



No recovery under GST during pendency of adjudication - It is against the Article 265 of the constitution

In the case of **M/S. Kesar Colour Chem Industries V/S The Intelligence Officer, Writ Petition No.17853 Of 2021 (T-Res)**, dated: **26.09.2024**, the **Hon'ble Karnataka High Court** has held that the recovery during pending adjudication is contrary to law and accordingly, contrary to Article 265 of the Constitution of India, the amount of Rs.2.50 crores is required to be refunded with interest as would be applicable in case of refund.

(The decision of the HC is enclosed with this blog)

Facts of the case

The petitioner/assessee has questioned the correctness and legality of, Investigation carried out under Section 67 of the Central Goods and Services Tax Act, 2017. The validity of the summons to the witness dated 31.07.2021. The assessee sought the relief in respect of the refund of the amount of Rs.2.50 crores collected, while keeping open the other contentions in light of pending adjudication initiated by issuance of show cause notice.

Contention of the Assessee

The assessee contended that the department do not have power to recover amounts during the pendency of investigation that has commenced even prior to issuance of show cause notice at the stage of Sections 67 and 70 and hence have sought for refund of amount paid.

The assessee contended that self-ascertainment of tax was not established and that recovery made during investigation was in violation of legal mandate contained in Article 265 of the Constitution of India. The supplies from M/s. Raj Chemicals have been long standing transactions and such supply is evidenced by e-way bills, issue of invoices and proof of transport.

The assessee argued that the show cause notice does not exclude payment of Rs. 2.50 crores which also strengthens the assertion that the amount paid was not towards self-ascertainment.

Contention of the Department

The department contended that the payment made under Section 74(5) read with Rule 142(2) of the GST Rules would be dealt with or adjusted by the department in accordance with Section 74 of the CGST Act. The DRC-03 specifically indicates nature of payment being 'voluntary' and has accordingly sought for dismissal of the petition.

Conclusion

The court held that the petition is allowed in part and while declaring that the recovery of tax made from the petitioner which though Revenue contends is deposit made by way of self-ascertainment under Section 74(5) of the CGST Act, is declared to be illegal and directed to be refunded within a period of four weeks from the date of receipt of certified copy of the order, with interest as is applicable. The Hon'ble HC held that it is contrary to Article 265 of the Constitution of India.



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 26TH DAY OF SEPTEMBER 2024

BEFORE

THE HON'BLE MR JUSTICE S SUNIL DUTT YADAV

WRIT PETITION NO.17853 OF 2021 (T-RES)

BETWEEN:

M/S. KESAR COLOUR CHEM INDUSTRIES
A PROPRIETARY CONCERN
HAVING ITS OFFICE AT
301 PRASHANT CHAMBER
74/78 BHANDARI STREET
MASJID BUNDER WEST,
MUMBAI – 400 003.
REPRESENTED BY ITS PROPRIETOR
MR. PRIYESH SHASHIKANT NANAVATI
S/O MR. SHASHIKANT NANAVATI
AGED ABOUT 54 YEARS.

...PETITIONER

(BY SMT. NIKITA BADHEKA, ADVOCATE FOR
SRI PARTH BADHEKA, ADVOCATE FOR
SRI PRADEEP KUMAR .J, ADVOCATE)



AND:

1. THE INTELLIGENCE OFFICER
BANGALORE ZONAL UNIT DGGI
UNIT NO.112,
SP ENCLAVE,
KH ROAD,
BENGALURU – 560 027.



2. THE SENIOR INTELLIGENCE OFFICER
BENGALORE ZONAL UNIT DGGI
UNIT NO.112,
SP ENCLAVE,
KH ROAD,
BENGALURU – 560 027.

...RESPONDENTS

(BY SRI JEEVAN J. NEERALGI, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE WRIT OF CERTIORARI OR SUCH OTHER WRIT OF APPROPRIATE NATURE, DECLARING THE INVESTIGATION CARRIED OUT UNDER SECTION 67 OF THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 (HEREINAFTER REFERRED TO AS "CGST ACT") BY THE RESPONDENTS AS BLATANT ABUSE OF POWER, BAD IN LAW, EXCESSIVE, ILLEGAL AND BEYOND JURISDICTION, AND CONSEQUENTLY TO QUASH THE SUMMONS TO WITNESS DATED 31.07.2021, BEARING DIN:202107DSS0000000A455, ISSUED UNDER SECTION 70 OF THE CGST ACT BY THE RESPONDENT NO.2, I.E., ANNEXURE-'B' AND ETC.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 26.07.2024 AND COMING ON FOR PRONOUNCEMENT OF ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE S SUNIL DUTT YADAV



C.A.V. ORDER

(PER: HON'BLE MR JUSTICE S SUNIL DUTT YADAV)

The petitioner has called in question the correctness and legality of, Investigation carried out under Section 67 of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act'); the validity of the summons to the witness dated 31.07.2021; declaration that the recoveries to the tune of Rs.2.50 crores "extracted coercively" from the petitioner by the respondents on 31.07.2021 vide Payment Challan in Form GST PMT-06 Payment Challan; recovery at the office of respondent Nos.1 and 2 on 03.08.2021 while responding to the summons under Section 70 of the CGST Act as abuse of power declaring that the recovery of Rs.2.50 crores under Section 74(5) of CGST Act as being illegal; to quash the statements coercively taken by the respondents from the petitioner as being illegal; pending investigation direct that there should be no further recovery; direction to the respondents to furnish copies of the statements attributed to M/s Raj Chemicals; direction



for investigation being carried out be transferred to Mumbai jurisdiction; and imposing of exemplary costs on respondent Nos.1 and 2 for causing mental agony.

2. Though the petitioner has sought for multiple reliefs, it is clear that they have confined their relief for refund of the amount of Rs.2.50 crores collected, while keeping open the other contentions in light of pending adjudication initiated by issuance of show cause notice.

3. The context in which proceedings were initiated by the respondents was that during investigation of M/s. Raj Chemicals, the statements of Sri Vijay Kumar Gupta one of the partners of M/s. Raj Chemicals, was stated to have been recorded under Section 70 of the CGST Act. It is stated that the said statement of Sri Vijay Kumar Gupta had referred to supplies made by M/s. Raj Chemicals to entities including that of the petitioner herein related to invoices raised without actual supply of any goods from M/s. Raj Chemicals. It was the further case of the respondents that an analysis of the



e-way bills would reveal that the vehicles had not moved as evidenced by the RFID/fastag data. It is stated that based on the said admission in the statement of Sri Vijay Kumar Gupta as well as analysis of e-way bills, investigation was initiated. The show cause notice eventually came to be issued on 30.11.2022. It is further submitted that during the course of investigation prior to issuance of show cause notice, forcible recovery has been made and it was sought to pass it off as voluntary payments as per procedure prescribed. The details of payments made are as follows:-

- “1. DRC No.DC2707210844665
dated 31.07.2021 for Rs.1,00,00,000/-.
2. DRC No.DC2708210031767
dated 03.08.2021 for Rs.1,50,00,000/-.”

4. It is the contention of the petitioner that the amounts were paid under duress and forcibly and the factual matrix and the manner of payment narrated by the petitioner in the list of dates and events produced before this Court is extracted hereinbelow:-



Sl. No.	Date	Time	Event	Exhibit
1	29.07.21		Bengaluru DGGI visit Rasik Kunj, Ground Floor, Mathuradas Road, Kandivali Mumbai 400067, which is the registered place of business of the Petitioner. Since the building is undergoing redevelopment, Nil Mahazar is drawn and Petitioner informs that he is sitting in Additional place of business carrying out business.	
2	29.07.21	9.50 a.m	The Respondents, total 5 officers visit the office of the Petitioner at 301 Prashant Chamber 74/78 Bhandari Street, Masjid Bunder West, Mumbai 400003. The Petitioner extends full cooperation.	
3	29.07.21	2.30 p.m	All mobile phones taken away having Mobile No 9324545262 and 9820185583, rendering the Petitioner unable to carry on business or banking. Additionally CPUs and hard disks also seized	
4	29.07.21		All possible details with regards to Raj Chemicals were submitted to the Officers. They were in	



			the office for the entire day.	
5	30.07.21	12.30 a.m	Respondents decided to sleep in the office of the Petitioner and did not allow the Petitioner to go home, despite assurances that he will rejoin working hours next day. The office is 150 sq ft. 2 officers along with the staff of the Petitioner and Petitioner himself spent the night in the office. The Petitioner had to sit all night. (Details mentioned at para 23 onwards in the Petition).	
6	30.07.21	11.30 a.m	3 officers along with Respondent No 2 arrive at the office premises. The Petitioner was physically removed from his chair and the same was taken by Respondent No 2. Investigation and threats of arrests continued with renewed gusto.	
7	30.07.21	Evening	The statement was being typed by the Respondents and the Petitioner was not allowed to even read the same properly. Only cosmetic changes about	



			personal details were allowed. They were forced to sign the statement failing which he was threatened with arrested (sic).	
			Finally after detention and ill treatment in his own office for close to 2 days, Petitioner agreed under pressure to arrange ad hoc 1,00,00,000/- to pay as soon as the bank opens and agreed to come to Bengaluru for which summons would be issued.	
8	31.07.21	12.30 a.m	Late in the night, Statement was coercively signed and Panchnama signed wherein witnesses were not 2 people of good standing from the locality but the drivers of the Respondents. The Panchnama wrongly mentions the time as 11 30 pm 30-07-21.	A-11-Part of SCN
9	31.07.21	12.30 a.m	Summons issued to attend Bengaluru on 2nd August 21. The Petitioner requested that last 3 days have taken a toll on his health and he is exhausted, and he requested that he be allowed to attend after a	B-Page 65



			few days. Which initially the officers agreed but constantly called the Petitioner on 2nd August 21 and directed him to come on 3rd August 21.	
10	31.07.21	12.30 p.m	As soon as possible, despite going through 2 days of mental and physical trauma, under the constant calls from the officer under their directions 1 crore paid through RTGS at the Bank. All through the Investigation the petitioner had no access to any legal consultation.	Page 63
11	03.08.21		Petitioner attends the summons and was kept on waiting till late afternoon. Whilst all phones and contact details of the Petitioner was unavailable him him (sic) since 30-07-21 due to seizure by the Authorities, these officers directly spoke to the Debtors of the Petitioner, the Respondent made them deposit the payment in the Petitioner's account. Subsequently after confirming the payment, the Petitioner's seized phones were returns and it was informed to him	C Page 67



			<p>to make payment of 1.5 crores by e-challan since they would now be able to access the OTP on phone, whilst they were before the Inv Authorities in Bengaluru (details para 46 onwards). The Petitioner was under constant threat of arrest and the payment was condition precedent to allow him to leave the Bengaluru office. The Petitioner's CA who was also traveling with him, asked the Petitioner to request the Officers to allow under protest letters which were not accepted.</p>	
12			<p>DRC-01 for both payments i.e. 31-07-21 and 03-08-21 are attached herewith, wherein the Petitioner was strictly forced to make payment under 74(5).</p>	
13	10.08.21		<p>Petitioner was mentally drained and physically exhausted due to the 2-day detention in his office and subsequent rush to the Bengaluru. After coming back took a few days to mentally and physically recover and finding legal help,</p>	H Page 149



			where he was directed to note down the entire details in an Affidavit and file an interim retraction affidavit till the Statement is received.	
14	16.09.21		Petitioner filed Writ Petition before the Hon'ble Karnataka HC.	
15	30.09.21		Hon'ble HC, grants protection to the Petitioner from coercive recovery and Petitioner agrees to cooperate with Investigation.	
16	01.12.22		SCN issued by the DGGI transferred to Nodal Officer. Petitioner never called again after attendance on 03-08-21. The Petitioner has complied with each and every detail in the SCN and attended on various occasions.	Copy to be presented in Court

5. It is the further stand of learned counsel for the petitioner Ms.Nikita Badheka that they are cooperating in the investigation pursuant to the order of 30.09.2021 passed in the writ petition restraining the respondents



from taking coercive steps compelling the petitioner to pay amounts during the course of investigation.

6. It is the stand of the petitioner that statements taken/recorded at 12.30 am on 31.07.2021 and during the summons proceedings at Bengaluru on 03.08.2021 has been retracted by the petitioner by filing affidavit dated 10.08.2021 (Annexure-H). It is further submitted that the writ petition was filed within one month thereafter to claim refund.

7. The legal contention raised on behalf of the petitioner is that the respondents do not have power to recover amounts during the pendency of investigation that has commenced even prior to issuance of show cause notice at the stage of Sections 67 and 70 and hence have sought for refund of amount paid.

8. It is the further contention of the petitioner that self-ascertainment of tax was not established and that recovery made during investigation was in violation of



legal mandate contained in Article 265 of the Constitution of India.

9. It is also the contention of the petitioner that the supplies from M/s. Raj Chemicals have been long standing transactions and such supply is evidenced by e-way bills, issue of invoices and proof of transport.

10. It is the further contention of the petitioner that the show cause notice does not exclude payment of Rs. 2.50 crores which also strengthens the assertion that the amount paid was not towards self-ascertainment.

11. The respondents have filed their statement of objections to the effect that the petitioner seeks to interfere with the investigation which is being lawfully pursued. It is asserted that information of evasion of tax was gathered by the officers of DGGI while conducting investigation in respect of M/s. Raj Chemicals. The Department submits that they have placed reliance on the statements of Sri. Vijay Kumar Gupta which would indicate



the role of the petitioner in tax evasion constituting receipt of invoices without actual supply of goods.

12. It is asserted that the statements of Sri. Priyesh Shashikant Nanavati, the proprietor of M/s. Kesar Colour Chem Industries were voluntary and deliberate and signed after reading the statements.

13. It is further specifically asserted that the payments were made during the investigation through Form GST DRC-03 dated 31.07.2021 as well as payment made under identical circumstances on 30.07.2021 were voluntary and is to be construed to be a part of self-ascertainment under Section 74(5) of the CGST Act.

14. It was specifically contended that DRC-03 was generated by the personnel of the petitioner from outside the office of DGGI, Bengaluru. It is asserted that the retraction of the statements was belated and there is no explanation for delayed retraction of the statements.



15. The department has specifically contended that the payment made under Section 74(5) read with Rule 142(2) of the GST Rules would be dealt with or adjusted by the department in accordance with Section 74 of the CGST Act. The revenue has further asserted that the DRC-03 specifically indicates nature of payment being 'voluntary' at serial No.3 and has accordingly sought for dismissal of the petition.

16. It is to be noticed that the petitioner has sworn to an Affidavit on 10.08.2021 clearly retracting the voluntary statements stated to have been made before the Authorities specifically asserting that statements stated to have been recorded during investigation were given under duress and coercion. It is specifically asserted in the said Affidavit that the petitioner had visited the Investigation Branch of the Bengaluru Unit on 29.07.2021 and in the continued extended investigation, statement was recorded in the early hours of 31.07.2021. It is stated that the petitioner was not permitted to make any



substantive changes to the statement recorded and when he signed such statement, he was under "tremendous duress and mental trauma". It is stated that he was forced to sign the statement prepared by the Revenue officials on 31.07.2021 at 12.30 a.m. and such statement contains "coerced admissions" and "grave threat to my freedom by constant threats of arrest".

17. It is also asserted that another statement was prepared containing an undertaking by him to make additional payment. It is specifically asserted that the statement dated 03.08.2021 was also drafted by the Intelligence Officers and was signed, but were not voluntary and under "unimaginable duress, threats of incarceration, blatant use of authority and mental torture".

18. Affidavit is dated 10.08.2021 and relates to two statements stated to have been made on 31.07.2021 and 03.08.2021, which can be stated to be proximate in time so as to construe the retraction as being made within reasonable time of recording of statements and



accordingly are required to be taken note of. It is also of significance to notice that the writ petition itself was filed on 16.09.2021, all within a span of approximately about 45 days and taking note of the explanation of inaction in the interregnum time, the time lag between completion of investigation and recording of last of the statements on 03.08.2021, swearing to the Affidavit on 10.08.2021 and filing of the writ petition itself on 16.08.20221, if all taken together it cannot be stated that the delay in taking action has defeated the right of the petitioner to assert that the statements recorded were under duress. Even otherwise, the substantive right of the petitioner to contest the recovery which according to the petitioner was under duress cannot be defeated on mere ground of delay in taking action, while noting that the substantive adjudication by way of show cause notice still is to be completed.



19. The legal position regarding self ascertainment in terms of Section 74(5) of the CGST Act attributed to the petitioner is a matter that requires consideration.

20. In terms of the Scheme of the CGST Act, it must be noticed that the assessee has an opportunity even before the service of notice under Section 74(1) on the basis of "his own ascertainment of such tax or the tax as ascertained by the proper officer", make payment and inform the proper officer in writing regarding such payment as envisaged under Section 74(5).

21. Upon such payment, in terms of Section 74(5) of the CGST Act, the Proper Officer in terms of Section 74(6) is barred from serving any notice under sub-section 74(1), though in terms of Section 74(7), whether Proper Officer is of the opinion that the amount paid under Section 74(5) falls short of the amount payable, he shall proceed to issue notice under Section 74(1).

22. Section 74(7) of the CGST Act states that,



"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 willful misstatement or suppression of facts.—

XXXX

(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.

(emphasis supplied)

23. In terms of Section 74(8), once the person chargeable with tax pays tax, interest and penalty "... *all proceedings in respect of the said notice shall be deemed to be concluded.*"

24. It must be noted that the payments made by the petitioner of Rs.1.00 crore on 31.07.2021 and further amount of Rs.1.50 crores on 03.08.2021 and even if 'DRC-03 declaration' is taken note of, it cannot be stated that in the present case, there is self-ascertainment. For



the purpose of self-ascertainment, it is clear that it amounts to a voluntary determination by the assessee himself as regards the liability of tax. In light of the stand taken in the Affidavit dated 10.08.2021 and the averments made in the writ petition filed on 16.09.2021, this element of voluntariness is absent and accordingly, the *sine qua non* of self-ascertainment is not fulfilled. Though the declaration in Form DRC-03 contains a declaration that the filing is voluntary, the facts as noticed above are sufficient to construe that such declaration was in fact not voluntary.

25. It is also to be noted that, if the Authority was of the view that petitioner had made payments as a part of the process of self-ascertainment under Section 74(5) of the CGST Act, the scheme of Section 74 contemplates that proceedings would terminate either on acceptance of self-ascertainment or if the Authorities were of the view that the self-ascertainment and the amount paid under Section 74(5) would fall short of the amount actually payable, the Authority could in terms of Section 74(7)



proceed to issue a notice as provided for under Section 74(1) in respect of such amount which falls short of the amount actually payable. In the present case, the show cause notice issued dated 30.11.2022 would clearly indicate that the notice sought to be issued under Section 74(1) would indicate a fresh and complete adjudication and is not a notice as regards short fall of actual tax required to be paid as contemplated under Section 74(7) and accordingly, the State itself is estopped from contending that there was self-ascertainment.

26. A perusal of the summary of show cause notice and the show cause notice would indicate that the State itself has not accepted the self-ascertainment

27. In light of adjudication still to conclude and notice under Section 74(1) of the CGST Act is already issued, the question of going back to the stage of 74(5) does not arise, as in terms of Section 74(5), the self-ascertainment process is to be completed prior to the



issuance of notice under Section 74(1), subject to issuance of notice under Section 74(7) as regards shortfall.

28. If that were to be so, the recovery made pending adjudication in the present factual matrix being one which could be construed to be a recovery contrary to law and accordingly, contrary to Article 265 of the Constitution of India, the amount of Rs.2.50 crores is required to be refunded with interest as would be applicable in case of refund.

29. It is clear that the observations made herein are limited only for the purpose of disposal of present petition and are not to be deemed adjudication as regards other aspects.

30. Though various contentions are raised regarding the ill-treatment of the petitioner, it would not be appropriate to express any finding such allegations made and contested and denied by the Revenue officials while observing that the spirit of the instructions and



guidelines to be followed as made in Instruction No.01/2020-21 [GST-investigation] dated 02.02.2021 passed by Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST-Investigation Wing, is required to be adhered to.

31. It is clarified that other contentions though raised regarding validity of investigation have not been seriously contested at the time of advancing oral arguments and accordingly are not adjudicated and are kept open and the findings are confined to the issues raised during arguments. It is also clarified that the observations made herein cannot be taken to be observations made as regards validity of the adjudication pursuant to the show cause notice pending consideration.

32. Accordingly, the petition is allowed in part and while declaring that the recovery of tax made from the petitioner which though Revenue contends is deposit made by way of self-ascertainment under Section 74(5) of the



CGST Act, is declared to be illegal and directed to be refunded within a period of four weeks from the date of receipt of certified copy of the order, with interest as is applicable.

Sd/-
(S SUNIL DUTT YADAV)
JUDGE

VP/VGR