearance:

HIREN J TRIVEDI(8808) for the Petitioner(s) No. 1

MR UTKARSH R SHARMA(6157) for the Respondent(s) No. 1

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CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI

and

HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 18/01/2023

ORAL ORDER

(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. By way of present petition, the petitioner seeks to invoke extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India seeking the direction to the respondent authorities to immediately refund Rs. 37,68,300/- of reversal of the Input Tax Credit (for short "ITC") reversed under threat, coercion and without the Will of the petitioner.

2. Petitioner - firm is engaged in the business of trading of industrial chemicals, soda ash, silica bicarbonates etc. and its

registered from 2012, with Commercial Tax Department, Gujarat and thereafter with GST Department bearing registration No. 24AARFS7953BIZX .

3. On 11th February, 2022, a search and seizure operation was carried out by the team of the CGST officials. On 12th February, 2022 at about 1.00 a.m. respondent No.1 reversed the ITC in the electronic credit ledger and corrosively and illegally filed Form DRC-03 under Section 74(5), although it was not voluntary. According to the petitioner, there is no tax evasion on the part of the petitioner-firm and there arises no question of admitting any wrong doing.

4. Retraction affidavit had been filed on 18th February, 2022 by the petitioner and the representations have been made for the refund of amount of ITC. According to the petitioner, he purchased Molasses from sugar factories and received invoices permit an E-way bills and the same is sold to various Dairies after getting permission from the Prohibition Department along with bill and E-way bill generated by the petitioner's firm. The transportation is

being done by M/s. Aarya Transport Company. Petitioner's firm had provided access to all records during the course of search. The summons was served upon one of the partners under Section 17 which mentioned the time 10.35 pm. The explanation since was not satisfactory as per the officers at around 1'00 O'clock in the night on 12th February, 2022. The officers forced the petitioner to login to GST portal using the personal laptop. The logins was registered with mobile number of son of the partner who was at Mumbai.

5. It is alleged that respondent No.1 had forcibly reversed the ITC of GST & CGST lying in the electronic credit ledger to the tune of Rs. 18,84,150/- and Rs.18,84,150/- after reversing the credit of ITC. It proceeded to file Form DRC-03 for which it had needed OTP which are sent to the partner's son.

6. According to the petitioner, he had not volunteered that & in fact was forced to reverses after reversing the credit ledger at 1.09 a.m. The From GST DRC-03 on 12th February, 2022 was filled-in. The petitioner has heavily relied upon the group of petitions being

Special Civil Application No. 2426, 2515, 2618 and 3196 of 2021 decided on February, 18, 2021 where, the Court came down heavily on the practice of making coercive recovery during the course of search and without making any assessment or adjudication. The Court has directed thus:-

“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, epayment 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 DRC03, the assessee should be asked/ advised to file such Form DRC03 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 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 aforestated directions, then strict

disciplinary action should be initiated against the concerned officer.”

7. It is case of the petitioner that no assessment has been framed so far nor any demand has been raised in absence of any assessment, the quantum of demand cannot be determined hence, the action of coercive recovery to the tune of Rs. 37,68,300/- by reversing the ITC in electronic credit ledger is bad in law. The prayers sought for are as follows:-

“(A) Your Lordships may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other writ, to quash and set aside Form DRC-03 dated 12.2.2022 (at Annexure E) and further be pleased to restrain the respondent No.1 or any other competent officer to generate Form DRC-05 in respect of the concerned Form DRC-03 dated 12.2.2022 (at Annexure E);

(B) Your Lordships may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other writ, orders, or directions retraining the respondent-authorities from adopting any coercive measures without issuing any show cause notice as required under the Act to compel the petitioner to pay further tax dues which are disputed by the petitioner-frim and further be pleased to direct the respondent-authorities to refund the amount of Rs.37,68,300/- recovered by reversing the Input Tax Credit on 12.2.2022 through DRC-03 paid under protest and coercion;

(C) *Your Lordships may be pleased to grant ex-parte ad interim order in favour of the petitioner herein in terms of prayer clause ‘A’ and ‘B’ hereinabove;*

(D) *Pass any such other and/or further orders that may be thought just and proper, in the facts and circumstances of the present case.”*

8. The affidavit-in-reply is filed on behalf of respondent No.1 where, it is denied all the averments, statements and submissions made in the petition. It is denied that the team of officers had violated any provisions of law while inspecting the premises declared by the petitioner as “Principal Place of Business”. It is say of the petitioner that some information was received for the officer to report back after completion of inquiry and its outcome. The officer was authorized by the competent authority under Section 67(1) of the CGST Act, 2017. This is permissible when a taxable person has suppressed any transaction relating to supply of goods or services or both.

9. The officers visited the declared “principal place of business”

to inspect and retrieve/obtain records of the petitioner's purchases and supplies. When the officers reached the place neither authorized person of the petitioner nor any statutory records were available, it was an empty godown without any office, a watchman and driver were available who was asked to call the authorized person. The petitioner was contacted over the phone and he was in Ahmedabad and sought time for arriving at the "Principal Place of Business". He reached the place with the Chartered Accountant at about 6.00 p.m. He also did not produce the statutory records in clear violation of the provision of Section 35 of the CGST Act. The documents supplied also did not disclose the detail of suppliers, sellers and the purchases. In fact, in his statement dated 11/12.02.2022, he ensured to submit the requisite documents within 04-05 days which did not receive after about months' time. Section 35 of the CGST Act is pressed into service to urge that at the principal place of business, every registered person is required to keep the goods in particular manner and also maintain the record. There being violation of provision of CGST Act and there would be liability for payment of huge amount of tax, in absence of any

requisite documents since it was not possible to ascertain the tax evasion. Rule 142(2) of the CGST Rules, 2017 is pressed into service where any person makes any payment of tax, interest, penalty, whether on his own ascertainment or as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in FORM GST DRC 03 and the proper officer shall issue an acknowledgment, accepting the payment made by the said person in Form GST DRC 04.

10. It is denied that any pressure was put on the petitioner to pay any kind of deposit. The statement of one of the partners on 11/12.2.2022 had been recorded and he had signed on each page and thus, it cannot be said that he was threatened or force.

11. The right of Show Cause Notice is envisaged under Section 73 and 74 of the CGST Act have been contemplated the manner in which the payment of lessor interest or can resultant into the penalty is also reflected. To urge eventually that petition being bereft of any merits deserves no entertainment.

12. In affidavit-in-rejoinder it is urged that the respondent is lying that the petitioner was not coerced to pay the tax. There was no question of reversing the ITC out of his own volition. The petitioner had asked the Chartered Accountant to reverse the credit which was denied by the Chartered Accountant. Respondent took the laptop of his Chartered Accountant and pressed a call to his son for getting the one time password which is required to file Form GST DRC-03 and that call recorded by an automatic feature in smartphone of his son and entire transcript of the call had been placed on record of intervening night of 11.2.2022 and 12.2.2022, which according to the petitioner, makes it clear that respondent called for the OTP and filed the Form DRC-03. Annexure "1" is produced reflecting the conversation of the respondent and son of the partner.

13. Rejoinder affidavit and sur-rejoinder affidavit have been filed today by emphasizing that there is no threat or coercion made by the visiting officer to the petitioner for making payment of GST or for rest. It is also said that after observation made by this Court in Special Civil Application No. 3196 of 2021, the CBIC has issued

instruction whereto the voluntary payment made by any assessee is allowed by the CBIC as per statutory provisions under GST Act and rule made thereunder.

14. Observations of Gujarat High Court in Special Civil Application No. 3196 of 2021 according to the respondent are not applicable because the facts involved in the instant case are different.

15. We have heard Mr.H.J.Trivedi, learned advocate for the petitioner who along the line of avements of the petitioner had argued before this Court and emphasized that the reversal of ITC to the tune of Rs.37,68,000/-(round off) was surely by compulsion and in violation of the order of this Court passed in Special Civil Application No. 3196 of 2021. He has also further urged that pursuant to the directions issued by the **Delhi High Court** in the case of **M/s. Vallabh Textiles Vs. Senior Intelligence Officer and Ors. [2022 (12) TMI 1038 Delhi High Court]**, the department has issued the instruction No.01/2022-23 on 25th May, 2022, for the

officers seeks to recover the tax dues during the search, inspection and investigation. It would be apt to reproduce the same :-

“37. 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:25th May, 2022 Instruction No. 01/2022-23 [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 Signature Not Verified Digitally Signed By:TARUN RANA Signing Date:20.12.2022 19:15:33 NEUTRAL CITATION NUMBER: 2022/DHC/005682 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 imposable 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 non-payment/ 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) Signature Not Verified Digitally Signed By:TARUN RANA Signing Date:20.12.2022 19:15:33 NEUTRAL CITATION NUMBER: 2022/DHC/005682 Commissioner (GST-Inv.), CBIC"

38. 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* MANU/GJ/0174/2021, 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."

38.1 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 Signature Not Verified Digitally Signed By:TARUN RANA Signing Date:20.12.2022 19:15:33 NEUTRAL CITATION NUMBER: 2022/DHC/005682 adopted in such circumstances, for example via cheque, cash, e-payment or even via adjustment of input tax credit.

16. The Delhi High Court found that while in the line with the directions contained in Bhumi Associate, Instruction provides 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, via cheque, cash, e-payment or even via adjustment of input tax credit. It also found 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. According to the Delhi High Court, these directions issued by the Gujarat High Court on 16.2.2021 are binding the officer respondent revenue which have

not been followed in the instant case. The Delhi High Court therefore has also held and observed as under:

“39. 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.

39.1 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.

39.2 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.

41. The reason that the officers of the official respondents/revenue have been asked, perhaps, to have the amounts deposited the day after the search is concluded, is, to also give space to the concerned person to seek legal advice, and only thereafter deposit tax, interest and penalty, wherever applicable, upon a proper self-ascertainment.

41.1 Undoubtedly, in this case, no such elbowroom was made available.

Conclusion:

42. Therefore, as alluded to hereinabove, we are persuaded to hold, that the aforementioned amounts which were deposited on behalf of the petitioner-concern, lacked an element of voluntariness.

17. Learned Senior Standing Counsel Mr. Utkarsh Sharma has strongly resisted this on the ground that there had been no threat or coercion on the part of the respondent. He however, on instructions has urged that there is technical glitch in reversing the input tax of Rs.37,68,000/-. The said proposal was not acceptable to the petitioner.

18. On 31st January, 2023 after both the sides had concluded the hearing, the department has shown the willingness to reverse this. The difficulties faced by the portal since was the reason he made a request not to pass an order. Today, the request is being made by learned Sr.Standing Counsel for the petitioner to fill up the form for refund of ITC which the department would consider within 60 days.

19. Having heard learned advocates on both the sides and we noticed that at the time of issuance of notice on 23rd February, 2022, this Court prima facie found that the respondent was in contempt as he has violated the order of Court on 16th February, 2021 passed in batch of writ applications being Special Civil Application No. 3196

of 2021 and allied matters, wherein the Court had passed the following order:-

“1. Issue Notice to the respondents, returnable on 16.03.2022. Prima-facie, the respondent could be said to be in contempt as he has violated the order of this Court dated 16th February, 2021 passed in a batch of writ-applications i.e. the Special Civil Application No.3196 of 2021 and allied petitions.

2. The respondent is called upon to make his stance clear as to why he asked the writ-applicant – assessee to make payment by filing the Form DRC-03 in the midnight hours. By our order dated 16th February 2021, we made it very clear that even if the assessee comes forward to make voluntary payment by filing the Form DRC03, the assessee should be asked/advised to file such Form DRC-03 on the next day after the end of the search proceedings. What has been alleged in the writ-application i.e. the mode and manner, in which, the raid was carried out at 01:00 a.m. in the mid-night and the writ-applicant was forced to make payment of Rs.3 Crore, is something which the Court should look into very seriously.

On the returnable date, notify this matter on top of the board.

The Officer concerned shall personally remain present before this Court.”

20. It appears that the officer concerned was to remain present before the Court. There is no reference of his remaining present.

However it has been conveyed to that Court that the officer had remained present. Be that it may today the officer is also present. The fact remains that there is categorical directions issued by this Court in group of writ applications being Special Civil Application No.3196 of 2021 and allied matters. That, order itself was the reason for publishing the instructions which received the attention of Delhi High Court which also frowned upon the action of the authority by questioning its non-fulfillment of one of the directions, (direction No.2) contained in Bhumi Associates. as the instructions had permitted making of voluntarily payments of filing DRC 03 on the basis of ascertainment of their liability on non payment/short payment of taxes before or at any stage of proceedings. The only safeguard is of the tax officers to inform the tax payers regarding the provisions of voluntary tax payments through DRC-03. These instructions surely are not keeping in pace with the directions issued in toto. They being binding in nature even though issued at an interim stage everywhere in sur-rejoinder, the officer concerned has referred to them as the observations. It is to be noted that the decision of the Delhi High Court is subsequent on 20.12.2022

which was also forming the part of the record and yet he has an audacity to refer this to as the observations and not the directions. This in our opinion is an apparent case where scant regard is shown to the interim directions of this Court which have so far not been challenged. Having issued the instructions with regard to the same by No.01/2022-23 on 25th May, 2022, this disregard on the part of the officer concerned is required to be viewed with little seriousness, what has been offered thereafter, is of filling up of the form for reversal of ITC, instead of an end that to by saying that there is some amount of difficulty with the portal and due to those limitations the filling up the Form will be necessary. At the first go, while issuing the notice itself, the Court had found this to have trappings of contempt at the time of final hearing also to term it has the observations and also insist on the petitioner to fill up the Form would require interference on the part of the Court. As can be noticed that this conduct is also contrary to the instructions issued by the Board and therefore, we can noticed that the action of the petitioner which is termed to be voluntary and not have any element of voluntariness. It is further fortified by the transcript

which has been produced on record which also would be apt to be reproduced.:-

First Call Conversation.

Axay Thakkar : Yes brother..... Yes.

Harindra Kumar Yadav : Hello.

Axay Thakkar : Yes.

Harindra Kumar Yadav : Yes Axayji. Harindra speaking.
GST Superintendent.

Axay Thakkar : Yes Sir.

Harindra Kumar Yadav : One..... one Registered Mail....Registered Phone is yours.

Axay Thakkar : Yes.

Harindra Kumar Yadav : Your other mail ID is probably registered for this firm.

Axay Thakkar : Yes.

Harindra Kumar Yadav : So we are doing Login on portal. An OTP will be received. You need to send it to us.

Axay Thakkar : Yes Sir. The OTP is received. 2B9807.

Harindra Kumar Yadav : Yes.

Harindra Kumar Yadav : Yes. The OTP has already been sent to him..... One minute..... Ok, then give me that OTP.

Axay Thakkar : Yes.

Harindra Kumar Yadav : One minute. You will get another..... another one. Send it on Whatsapp, Ok.

Axay Thakkar : Yes.....Yes Sir.

Harindra Kumar Yadav : Please remain Login for one or two minute..... One or two minute.

Axay Thakkar : Yes Sir.

Harindra Kumar Yadav : Ok.... They will do it.

Second Call Conversation.

Axay Thakkar : Yes Sir.

Harindra Kumar Yadav : Yes. It might have come. Tell me.

Axay Thakkar : Yes... 7C873C.

Harindra Kumar Yadav : 7C.

Axay Thakkar : 87.

Harindra Kumar Yadav : 73C after 7.....7C.

Axay Thakkar : No....No. 7C873C.

Harindra Kumar Yadav : 7C873C.

Axay Thakkar : Yes Sir.

Harindra Kumar Yadav : It is done. 7C87C. Hold on for one minute.

Axay Thakkar : Yes Sir.

Harindra Kumar Yadav : It is done. Now I should hang up the call. Just do it. Only one minute Axayji. Please hold on.

Axay Thakkar : Yes Sir. A message is received *Intimation of voluntary payment is successful filed.....*

Harindra Kumar Yadav : Yes. Let's see. The system portal is still buffering.

Axay Thakkar : Yes..... Yes. Something *track of ARN..... A*
A.....something like track status has been received Sir.

Harindra Kumar Yadav : Yes. It is done..... It is done. Ok. Thank you.

Axay Thakkar : Thank you Sir.

Harindra Kumar Yadav : Thank you..... Thank you Akhay..... Thank you somuch.

Axay Thakkar : Thank you Sir.

21. Assuming that the directions contained in the Bhumi Associates at the interim stage, no authority should forget that its own Board had followed it subsequently by issuing the instructions on the basis thereof and same had also received the scrutiny at the end of Delhi High Court.

22. Resultantly, this Court requires to hold that the respondent-revenue is required to reverse the ITC to the tune of Rs. 37,68,300/- along with 6% interest. Accordingly, this petition stands disposed of.

सत्यमेव जयते

(SONIA GOKANI, J)

THE HIGH COURT
OF GUJARAT

(SANDEEP N. BHATT, J)

BEENA SHAH

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