

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.02.2021

PRONOUNCED ON : 07.04.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

**W.P. No.5192 of 2020 and**

**WMP. No.6135 of 2020**

M/s.ShriNandhiDhall Mills India Private Limited  
Rep. By its Managing Director S.A.Kumar,  
270, Narasimman Road,  
Shevapet,  
Salem – 636 002.

...Petitioner

Vs.

- 1.Senior Intelligence Officer,  
Director General of Goods and Service Tax,  
Trichy Regional Unit,  
No.10B/5, First Street, Jaya Nagar,  
KK Nagar Post, Trichy – 620 021.
- 2.Director General of Goods and Service Tax,  
Trichy Regional Unit,  
No.10B/5, First Street, Jaya Nagar,  
KK Nagar Post,  
Trichy – 620 021.
- 3.Director General-South Zone,  
Director General of Goods and Service Tax,  
C-3, C-Wing, II Floor,  
Rajaji Bhawan, Besant Nagar,

Chennai-600 090.

4.Grievance Officer,  
MSME-GST,  
Room No.356A,  
Udyog Bhawan, Rafi Marg,  
New Delhi – 110011.

(R4 given up vide order dated 4.6.2020 made in  
WP.No.5192 of 2020 by this Court)

5.Director General of Goods and Service Tax,  
Intelligence (HQ),  
West Block – 8, Wing No.6, 2<sup>nd</sup> Floor,  
R.K.Puram, New Delhi – 110066. ...Respondents

**Prayer:** Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Mandamus, direction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondent from demanding any amount from the petitioner except by following due process of law and further direct to refund of Rs.2 crores along with statutory interest under CGST Act 2017 and also return the documents seized at the time of search on 22.10.2019.

(Prayer amended vide order dated 25.8.2020 made in WMP.No.11963 of 2020 in WP.No.5192 of 2020 by this Court)

For Petitioner : Mr.Hari Radhakrishnan  
For Respondents : Mr.V.Sundareshwaran (for R1 to R3 & R5)  
Senior Panel Counsel  
R4 – Given up

**ORDER**

This writ petition was originally filed seeking a mandamus restraining the first respondent from harassing the petitioner baselessly without addressing its grievance petition and refund claim pending before the respondents. The respondents are officials of the Director General of Goods and Service Tax (R1, R2, R3 and R5), the writ petition having been given up qua R4 on 04.06.2020. On 25.08.2020, the request of the petitioner for amendment of prayer was allowed, recording no objection to the same by Mr.V.Sundareswaran.

2.The amended prayer is for a mandamus restraining R1 and R2 from demanding any amount from the petitioner except by following the due process of law and a further direction to refund a sum of Rs.2 crores along with statutory interest under the provisions of the Central Goods and Service Tax Act, 2017 (in short 'Act') and of return the documents seized at the time of search on 22.10.2019. Post amendment, pleadings have been completed and detailed submissions of the parties have been heard.

3.The petitioner is registered as a Small Scale Industry under the MSME Act and is an assessee under the provisions of the Goods and Service Tax Act, 2017 (Act). An investigation was conducted in the premises of the petitioner on

22.10.2019 and various documents and registers seized. In the course of that investigation, a statement was recorded from one S.A.Kumar, who has also deposed to the affidavit filed in support of this writ petition, to the effect that the petitioner has not discharged its GST liability correctly. In the statement, he accepts the mistakes in computation of GST and assures the respondents that the liability would be discharged at the earliest with applicable interest. A scheme of payment has also been set out for the tax remaining unpaid, as follows:

**TIME LINE FOR PAYING GST LIABILITY ON TAXABLE OUTWARD  
SUPPLIES MADE DURING THE PERIOD FROM JULY, 2017 TO  
OCTOBER, 2019 (UP TO 21.10.2019)**

22.10.2019 - Rs.1,00,00,000/- paid

23.10.2019 - Rs.1,00,00,000/-

30.10.2019 - Rs.1,00,00,000/-

07.11.2019 - Rs.1,00,00,000/-

13.11.2019 - Rs.1,00,00,000/-

20.11.2019 - Rs.1,00,00,000/-

27.11.2019 - Rs.1,00,00,000/-

04.12.2019 - Balance amount as quantified by the GST Department

4. This undertaking has been signed by the Managing Director on 22.10.2019. In line with the undertaking, the petitioner has, on the same day remitted a sum of Rs.1 crore in FORM GST DRC-03 corresponding to Rule

142(2) and (3) and Section 74(5) of the Act. The second installment of the tax was paid on 30.10.2019.

5. However, on 05.11.2019 the Managing Director of the petitioner has retracted his statement in the following terms:

To  
The Office of Senior Intelligence  
DGGI, Regional Unit,  
No.5, Williams Road, Melapudur  
Cantonment, Tiruchirappalli – 620 001  
Tamil Nadu

Respected Sir,

*Sub: Search conducted at our premises on 22-10-2019*

*Reg Ref: Mahazar dated 22-10-2019*

*This has reference to the search proceedings conducted by your Ld. Authority at our premises at No.270, Narasimman Road, Shevapet, Salem, Tamil Nadu 636 002 on 22-10-2019, wherein we would like to retract the version/statement mentioned in the MAHAZAR dated 22-10-2019. We would further like to inform you that your Ld. Authority had failed to mention the actual facts in the Mahazar which were informed to your Ld. Authority during the search proceedings along with relevant supporting documents in support of our claim.*

*In this regard, we would like to present the actual facts before your Ld. Authority and the reason for why GST has not been discharged by our company M/s.ShriNandhiDhall Mills India Private Limited for the period from July 2017 to September 2019:*

.....

*13) Further, we request you to kindly make a note that despite we are supplying Nil/exempted goods, we have been forcibly made to make the payment of GST liability for the tax period July 2017 to March 2018 of Rs.1,00,00,000/- immediately on the same day i.e.22-10-2019 under the influence of coercion, threat and in a state of panic without providing any workings of determination of tax liability;*

*14) It has been 15 days from the date of search and yet your office has not provided us with the workings of actual determination of tax liability despite receiving frequent follow up calls from your office on enquiry of discharge of tax liability for which we are not bound to make any payment as per the provisions of CGST Act, 2017;*

*15) Based on the above facts, we would like to bring to your notice that Shri.S.A.Kumar signed the MAHAZAR and paid an amount of Rs.2,00,000/-under the influence of coercion, threat and in a state of panic without giving an opportunity to read the content of the Mahazar and without providing the workings of the actual determination of tax liability;*

.....

6. Thus, the petitioner has stated that it has no liability to tax, that the MD and officials were forced to accept liability to tax and the admission was, by no means, voluntary. The petitioner has also made serious allegations about the high handedness of the authorities during the conduct of search and the scant regard expressed for the sentiments of the family of the Managing Director and employees of the petitioner. They state that the visit was on the eve of Deepavali and investigation was carried out in an intrusive and acrimonious fashion. The petitioner, leave alone celebrating the festival, could not even disburse bonus and gifts to its employees. In all, not just high handedness, but also malafides is attributed in the conduct of the proceedings.

7.The aforesaid allegations have been strenuously denied by the respondents. According to the respondents, the petitioner has been engaging in large scale tax evasion and has not been paying tax that it is legitimately bound to pay. It was for this reason that it had voluntarily offered to remit tax. The very fact that the petitioner had remitted not one but two instalments of tax would reveal

that the payments were voluntary as, if they had been coerced as alleged, the payments would have stopped with the first instalment. They would also state that there has been no co-operation extended by the petitioner in the proceedings for enquiry and no appearances/compliance with the summons issued and it is for this reason that the proceedings for investigation are being delayed.

8.As far as the investigation is itself concerned, I had passed an order on 17.12.2020 recording the agreement of both parties to the effect that the investigation could continue on three days i.e. 29.12.2020, 30.12.2020 and 31.12.2020 and the petitioner will appear and co-operate in the conduct of the enquiry. There has been compliance of this order and some progress in enquiry. However, post these dates, differences appear to have cropped up again in regard to whether the petitioner has complied with the notices for submission of material. While the respondents state that certain material particulars, such as invoices containing the brand name of the products dealt with have not been supplied, the petitioner would aver to the contrary. I am not inclined to enter this arena of conflict as it involves disputed questions of fact and as it is for the parties to follow proper procedure for the of completion of assessment smoothly and in line with the statutory provisions. Suffice it to say that it is for the revenue to afford a

full and fair hearing to the assessee and for the assessee to appear when summoned and furnish full available material to facilitate the completion of assessment. In the absence of such co-operation the revenue will be justified in completing the assessment in accordance with law.

9.Mr.Sundareswaran confirms that the completion of proceedings for investigation leading to the issuance of show cause notice, will take, not less than six months. It is in these circumstances that the petitioner presses the mandamus seeking refund of the amount of Rs.2 crores paid at the time of investigation. According to the respondents, the amounts have been paid in line with the schedule of payments voluntarily suggested by the petitioner and as such there is no justification whatsoever for seeking such refund. Though I am only concerned with the legal issue of whether the collection of any amount during the process of investigation is statutorily permitted, some facts would have to be adverted to in deciding this issue.

10.The petitioner is a dealer in pulses, dhals and flour and manufactures food products, grain mill products and dhal. The dispute revolves around the short compass of whether the products sold are branded or unbranded. If unbranded, then there is no liability to GST. While the petitioner use the trade marks Shivam,



Trishul, Cycle and Nandhi, they claim that these are not registered marks and moreover that the petitioner voluntarily forgoes any actionable claim or enforceable right in regard to the usage of the aforesaid marks. An affidavit dated 29.09.2017 has been filed to this effect in terms of Clause (b) of Annexure to Schedule VI of CGST Rates for Goods. This affidavit is filed before the Assessing Officer and not the jurisdictional Commissioner and Mr.Sundareswaran would contend that the Statute specifically requires that such affidavit be filed only before the Jurisdictional Commissioner, thus disentitling the petitioner to any benefit thereunder.

11. This is a matter of assessment and the veracity or otherwise of the affidavit filed by the petitioner on 29.09.2017 will have to be tested by the Assessing Authority in the course of the assessment itself.

12. The legal issue raised is as to whether the petitioner is entitled to the refund of the amounts paid during investigation and the revenue relies upon the provisions of Section 74(5) of the Act. It would be relevant, in this context, to understand the Scheme of assessment as set out under Section 74 and for this purpose, I extract Section 74 in full below:

*74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.*

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax 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), in respect of the tax so paid or any penalty payable under the provisions of this Act or the 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.

(8) 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.

(9) *The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.*

(10) *The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.*

(11) *Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.*

*Explanation 1.— For the purposes of section 73 and this section,—*

*(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;*

*(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.*

*Explanation 2.— For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.*

13. Section 74 provides for a determination of tax not paid or short paid or erroneously refunded or the wrongful availment or utilization of Input Tax Credit (ITC) by reason of fraud, willful misstatement or suppression of facts. Sub-section (1) states that if the officer feels that the aforesaid circumstances arise in any case, he shall issue a show cause notice to the person concerned calling for an explanation in this regard and also proposing interest under Section 50 and penalty

equivalent to the tax proposed to be levied. Sub-section (2) states that the notice shall be issued at least six months prior to the time limit specified in Section 74(10) for issuance of the order of assessment.

14.Sub-section (3) states that where a notice has been issued under sub-section (1), it shall be supported by a statement containing the details of tax unpaid, short paid or erroneously refunded or ITC wrongly availed or utilized for such purpose other than those covered under sub-section (1) of Section 73. According to sub-section (4), the statement referred to is the same as in sub-section (3) of Section 73, however additionally mentioning as a pre-condition the alleged fraud, willful misstatement or suppression of facts with the intention to evade tax.

15.Sub-section (5) read with sub-section (6), which is critical to the present case, provides the first opportunity to an assessee for an amicable settlement of an assessment before the authorities. It states that an assessee may, prior to receipt of notice under sub-section (1), pay the tax along with interest under section 50 and penalty equivalent to 15% of such tax, on the basis of a self-ascertainment or as ascertained by the proper officer under information to him. On receipt of the information, sub-section (6) provides that no show cause notice shall be served

under section 74(1) in respect of the tax and interest. The provisions of sub-section (5) and (6) of Section 74 thus provide an opportunity for the assessee and/or the revenue to ascertain the proper amount of tax, interest and penalty and, even in cases where there might have been a shadow of misdeclaration/short payment of tax or wrongful availment or utilization of ITC, a closure of the proceedings at that stage on the basis of either a self-ascertainment by an assessee and acceptance of the same by the revenue or vice versa.

16. Where there is no such closure as contemplated under sub-sections (5) and (6), sub-section (7) provides for an avenue to the revenue to continue the proceedings. It states that where the proper officer, on receipt of the self-ascertainment believes that such ascertainment is incorrect and the amount falls short of the amount actually payable, he shall proceed to issue a show cause notice as provided for under sub-section (1). Sub-section (8) states that an assessee, when confronted with the show cause notice under sub-section (1), may opt for payment of the entire tax, interest under Section 50 and penalty equivalent to 25% of such tax within 30 days of issue of the notice. This is the second avenue available to the assessee and the revenue for amicable conclusion of the proceedings.

17. Sub-section (9) states that if an objection/response is filed to the show cause notice, then, after considering such objection, the Officer will determine the amount of tax, interest and penalty due from the person and issue an order-in-original and sub-section (10) provides for the time limit for issuance of such order.

18. Sub-section (11) states that any person served with an order-in-original under sub-section (9) has the option of remitting the tax and interest along with penalty amounting to 50% of such tax, within 30 days of communication of the order, in which case, all proceedings in respect of that notice shall stand concluded then and there. This consciously opens the door for a contest as the assessee, had it been inclined to settle matters amicably, would/should have chosen the avenues presented to it under sub-sections (5) and (8) and (11) of Section 74. Henceforth, an adversarial and contested position emerges. This, in my understanding, is the scheme of assessment under Section 74.

19. The remittance under Section 74(5) is in terms of Rule 142 of the Central Goods and Services Tax Rules, 2017 (in short 'Rules') and has to be made in Form GST DRC-03. Both the Rule and the Form (the latter as executed by the petitioner) are extracted below:

**142. Notice and order for demand of amounts payable under the Act.-(1) The proper officer shall serve, along with the**

(a) notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GST DRC-01,

(b) statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof electronically in FORM GST DRC-02, specifying therein the details of the amount payable.

(1A) The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.

(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act whether on his own ascertainment or, as communicated by the proper officer under subrule (1A),]he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.

[(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A.

(3) Where the person chargeable with tax makes payment of tax and interest under subsection (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within fourteen days of detention or seizure of the goods and conveyance, he shall intimate the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an order in FORM GST DRC-05 concluding the proceedings in respect of the said notice.

(4) The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 or the reply to any notice issued under any section whose summary has been uploaded electronically in FORM GST DRC-01 under sub-rule (1) shall be furnished in FORM GST DRC-06.

(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or

section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in FORM GST DRC-08.

**FORM GST DRC- 03**  
[See rule 142(2) & 142 (3)]

*Intimation of payment made voluntarily or made against the show cause notice (SCN) or statement*

1.	GSTIN		33AACCN9858N1ZR								
2.	Name		SHRI NANDHI DHALL MILLS INDIA PRIVATE LIMITED								
3.	Cause of Payment		Voluntary								
4.	Section under which voluntary payment is made		74(5) Voluntary								
5.	Details of show cause notice, if payment is made within 30 days of its issue		Reference No.: N.A.						Date Of issue : N.A.		
6.	Financial Year		2017-2018								
7.	Details of payment made including interest and penalty, if applicable (Amount in Rs.)										
Sr. No.	Tax Period	Act	Place of supply (POS)	Tax/ Cess	Interest	Penalty, if applicable	Others	Total	Ledger utilized (Cash/Credit)	Debit entry no.	Date of entry
1.	JUL 2017-MAR 2018	CGST	Tamil Nadu	50,00,000.00	0	0	0	50,00,000.00	cash	DC3310190341802	N.A.
2.	JUL 2017-MAR 2018	SGST	Tamil Nadu	50,00,000.00	0	0	0	50,00,000.00	cash	DC3310190341802	N.A.

8.Reasons, if any- Part Payment of CGST and SGST liability for the period from July 2017 to Sep 2019 – 1<sup>st</sup> installment paid voluntarily, as per the investigation of DGGI, Trichy Regional Unit.

9. Verification-

I hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

20.The revenue points out that the payment is 'voluntary' as per the form above and the same procedure has been followed in regard to the second instalment as well.



21. The petitioner has relied on the following decisions in support of its contention that any amount collected during investigation should be refunded in the absence of any determination of demand as against the concerned assessee:

1. *Gee Kay International vs. Union of India* (2008 (230) E.L.T. 590 (P&H))

2. *Dabur India Ltd. vs. State of Uttar Pradesh* (1990 (49) E.L.T. 3 (S.C.))

3. *Vodafone Essar South Ltd. vs. Union of India* (2009 (237) E.L.T. 35 (Bom.))

4. *Cleartrip Private Ltd. vs. Union of India* (2016 (42) S.T.R. 948 (Bom.))

22. According to the revenue, the above decisions have been rendered in the context of the erstwhile Central Excise and Service Tax Enactments where there was no express statutory provision for collection of an amount during investigation whereas the present remittances have been made in line with Section 74(5) and are hence permitted statutorily. Prior to the inception of the GST Act, instances were rife when officials of DRI and Customs Department were infamous for collecting advance payments of tax from assesses, many a time under coercion, and in the course of investigation itself. There are several decisions of Courts wherein such acts have been frowned upon, with Courts consistently holding that

no amounts may be collected prior to an actual determination of an amount payable by an assessee. With the inception of Section 74(5), it is the case of the revenue that the collection of amounts in advance has attained statutory sanction, provided the same are voluntary in Form GST-DR03.

23. Thus, according to the revenue, the remittances made by the petitioner during investigation in terms of Section 74(5) amount to 'self-ascertainment'. Having remitted two instalments of the tax as per its own ascertainment, it cannot now pray for a mandamus seeking refund of the amount. After all, revenue argues, the petitioner is well aware of the fact that its transactions are liable to tax and any remittances effected would be adjusted against final tax liability.

24. The basis of this argument is flawed as I am not in agreement with the submission that Section 74(5) is a statutory sanction for advance tax payment, pending final determination in assessment. In my view, this is contrary to the scheme of assessment under Section 74, as I have noticed in paragraphs 12 to 16 above.

25. The ratio of the decisions relied by the petitioner and several more besides, are to the effect that no collection can be insisted upon prior to a final determination of liability being made. These decisions, in my view, still hold the

field. What Section 74(5) provides is the first opportunity to an assessee to pay tax, interest and penalty liability even prior to the issuance of a show cause notice and such acceptance will have to be in the form of either self-ascertainment or an ascertainment by the proper officer.

26. Records were summoned to examine whether there was an ascertainment in this case. The records revealed the tabulation of instalments furnished by the assessee at the time of recording of statement and out of which the first two instalments have been paid. These, according to Mr.Sundareswaran constitute self-ascertainment and trigger the provisions of Section 74(5) and (7). Had this been the position, the records must contain material to show that (i) the assessee accepts the ascertainment made by it, (ii) the revenue has applied its mind and arrived at the position that the self-ascertainment by the assessee is inadequate and (iii) An ascertainment by the officer, as in the tabulation of payments (see para 3 of this order), the balance tax liability, after taking note of the amount of Rupees Seven Crores to be paid by the petitioner, is to be made by the officer. However, statement recorded at the time of search admitting GST liability and setting the scheme of instalments have been retracted by the petitioner on 05.11.2019 and the petitioner has consistently and vehemently been contested

the liability to tax. Importantly, the records also do not contain any ascertainment by the officer. The tabulation of payments in this case is joint, the petitioner offering a sum of Rupees Seven Crores (since retracted) and the Officer to ascertain the balance. This exercise has not been carried out and, with this, the requirement of 'ascertainment' under Section 74(5), fails.

27. Merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and has also made a few payments as per the statement, cannot lead to self-assessment or self-ascertainment. The ascertainment contemplated under Section 74(5) is of the nature of self-assessment and amounts to a determination which is unconditional, and not one that is retracted as in the present case. Had such ascertainment/self-assessment had been made, there would be no further proceedings contemplated, as Section 74(6) states that with ascertainment of demand in Section 74(5), no proceedings for show cause under Section 74(1) shall be issued. In this case, enquiry and investigation are ongoing, personal hearings have been afforded and both the parties are fully geared towards issuing/receiving a show cause notice and taking matters forward. Thus, the understanding and application of Section 74(5) in this case, is, in my view, wholly misconceived.

28. In this context I may usefully extract from a decision in the case of *Clear trip Private Ltd. and Ors.* (supra), wherein a Bench of the Bombay High Court at paragraph 16 holds as follows:

*16. We are clear in our minds and from the scheme of the Act and the Law as a whole that coercive measures, including effecting any arrest, would arise only when investigation has been completed and on launching the prosecution. If the prosecution is a criminal prosecution, then, there is no question of deviating or defeating from the Criminal Law. The Criminal Law contains several provisions including protective measures, which would enable the Petitioners to resist any arrest, as apprehended. In the scheme of the Criminal Law and particularly the Finance Act, 1994 as well, if it contains any penal provisions, it is not as merely because the investigations are underway that the arrest would be effected. Eventually, all that the Respondents are presently contemplating is to investigate the matter. The Petitioners do not dispute the right to investigate and in accordance with law. That they have already attended the offices of the concerned Respondents and once the statement of the Petitioners was recorded goes without saying that on further summons being issued and on called upon to attend the Officers of the Respondents, they will attend and co-operate in these investigations by producing all the documents and answering the requisite queries, subject, of-course, to their rights in law. It is only when these investigations conclude that the authorities would be in a position to take a decision whether to launch any prosecution. In such a prosecution as well, if the provisions of the Criminal Law, which enable arrest in cases of cognizable offences and non-bailable, that the Petitioners can have an apprehension and which also can be taken care of by approaching a competent Criminal Court. Secondly, there is no question of any recovery of tax by coercive means, unless the investigation results into issuance of a show cause notice, an opportunity to the Petitioner to resist the demand, a adjudication thereof by a reasoned order and protective remedies such as appeals. We do not think that any recovery by coercive measures is straightway permissible and particularly in the given facts and circumstances of the case.*

29. In SCA.No.3196 of 2021 (*M/s.Bhumi Associate vs. Union of India through the Secretary*) the Gujarat High Court is also concerned with a similar prayer as in this matter and the Bench has formulated the following guidelines for resolution of the above issues. The matter is pending decision.

*“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.”*

Sadly, the winds of change brought about by the era of GST do not appear to have made any impact on this position.

30. In the light of the discussion as above, the mandamus as sought for by the petitioner is issued. The amount collected, of Rupees Two Crores shall be refunded to the petitioner within a period of four (4) weeks from today.

31. This Writ Petition is allowed. No costs. Connected Miscellaneous

Petition is closed.

07.04.2021

vs/sl

Index: Yes

Speaking order

To

- 1.Senior Intelligence Officer,  
Director General of Goods and Service Tax,  
Trichy Regional Unit,  
No.10B/5, First Street, Jaya Nagar,  
KK Nagar Post,  
Trichy – 620 021.
- 2.Director General of Goods and Service Tax,  
Trichy Regional Unit,  
No.10B/5, First Street, Jaya Nagar,  
KK Nagar Post,  
Trichy – 620 021.
- 3.Director General-South Zone,  
Director General of Goods and Service Tax,  
C-3, C-Wing, II Floor,  
Rajaji Bhawan, Besant Nagar,  
Chennai-600 090.
- 4.Director General of Goods and Service Tax,  
Intelligence (HQ),  
West Block – 8, Wing No.6, 2<sup>nd</sup> Floor,  
R.K.Puram, New Delhi – 110066.

**DR. ANITA SUMANTH, J.**

vs/sl



**W.P. No.5192 of 2020 and**

**WMP. No.6135 of 2020**

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**07.04.2021**