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“Refund of deposit during search/investigation”



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OVERVIEW

The Article delves into the nuances of tax refund scenarios during search or investigation proceedings under the Central Goods and Services Tax (GST) Act, 2017. It navigates through the constitutional provisions, court decisions, and regulatory directives. Anchored by Article 265 of Indian Constitution "*no tax shall be charged or collected except by authority of law*", the discussion unfolds with a focus on jurisdictional issues and the necessity for adjudication before any recovery of amount. The legal symphony crescendos with insights from cases like *Suretex Prophylactics (India) Pvt. Ltd.* and unfolds further through directives like Instruction No. 01/2022-23, which accentuates the requirement for an adjudicating authority's imprimatur. The Article then weaves through instances of involuntary deposits during searches, emphasizing the significance of procedural adherence. The legal composition concludes with a nuanced exploration of self-assessment under Section [74\(5\)](#) of the CGST Act, 2017, portraying court decisions that calls for refunds in situations where deposits are made under investigation stress. Overall, the overview provides a comprehensive and engaging journey through the complexities of tax refund dynamics within the GST framework.

REFUND IN ABSENCE OF JURISDICTION

Article 265 of the Indian Constitution specifies that "no tax shall be charged or collected except by authority of law". Moreover, the tax collection without any authority of law would also amount to depriving person of his property without any authority of law and this would be violative of Article 300 A of the Constitution.

In case *Suretex Prophylactics (India) (P.) Ltd. v. Union of India*¹, the Karnataka High Court opined that since the petitioner had made the payment under protest and it had not been preceded by an adjudication order, the respondents lacked the jurisdiction or authority of law to recover INR 1.5 crores, which is clearly violative of Article 265 of the Constitution of India. As a result, the petitioner would be entitled to a refund of the aforesaid amount that the respondents had collected without jurisdiction or authority of law.

In case of *Diwakar Enterprises Pvt. Ltd. v. Commissioner of CGST*², the Honorable High Court observed that if tax is collected without any authority of law, the same would amount to depriving a person of his

property without any authority of law and would infringe his right under Article 300 A of the Constitution of India as well. In the instant case, as per the department, the petitioner has deposited the impugned amount voluntarily but no receipt was given by the Proper Officer after accepting the impugned amount. Therefore, it was held that the amount deposited by the petitioner under protest was liable to be refunded along with 6 % interest.

WITHOUT ADJUDICATION

In absence of adjudication or the order for payment, the question of recovery of any amount does not arise. The amounts collected from a person without there being adjudication are in nature of pre-deposit and the same not in the nature of tax/duty, it deserves to be refunded back to the person paying it³. In case of **Vodafone Essar South Ltd. v. Union of India**⁴, the Bombay High court concluded that without adjudication of liability during the course of an investigation the assessee should not be forced to pay any amount.

In case of **Makemytrip (India) (P.) Ltd. v. Union of India**⁵, the Delhi High Court held that without even a Show Cause Notice (SCN) being issued and without there being any determination of the amount of service tax arrears, the resort to the extreme coercive measure of arrest followed by detention was impermissible in law. In this case, the amount that was paid by petitioners as a result of the search of their premises by DGCEI without any adjudication much less an SCN, was ordered to be refunded to the petitioners.

In case of **Century Knitters (India) Ltd. v. Union of India**⁶, it was held that any amount illegally collected cannot be retained without issuance of show cause notice and adjudication of liability and such amount is liable to be refunded.

In case of **Bhumi Associate v. Union of India**⁷, some directions or guidelines were issued that the Central Board of Indirect Taxes and Customs as well as the Chief Commissioner of Central/ State Tax of the State of Gujarat were directed to issue 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 aforesaid directions, then strict disciplinary action should be initiated against the concerned officer.

On the basis of this, the **Instruction No. 01/2022-23 (GST investigation) dated 25-05-2022** has been passed by central Board of Indirect Taxes and Customs. The instruction states that no recovery/collection of amounts can be made unless the amount become payable in pursuance of the order passed by adjudicating authority or otherwise become payable under the provisions of the CGST Act, 2017.

Under CGST Act, 2017 a taxpayer has an option to deposit the tax voluntarily by way of submitting DRC-03 on GST portal. Such voluntary payments are initiated only by the taxpayer by logging into the GST portal using its login id and password. It is further observed that recovery of taxes not paid or short paid, can be

made under the provisions of Section [79](#) of CGST Act, 2017 only after following due process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order.

There not be any circumstances necessitating recovery of tax dues during the course of search or inspection or investigation proceedings. However, there is also no bar on the taxpayers for voluntarily making the payments. But, if the recovery of deposit been made under protest, threat or coercion the same must be refunded back to the depositor.

Moreover, the above instruction also provides that no recovery of tax should be made during search, inspection and investigation unless it is voluntary. The provisions of search and inspection and summon is been mentioned under Section [67](#) and section [70](#) of the CGST Act, 2017. Section 67(1) of the said act confers power of inspection, search and seizure upon the proper officer not below the rank of Joint Commissioner and Section 70 of the said act confers the power on the authority to summon person to give evidence and adduce evidence.

Further, the ***Circular No. 1081/02/2022-CX., dated 19-01-2022*** by CBIC states that arrears are the overdue payment of the amount of tax, interest, fine or penalty that is confirmed against a person who is liable to pay the same to the exchequer and it arises as result of Order-in-Original.

INVOLUNTARY DEPOSIT DURING SEARCH

There have many instances in which the deposit has been made involuntarily either in threat, coercion or under protest.

Furthermore, the deposit is said to be of involuntary nature when it does not fulfill the provisions of Rule [142\(1A\)](#) and [142\(2\)](#) of the CGST Act, 2017. Under Rule 142 (1A), a proper officer, before service of notice under Section [73\(1\)](#) or Section [74\(1\)](#) of the 2017 rules seeks to communicate details of tax, interest or penalty in the prescribed form of GST DRC-01A whereas Rule 142(2) mandates that if payments/deposits were voluntary, then an acknowledgement of having received the payment should emanate from the proper officer in the prescribed form of GST DRC-04.

Under section 74(5) of CGST Act, 2017 a person can voluntarily make payment of tax along with interest and 15% penalty on its own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment. However, if a person made payment as a gesture of goodwill and bonafide, that person has full rights to seek necessary refund at the appropriate time and therefore they should not be regarded as admission of liability. Reference at this stage can further be made to judgement of Karnataka High Court in case ***Union of India v. Bundl Technologies (P.) Ltd.***⁸, wherein the question was whether the amount was voluntarily paid during investigation by the company under Section [75\(5\)](#) of the CGST Act, 2017. The appeal was dismissed and The Hon'ble Court held that the payment by the petitioner is not being made voluntarily under section 74(5) of CGST Act and it should not be treated as an admission of its liability.

In case of ***Vallabh Textiles v. Senior Intelligence Officer***⁹, the Assessee contended that the cumulative sum was deposited under coercion during search proceedings. The Delhi High Court opined in this case that the deposit of amount pending search proceedings was not a voluntary payment as there was no acknowledgement of acceptance of payment issued in Form GST DRC-04 as mandated under Rule 142 of CGST Act, 2017. The Amount deposited did not have element of voluntariness attached to it. Payments made were involuntary and same was evident from fact that deposits were made during midnight and early hours when search was not concluded. Hence in this case the court directed the department to refund the deposit along with interest.

In case ***Samyak Metals (P.) Ltd. v. Union of India***¹⁰, the petitioner assessee was forced to deposit tax in lieu of Input Tax Credit including interest and penalty. It has been contended by the assessee that the amount had been recovered by department without passing adjudication order and following of procedure under Section [73](#) and [74](#) of CGST Act, 2017 and even after depositing abovesaid amount no GST DRC-04 had been issued by respondent. In this case, it was held by the High Court of **Punjab and Haryana** that as per Rule 142(2) of CGST Rules, 2017, when a payment is made in FORM GST DRC-03, proper officer has to issue acknowledgement in FORM GST DRC-04. Further, the department has not followed CBIC Instruction NO. 1/2022-23, dated 25-05-2022 which has clarified that there is no bar on taxpayers for voluntarily making payments on the basis of ascertainment of their liability on non-payment/short payment of taxes before or at any stage of proceedings. Therefore, in light of above the department was ordered to refund the amount impugned to assessee along with simple interest of 6% per annum from the date of deposit till refund is made.

Furthermore, the Hon'ble Madras High Court in ***Senior intelligence officer, DGGI v. Shri Nandhi Dhall Mills India (P.) Ltd.*** has held that merely because the assessee had signed a statement admitting tax liability under the stress of investigation and had also made a few payments as per the statement, cannot lead to self-assessment or self-ascertainment. The ascertainment contemplated under Section 74(5) of the CGST Act is of the nature of self-assessment and amounts to a determination by it which is unconditional, and not one that is retracted. Thus, the understanding and application of Section 74(5) of the CGST Act is wholly misconceived. Further directed the Revenue Department, to refund the amount of INR 2 crore collected from the assessee during the investigation.

CONCLUSION

In summation, the discourse on tax refund within the ambit of the Central Goods and Services Tax (GST) Act unveils a meticulous interplay of constitutional provisions, judicial precedents, and regulatory directives. Noteworthy court decisions, including Suretex Prophylactics (India) Pvt. Ltd., alongside regulatory directives like Instruction No. 01/2022-23, accentuate the indispensability of a sound legal foundation. Instances of involuntary deposits during searches, scrutinized in cases such as *Vallabh Textiles v. Senior Intelligence Officer* and *Samyak Metals (P.) Ltd. (supra)*, highlight the significance of procedural adherence. The nuanced exploration of self-assessment under Section 74(5) of CGST Act, 2017 elucidates that admissions made under the duress of investigation do not tantamount to self-assessment, warranting rightful refunds. In essence, the legal paradigm governing tax refund dynamics demands a seamless integration of legal principles, procedural rectitude, and unwavering fidelity to constitutional norms.

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1. Writ petition No. 2444 of 2022 (T-Cus), dated 7-2-2023.
2. [\[2023\] 149 taxmann.com 419/2023 \(74\) GSTL 202/98 GST 322 \(Punj. & Har.\)](#)
3. Suretex Prophylactics (India) Pvt. Ltd.'s case (*supra*).
4. [2009 taxmanm.com 730/2009 \(237\) ELT 35 \(Bom.\)](#)
5. [\[2016\] 73 taxmann.com 31/58 GST 397 \(Delhi\)](#)

- [6.](#) 2013 (293) ELT 504 (Punj. & Har.)
- [7.](#) [\[2021\] 124 taxmann.com 429/2021 \(46\) GSTL 36/84 GST 634 \(Guj.\)](#)
- [8.](#) [\[2022\] 136 taxmann.com 112/91 GST 709 \(Kar.\)](#)
- [9.](#) [\[2022\] 145 taxmann.com 596/\[2023\] 95 GST 751/2023 \(70\) GSTL 3 \(Delhi\)](#)
- [10.](#) [\[2023\] 151 taxmann.com 225/2023 \(41\) GSTL 411/98 GST 520 \(Punj. & Har.\)](#)
- [11.](#) W.P. No. 5192 of 2020 and WMP. No. 6135 of 2020, dated 7-4-2021.