IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: **05.12.2023**

\+ **W.P.(C) 17171/2022**

SANTOSH KUMAR GUPTA PROP. MAHAN POLYMERS ..... Petitioner

versus

COMMISSIONER, DELHI GOODS AND SERVICES TAX ACT & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. A. K. Babbar & Mr. Surender Kumar, Advs.

For the Respondents : Mr. Rajeev Aggarwal, SC with Ms. Shilpa Singh, Adv.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition principally challenging the search / inspection conducted at his business premises situated at 3460/1, Jai Mata Market, Tri Nagar, Delhi- 110039 and Godown at E-285, Sector-4, Bawana, Delhi-110039 on 18.10.2022 under Section 67(1) of the Delhi Goods and Services Tax Act, 2017 (hereafter '**the DGST Act**'). The petitioner claims that during the course of the search/inspection, he was compelled to reverse the Input

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Tax Credit (hereafter '**ITC**') amounting to ₹22,14,226/- on account of inadmissible ITC and shortage of cash.

2. The petitioner claims that his statement was recorded at about 11:30 pm on 18.10.2022 and he was compelled to agree to reverse the ITC in respect of certain suppliers whose registration were stated to be cancelled. The petitioner claims that the petitioner's statement as well as the reversal of ITC, was done under duress and while the petitioner was effectively under the control and supervision of officers of the visiting team. The petitioner also claims that the petitioner was under the stress of interrogation as the inspection was continuing from 4:00 pm, earlier that day. The petitioner also claims that although the petitioner had filed FORM GST DRC-03, there was no acknowledgement of receipt by the Department by issuing FORM GST DRC-04.

3. The petitioner also claims that the inspection conducted on 18.10.2022 was illegal as the authorization for the same [(FORM GST INS-01 dated 18.10.2022)] was issued without mentioning any specific reason for the same.

4. The first and foremost question to be examined is whether the inspection conducted by the Delhi GST Authorities was illegal for want of proper authorization.

5. According to the petitioner, the inspection / search conducted on 18.10.2022 under Section 67 of the DGST Act was illegal as the

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authorization for conducting the search (in FORM GST INS-01) mentioned all the reasons as stated in Section 67(1)(a) of the DGST Act. The petitioner contends that the said authorization is issued mechanically and without application of mind.

6. Rule 139(1) of the Central Goods and Services Tax Rules, 2017 (hereafter '**the CGST Rules**') expressly requires that the authorization for conducting a search be issued in FORM GST INS-01. The said form is set out below:

"FORM GST INS-1

AUTHORISATION FOR INSPECTION OR SEARCH

[See rule 139(1)]

To

……..

……..

(Name and Designation of officer)

Whereas information has been presented before me and I have reasons to believe that—

A.

M/s._____

- ☐ has suppressed transactions relating to supply of goods and/or services
- ☐ has suppressed transactions relating to the stock of goods in hand,
- ☐ has claimed ITC in excess of his entitlement under the Act
- ☐ has claimed refund in excess of his entitlement under the Act
- ☐ has indulged in contravention of the provisions of this Act or rules made thereunder to evade tax under this Act;

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OR

B. M/s._____

- ☐ is engaged in the business of transporting goods that have escaped payment of tax
- ☐ is an owner or operator of a warehouse or a godown or a place where goods that have escaped payment of tax have been stored
- ☐ has kept accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act.

OR

C.

- ☐ goods liable to confiscation / documents relevant to the proceedings under the Act are secreted in the business/residential premises detailed herein below

<<Details of the Premises>>

Therefore,—

- ☐ in exercise of the powers conferred upon me under sub-section (1) of section 67 of the Act, I authorize and require you to inspect the premises belonging to the above mentioned person with such assistance as may be necessary for inspection of goods or documents and/or any other things relevant to the proceedings under the said Act and rules made thereunder.

OR

- ☐ in exercise of the powers conferred upon me under sub-section (2) of section 67 of the Act, I authorize and require you to search the above premises with such assistance as may be necessary, and if any goods or documents and/or other things relevant to the proceedings under the Act are found, to seize and produce the same forthwith before me for further action under the Act and rules made thereunder.

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Any attempt on the part of the person to mislead, tamper with the evidence, refusal to answer the questions relevant to inspection / search operations, making of false statement or providing false evidence is punishable with imprisonment and /or fine under the Act read with section 179, 181, 191 and 418 of the Indian Penal Code.

Given under my hand & seal this …… day of …… (month) 20…. (year). Valid for …… day(s).

Seal

Place Signature, Name and designation of the issuing authority

Name, Designation & Signature of the Inspection Officer/s

(i)

(ii)"

7. In the present case, respondent no.3 had issued the authorization dated 18.10.2022 by selecting all reasons (except that the taxpayer had availed of a refund) as set out in Clause 'A' of the said form. The reasons, as stated, also exhaustively comprise of reasons for issuing such authorization as set out in Section 67(1)(a) of the DGST Act. Therefore, it does not appear that the authorization was issued without specifically noting the relevant reason for such search. However, it is averred by the respondents – and not seriously contested by the petitioner – that the reasons for conducting search / inspection on 18.10.2022 are recorded in the relevant files.

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8. The authorization in FORM GST INS-01 does not require the concerned officer to give any reasons in detail. It merely requires that the reason for which the search / inspection is to be conducted under the statute, be mentioned. The detailed reasons are not required to be shared with the taxpayer prior to the search / inspection. However, the taxpayer is at liberty to apply for the same and absent any reason to deny the request, the same ought to be provided to the taxpayer.

9. It is contended on behalf of the respondents that the inspection / search was conducted on account of the petitioner having availed of the ITC from suppliers whose registrations were cancelled. It is also affirmed in the counter affidavit that during the course of the search, it was noticed that the petitioner had availed of ITC amounting to ₹2,39,40,871/- on account of purchases made from suppliers whose registrations were cancelled. In view of the above, we find no merit in the contention that the search conducted was illegal and was without any reasons to believe that the conditions under Section 67(1)(a) of the DGST Act were satisfied.

10. The second question to be examined is, whether the petitioner is entitled to the refund of ITC deposited during the course of the search conducted on 18.10.2022. According to the petitioner, he was compelled to deposit a sum of ₹22,14,226/- by reversing the ITC available in his Electronic Credit Ledger (hereafter '**the ECL**'). The petitioner also claims that the statement to that effect as recorded on 18.10.2022, was also recorded under duress and coercion.

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11. Mr. Rajiv Aggarwal, learned counsel appearing for the respondents countered the aforesaid submission on, essentially, two grounds. First, he submitted that the petitioner had not retracted the statement recorded on 18.10.2022, immediately after the search and therefore, he is precluded from disputing that he had voluntarily reversed the ITC amounting to ₹22,14,226/-. Mr. Aggarwal referred to the decision of the Coordinate Bench of this Court in ***RCI Industries and Technologies Ltd. though its Director Rajiv Gupta v. Commissioner, DGST Delhi & Ors.: 2021 SCC OnLine Del 3450.***

12. Second, Mr. Aggarwal contended that on the date of the search, there was a balance of ₹84,19,466/- in the ECL of the petitioner. According to the respondents, the petitioner had availed of the inadmissible ITC to the extent of ₹2,39,40,871/-. Thus, if the petitioner was under any coercion, he would have been compelled to deposit the entire amount lying in his ECL.

13. It is relevant to refer to the statement of the petitioner recorded on 18.10.2022. The relevant extract which is relied upon by the respondent is set out below:

> "13. That the visiting team has informed that the following inward supply dealers have been cancelled suomoto from the date of registration: -
>
> 1. M/s. S. R. Enterprises, GSTN: 07AAFHS2748C1Z8 (1,67,310)
> 2. M/s N N Polymers, GSTN:07AMPS2298F1ZV (5,85,900/-)
> 3. M/s J P Polymers, GSTN:07ADGPJ9077M1ZW (4,64,130/-)

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4. M/s Dream world global Asia, GSTN:07BEPPG0134K1ZJ (5,19,300/-)
5. M/s Kanav International Pvt. Ltd., GSTN:07AAFCK8521N1Z4 (3,94,785/-)

> In this regard, I agreed to reverse the ITC above mentioned firms as per DGST Act, 20 17, the question of payment of interest on ITC reversal does not arises as the firm always having ITC in Credit ledger to meet out any liability of tax."

14. It does appear from the above that the petitioner had agreed to reverse the ITC in respect of purchases from five firms aggregating ₹22,14,226/-. The petitioner now claims that the said statement was not voluntary and that he was compelled to reverse the ITC. It is not disputed that the said deposit was made at about 11:30 pm during the course of the search proceedings.

15. The petitioner filed the present writ petition on 23.11.2022, about a month after his statement was recorded, *inter alia*, seeking to retract the said statement. It is necessary to bear in mind that an opportunity to pay the tax prior to issuance of any notice under Sections 73 or 74 of the DGST Act is for the benefit of the taxpayer. Payment of tax along with interest, prior to issuance of notice, absolves the taxpayer of any liability to pay penalty or penalty in excess of 15% of the tax depending on whether Sections 73 or 74 of the DGST Act are applicable. The said tax is to be paid based on self-ascertainment basis. In the event that a taxpayer voluntary pays the tax and the applicable interest, no notice is required to be issued under Section 73(1) of the DGST Act. If it is found that the tax paid falls short of the tax payable, the proper officer

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is required to issue a notice for the shortfall under Section 73(7) of the DGST Act.

16. Sub-sections (5), (6) and (7) of Section 73 of the CGST Act are set out below:

> "73. Determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts.—
>
> xxx xxx xxx
>
> (5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.
>
> (6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the CGST Rules made thereunder.
>
> (7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable"

17. The scheme of Sub-sections (5), (6) and (7) of Section 74 of the DGST Act are also similar except that the taxpayer is also required to pay 15% of the tax as penalty.

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18. If the tax is not paid on self-ascertainment basis, the assessee cannot be extended the benefit of Section 73(6) of the DGST Act or Section 74(6) of the DGST Act. In the present case, the petitioner has stoutly disputed that the reversal of ITC was voluntary. In cases where the payment made during search is not voluntary, the taxpayer is required to be refunded the said deposit while reserving the right of the GST authorities to proceed against the said taxpayer to the full extent in accordance with law**.**

19. It is also material to note that the respondents have not issued an acknowledgment in FORM GST DRC-04. Thus, the procedure under Rule 142 of Delhi Goods & Services Tax Rules, 2017 (hereafter '**the DGST Rules**') has not been followed. We find that the issue is covered by the decisions of this Court in ***Vallabh Textiles v. Senior Intelligence Officer &Ors.***: ***2022 SCC OnLine Del 4508*** and in ***Lovelesh Singhal v. Commissioner, Delhi Goods & Service Tax &Ors.: Neutral Citation No. 2023:DHC:8631-DB.***

20. We are also unable to agree that, the petitioner's case that he had deposited the tax involuntarily, is required to be rejected on the basis of the decision in ***RCI Industries and Technologies though its Director Rajiv Gupta v. Commissioner, DGST & Anr.*** (*supra*). In that case, the Court had noted that the petitioner had "categorically admitted his tax liability and stated that he would deposit the admitted tax / penalty amounting to ₹17,34,314". In the present case, there is no admission on the part of the petitioner of his tax liability. It is clear that the petitioner

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was informed by the visiting team that registration of certain dealers from whom the petitioner had reportedly received supplies was cancelled. The petitioner's statement indicates that he had agreed to reverse the ITC in respect of those suppliers. There is no acknowledgment that the invoices covering supplies from those suppliers were fake and the petitioner had not paid the consideration and the applicable GST to the said suppliers. There is no adjudication of the question whether the taxpayer was required to reverse the ITC in respect of purchases made from dealers whose registration was cancelled after the receipt of supplies, *albeit* retrospectively.

21. Mr. Aggarwal further submitted that there was no requirement for adjudicating the liability as the petitioner had reversed the ITC. However, in ***RCI Industries and Technologies Ltd. though its Director Rajiv Gupta v. Commissioner, DGST Delhi & Ors.*** (*supra*), this Court had not finally rejected the petitioner's claim that the statement was made under coercion as the Court had noted that the payment of tax would be adjudicated and that the correctness of the statement would be required to be established in the adjudication proceedings. In the present case, the tax deposited by the petitioner by reversal of ITC is not subject to any adjudication proceedings. As noted above, Mr. Aggarwal had contended that no adjudication in respect of the demand is necessary. This is also the Scheme of Sections 73(6) and 74(6) of the DGST Act. Thus, it is essential that the deposit made by an assessee on a self-ascertainment basis finally and conclusively concludes the issue regarding the tax liability to the said extent. As noted above, in the

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present case, the petitioner has stoutly disputed that the reversal of ITC was voluntary. Undisputedly, the same has been made while the petitioner's premises were being searched and he was being subjected to questioning / enquiries. We do not find it difficult to accept that the petitioner may have found the circumstances intimidating and had, accordingly, agreed to reverse the ITC. We are unable to accept that the reversal of ITC was made voluntarily without any suggestion or encouragement by the officers as contended by Mr. Aggarwal. But for the search continuing till late at night, there were no circumstances which would, in normal course, lead the petitioner to reverse the ITC late at night.

22. In the circumstances, we direct the respondents to reverse the ITC amounting to ₹22,14,226/- in the petitioner's ECL. We however clarify that this would not preclude the concerned authorities from safeguarding the interest of the Revenue including issuing order under Section 83 of the DGST Act or Rule 86A of the DGST Rules, if the requisite conditions are satisfied.

23. The petition is disposed of with the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

DECEMBER 05, 2023
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