VERDICTUM.IN

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

228 **Date of decision: 27.07.2023**

1 **CWP No.10923 of 2021**

M/S PARSVNATH TRADERS **…. Petitioner**

Versus

PRINCIPAL COMMISSIONER, CGST AND ANOTHER

…. Respondents

2 **CWP No.10976 of 2021**

M/S MAHAVIRA DYES & CHEMICALS **…. Petitioner**

Versus

PRINCIPAL COMMISSIONER, CGST AND ANOTHER

…. Respondents

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

Present : Mr. Deepak Gupta, Advocate for the petitioner(s).

Mr. Anshuman Chopra, Senior Standing Counsel for the respondents.

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MANISHA BATRA, J.

This common order shall dispose of two above mentioned petitions which have been filed under Article 226 of the Constitution of India by the petitioners making prayer for issuing writs of certiorari for quashing the orders dated 18.05.2021 whereby, the request of the petitioners of both petitions for grant of refund had been declined by respondent No.1. They have also made prayer for issuing writs of mandamus thereby, directing respondent No.1 to refund the amounts as mentioned in both these petitions. As common question of facts and law have arisen in these petitions, therefore, they are

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VERDICTUM.IN

taken up together for disposal. However, for the sake of convenience, the facts are being extracted from CWP-10923-2021.

2. As pleaded, the petitioner-M/S Parsvnath Traders, a firm under the proprietorship of Krishan Jain, is engaged in the business of trading of different types of chemicals. During the years 2018-19 and 2019-20, it had made purchases in the normal course of business from its regular supplier- M/s Royal Sales Corporation, Rohtak (for short-**"M/s Royal"**). The goods purchased by the petitioner from M/S Royal were received along with requisite invoices, E Way Bills, Goods receipts and other supporting documents. The petitioner paid GST on the purchases so made, and had subsequently, availed Input Tax Credit (for short-**"ITC"**) for sums of Rs.60.89 lacs and Rs.1.25 crore respectively. On 05.02.2021, the officials of the Department of Central Goods and Services Taxation (for short-**"CGST"**) had searched the business premises of the petitioner and verbally informed it during investigation that there were allegations that the petitioner had got issued bogus invoices from M/S Royal without receiving goods in fact and had availed ITC in an illegal manner. The petitioner was forced to deposit a sum of Rs.20 lacs on the same day by the officials of CGST Department and was called upon to appear in their office on 08.02.2021. They also got deposited an additional amount of Rs.30,70,216/- from the petitioner on 16.02.2021. The petitioner made oral as well as written requests to the respondents to supply copy of Panchnama and statements recorded against it but the same were not supplied. The respondents even did not issue any show cause notice and no order determining its tax liability had been passed by them. The petitioner made another request in writing to the respondents to refund the amount of Rs.50,70,216/- (Rs.20.00,000+Rs.30,70,216) got deposited from it but the prayer made by the

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VERDICTUM.IN

petitioner was rejected by order dated 18.05.2021 which was communicated through e-mail. Aggrieved by the same, the petitioner challenged the action of the respondents on the ground that the amount of Rs.50,70,216/- was got deposited from it without issuance of any show cause notice, passing any adjudication order and also without following the procedure prescribed by law. The provisions of Section 74(5) of the Central Goods and Service Tax Act, 2017 (for short-the Act) which were mandatory in nature had not been complied and principles of natural justice were violated. Hence, prayer had been made by the petitioner for setting aside the order rejecting the request made by it for refund of the amount of Rs.50.70 lacs and also for further directing the respondents No.1 to refund the above said amount.

3. In response to the notice of the petition, the respondents filed a joint reply by way of affidavit submitting therein that on receipt of a report regarding evasion of tax and availing of ITC by certain tax payers on the basis of fake transactions, from the Directorate General of Analytics and Risk Management, New Delhi (DGARM) in the year 2018 and on going through the data shared by the DGARM of tax payers who were involved in issuance of availment of fake ITC, the respondents had verified data of M/S Royal on GST portal which revealed that this firm had passed ITC amounting to Rs.5,15,12,408/- within a short span of 13-15 months after getting itself registered in GST. On making enquiries, it was found that the premises of the firm were locked and no business activities were going on. The premises of the proprietor of M/S Royal were searched on 03.02.2021 and on seeking instructions from the proprietor who was not present there, his son deposited a sum of Rs.16 lacs by submitting Form GST DRC-03 as a token of acceptance regarding fake purchases and also recorded statement that some purchases

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VERDICTUM.IN

made by the firm from Delhi might be fake. As the record also revealed that M/S Royal had issued invoices regarding sale of goods to the petitioner as well, therefore, premises of the petitioner were searched on 05.02.2021 after seeking authorization. The petitioner deposited GST amounting to Rs.20 lacs vide DRC-03 dated 05.02.2021 and had again deposited a sum of Rs.30,70,216/- on 16.02.2021 through DRC-03. The respondents submitted that the payments made by the petitioner were voluntary payments and amounted to admission by the petitioner that it had received fake invoices from M/S Royal and by misutilising those invoices had availed ITC on the strength thereof. It was denied that the petitioner was forced to deposit the amount of Rs.50.70 lacs.

4. It was further submitted that enquiries regarding movement of outward supply of goods by M/S Royal to the petitioner had also been made and information was procured from the office of Regional Transport Authority, Rohtak about movement of the vehicles which were claimed to have been used for transporting goods from M/S Royal to the petitioner and it was revealed that no such goods were transported in either of those vehicles. The statements of transporters were also recorded. It was revealed that the petitioner besides availing ITC amount of Rs.1,45,91,383/- on the invoices of M/S Royal had passed on credit of Rs.75,40,551/- showing transportation in the vehicles bearing same numbers which were shown in the invoices of M/S Royal. The petitioner as such, was found indulged in illegitimate passing of ITC without supplying of goods thereby causing loss to the Government Exchequer. Accordingly, , dismissal of the petition had been prayed for.

5. The petitioner filed rejoinder to the reply filed by the respondents wherein, contents of the petition were reiterated and those of the replies were

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VERDICTUM.IN

controverted.

6. The main thrust of the argument of learned counsel for the petitioner was that since the respondents had recovered/got deposited GST to the tune of Rs.50.70 lacs from the petitioner without serving a show cause notice in accordance with Section 74(1) of the Act and even till the date of filing of this petition, had not served any such notice upon it, therefore, the petitioner was certainly entitled to refund of the amount so paid which was not at all a voluntary deposit. To fortify his argument, learned counsel for the petitioner has relied upon the judgments passed by the Co-ordinate Benches of this Court in **Century Metal Recycling Pvt. Ltd. vs. Union of India, 2009 (234) E.L.T. 234 (P&H), Concepts Global Impex vs. Union of India, 2019(365) E.L.T. 32 (P&H), Century Knitters (India) Ltd. vs. Union of India, 2013 (293) E.L.T. 504 (P&H)** and the judgment passed by the High Court of Gujarat in ***M/s Bhumi Associate vs. Union of India through the Secretary, (2021) 46 GSTL 36.***

7. Per contra, the contention as raised by learned counsel for the revenue was that the petitioner in connivance with M/S Royal was found engaged in tax evasion of huge amount of money. There was ample material on record to show that it had taken invoices showing false purchases on bogus transactions from M/S Royal to cause loss to the revenue and had wrongly availed ITC on that amount. He submitted that since the payment of amount of Rs. 50.70 lacs had been made at two different point of time by the petitioner and was voluntarily made vide GST DRC-03, therefore, there was neither any requirement of issuing show cause notice under Section 74(1) of the Act nor the petitioner was entitled to any refund of the amounts so paid. Hence, it was submitted that the petition was liable to be dismissed.

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VERDICTUM.IN

8. We have heard learned counsel for the parties at considerable length and have minutely scrutinised the record.

9. Before considering the contentions raised by both the parties, it would be proper to discuss certain provisions of law which are relevant for the purpose. Section 2 (59) of the Act defines **"Input"** as any goods other capital goods used or intended to be used by a supplier in the course or furtherance of business. Sub-Section (62) defines "Input Tax" in relation to a registered person as Central tax, State tax, Integrated tax or Union Territory tax charged on any supply of goods or services or both made to him. As per sub-Section (63), "Input Tax Credit" means the credit of input tax. Further, as per Section 16 of the Act, a registered dealer may avail ITC of inputs which are used in the furtherance of business and in following conditions :-

I The registered persons should be in possession of tax invoice or debit note issued by a supplier registered under the Act.

II He must have received goods.

III The tax charged in respect of supply should have actually been paid to the Government either in cash or through utilization of ITC admissible in respect of said supply.

IV The registered person must have furnished return under Section 39.

10. Then, under Section 74 of the Act, the revenue has power to investigate and issue show cause notice and then recover the tax and penalty amount. As per sub-Section (1) of Section 74, where it appears to the proper officer that any tax has not been paid, short paid, erroneously refunded or

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VERDICTUM.IN

where input tax credit has been wrongly availed or utilized by reason of fraud, or any willful misstatement or suppression of facts to evade tax is there, then he shall serve notice on the person chargeable with tax requiring him to show cause as to why he should not pay the amount specified in the notice along with interest and penalty. Sub-Section (5) of Section 74 of the Act says that any person chargeable with tax, before service of notice under sub-Section (1) of Section 74 of the Act, pay the amount of tax along with interest payable and penalty equivalent to 50% of the tax on the basis of such tax as ascertained by the proper officer. Sub-Section (6) of Section 74 of the Act further provides that the proper officer on receipt of information qua deposit of amount of such tax and penalty shall not serve any notice under sub-Section (1) of Section 74, of the Act in respect of tax so paid or any penalty.

11. The grievance of the petitioner is that the respondents without issuing any show cause notice as required under Section 74(1) of the Act, straightaway recovered an amount of Rs.50.70 lacs from it thereby, without following the adopted procedure and this action amounted to recovery without authority of law. Whereas, according to the respondents, the deposit had been made voluntarily vide GST DRC-03 on two different dates during the course of investigation which amounted to 'self-ascertainment' in terms of Section 74 and it was hence urged that the petitioner could not make any prayer for issuing a mandamus seeking refund of that amount. The legal issue raised before us is as to whether the petitioner is entitled to refund of the amount paid during the investigation. For this purpose, in our opinion it would be relevant to understand the scheme of assessment as set out under Section 74 of the Act. A bare reading of provisions of Section 74(1) of the Act makes it clear that it provides for determination of tax not paid, shortly paid or erroneously

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VERDICTUM.IN

refunded or wrongful availment of ITC by reason of fraud, willful misstatement or suppression of facts etc. The sub-Section 5 of Section 74 on the other hand, provides an opportunity to an assessee for amicable settlement of an assessment before the authorities prior to receipt of show cause notice and the assessee may pay at that stage the tax along with interest and penalty on the basis of 'self ascertainment' or on ascertainment by the proper officer. It is, however, well settled proposition of law that Section 74(5) of the Act cannot be considered as a statutory sanction for advance tax payment, pending final determination in the assessment because that would certainly be contrary to scheme of assessment as set out under Section 74. Sub-Section 6 of this Section further provides that no show cause notice shall be served upon the assessee on deposit by way of such ascertainment. These provisions clearly provide an opportunity for the assessee and/or to the revenue to ascertain the proper amount of tax, interest and penalty and even in cases where there might have been a shadow of wrong declaration, wrong availment or utilisation of ITC, or short payment of tax, there can be a closure of the proceedings at that stage itself on the basis of either a 'self ascertainment' by an assessee and acceptance of the same by the revenue or vice-a-versa.

12. Further, it is also the well established that no collection of tax from an assessee can be insisted upon prior to final determination of liability being made. According to the revenue, with the inception of Section 74(5), the collection of amounts in advance has attained statutory sanction, provided the same are voluntary in form GST DRC-03. Now it is to be considered as to whether the deposit of sum Rs.50.70 lacs which was made by the petitioner during the course of investigation, is to be considered as voluntary deposit of amount which had allegedly been claimed by it by way of ITC on the basis of

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VERDICTUM.IN

purchases made by it from M/S Royal which are alleged to be false purchases? According to the petitioner, since there was no assessment and even demand by way of issuance of show cause notice, the amount deposited by it could not be appropriated especially when it was not voluntary deposit. Interestingly, this petition is pending since the year 2021, admittedly no show cause notice has been issued against the petitioner in accordance with Section 74(1) of the Act till date. As asserted by the revenue, the payments of Rs.50.70 lacs (Rs.20 lacs+Rs.30.70 lacs) as made by the petitioner on two different dates constituted 'self ascertainment' and triggered the provisions of Section 74(5) of the Act and were voluntary deposits. However, we are unable to accept this contention for the reasons that if that would have been actually the position, then the respondents must have contained material on record to show that the petitioner had in fact, accepted the ascertainment made by it and the revenue had applied its mind and arrived at the conclusion that 'self ascertainment' by the assessee was adequate/inadequate. The petitioner on the contrary is shown to have consistently contested its liability to make payment of the tax. The deposit of the aforementioned amount on the day of search and shortly thereof, when the proprietor of the petitioner was naturally under the stress of search/investigation does not amount to lead to 'self assessment' or 'self ascertainment'. The 'self ascertainment' which is contemplated under Section 74(5) of the Act, 2017 is in the nature of ' self assessment' and amounts to a determination by it which is unconditional and not as in the present case when shortly after depositing the amount Rs.50.70 lacs, the petitioner approached the revenue for refund of the same. Such recovery is not permissible. In this regard, reliance can be placed upon in ***M/s Bhumi Associate****'s* case (supra) wherein, it was observed that at the time of search/inspection proceedings

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VERDICTUM.IN

under the provisions of Central/Gujarat Goods and Services Tax Act, 2017, no recovery in any mode by cheque, cash, e-payments or adjustment of ITC should be made.

13. Further, no crystalised liability was shown to be existing against the petitioner and no show cause notice had been issued to it either at that time or even till now and the amount of Rs.50.70 lacs was recovered from it during investigation and has been retained by it. In similar circumstances in **Century Knitters (India) Ltd.**'s case (supra), a Bench of this Court had observed that unless and until demand was finalised and existing, no crystalised liability was existing against the petitioner and the revenue could not retain any amount in absence of specific statutory provisions and the refund of the amount so recovered was ordered. Similarly, in **Concepts Global Impex's** case (supra), a Co-ordinate Bench of this Court was dealing with a case wherein, at the time of import of goods, the duty leviable thereon, was paid but the Directorate of Revenue Intelligence has pressurized the petitioner to pay another sum of Rs.42 lacs while detaining the goods in transit. The petitioner submitted that the same had been paid without there being any show cause notice or order confirming the demand and the same was in violation of Article 265 of the Constitution of India as it was paid under the pressure of DRI officials. It was held that since there was no show cause notice or demand, the revenue could not retain the deposited amount and the refund thereof, was allowed.

14. Reference can also be made to **Century Metal Recycling Pvt. Ltd.**'s case (supra) wherein, a Co-ordinate Bench of this Court had observed that unless there was an assessment and demand, the amount deposited by the petitioners could not be appropriated. It was observed as under:-

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VERDICTUM.IN

> "13. As far as the amount deposited by the petitioners is concerned, case of the petitioners is that the same was deposited under coercion. Case of the respondents was that the same was deposited voluntarily. Whatever be the position, unless there is assessment and demand, the amount deposited by the petitioners cannot be appropriated. No justification has been shown for retaining the amount deposited, except saying that it was voluntarily deposited. In view of this admitted position, the petitioners are entitled to be returned the amount paid."

15. It is also relevant to mention also that this Bench has dealt with similar question in CWP-733-2021 titled as ***William E Connor Associates & Sourcing Pvt. Ltd. vs. Union of India & Others,*** decided on 04.05.2023, in CWP-23788-2021 titled as ***Diwakar Enterprises Pvt. Ltd. vs. Commissioner of CGST and Others, 2023(98) GST 322,*** decided on 14.03.2023 and in CWP-8035-2021 titled as ***Modern Insecticides Ltd. and Others vs. Commissioner, Central Goods and Service Tax and Others,*** decided on 19.04.2023 by this Court, and it has been held that the amount deposited during search cannot be retained by the Department if proceedings under Section 74(1) of the Act are not initiated.

16. In the present case, the petitioner shortly after depositing the amount of Rs.50.70 lacs had approached the revenue for refund of the same therefore, the ascertainment contemplated under Section 74(5) of the Act which amounts to an unconditional determination and in the nature of 'self assessment' by the assessee is not attracted and hence, the said deposit could not be stated to be voluntary deposit by any stretch of imagination, irrespective of the fact that deposits were made in the form of GST DRC-03. In view of the

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VERDICTUM.IN

discussion as made above, we are of the opinion that the petitioner deserves the relief as claimed by it and accordingly, mandamus as sought by the petitioner, is granted and it is ordered that the sum of Rs.50.70 lacs, which was collected from the petitioner-M/S Parsvnath Traders during the course of search, shall be refunded to it within a period of 6 weeks from today. The petitioner shall also be entitled to interest @ 6% per annum from the date of deposit till the refund amount is released in its favour.

17. With regard to the petitioner- M/S Mahavira Dyes & Chemicals in CWP-10976-2021, who had deposited an amount of Rs.45.65 lacs, the similar directions are issued and it is ordered that the respondents shall refund this amount along with interest 6 % per annum from the date of deposit till its realisation.

18. Accordingly, writ petitions stand allowed with no order as to costs.

Pending application(s), if any, also stands disposed of.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

27.07.2023
Jyoti-IV

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

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