

No GST to be paid during Search & Seizure unless accepted as GST liability

The Hon'ble Madras High Court in *Shri Nandhi Dhall Mills India Pvt. Ltd. v. Senior Intelligence Officer, DGGST & Ors. [W.P. No. 5192 of 2020 and WMP. No. 6135 of 2020]* directed the Revenue Department to refund the amount of INR 2 crore collected from the assessee during the investigation. 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.

Facts:

Shri Nandhi Dhall Mills India Pvt. Ltd. ("**the Petitioner**") is registered as a Small Scale Industry and is engaged in the business of dealing in pulses, dhals, and flour and also manufactures food products, grain mill products and dal.

An investigation was conducted by the officials of the Director General of Goods and Services Tax ("**the Respondents**") in the premises of the Petitioner on October 22, 2019 and various documents and registers were seized. In the course of the investigation, a statement was recorded to the effect that the Petitioner has not discharged its GST liability correctly and it had accepted that there has been a mistake in computation of GST liability and assured the Respondents that the liability would be discharged along with applicable interest.

Further, a scheme of payment was set out and the undertaking was signed by the Managing Director of the Petitioner on October 22, 2019. Further, the Petitioner remitted a sum of INR 1 crore in FORM GST DRC-03 corresponding to Rule 142(2) and Rule 142(3) of the Central Goods and Services Tax Rules, 2017 ("**CGST Rules**") read with Section 74(5) of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") on the same day. The second installment of the tax amounting to INR 1 crore was paid on October 30, 2019.

Further, the Managing Director of the Petitioner vide letter dated November 05, 2019 retracted its earlier statement and stated that there is no tax liability and that the Managing Director and employees of the Petitioner were forced to accept the liability to tax and the admission was, by no means, voluntary but 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.

This writ petition has been filed to restrain the Respondents from demanding any amount from the Petitioner except by following the due process of law and to refund a sum of INR 2 crores along with statutory interest under the provisions of the CGST Act.

Issue:

Whether the Petitioner is entitled to refund of INR 2 crores paid during investigation along with interest?

Held:

The Hon'ble Madras High Court in ***W.P. No. 5192 of 2020 and WMP. No. 6135 of 2020 decided on April 07, 2021*** held as under:

- Analyzed the provision of Section 74 of the CGST Act and noted that, Section 74(5) read with Section 74(6) of the CGST Act, provides an opportunity for the assessee and/or the revenue to ascertain the proper amount of tax, interest and penalty and amicable settlement for an assessment. At this stage the proceedings are closed on the basis of either a self-ascertainment by an assessee and acceptance of the same by the revenue or vice versa. However, if where there is no such closure then it provides for an avenue to the revenue to continue the proceedings. Further, 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 ("**SCN**") as provided for under Section 74(1) of the CGST Act.
- Observed that, Section 74(5) of the CGST Act is not a statutory sanction for advance tax payment, pending final determination in assessment and is contrary to the scheme of assessment set out under Section 74 of the CGST Act. Section 74(5) of the CGST Act provides the first opportunity to an assessee to pay tax, interest and penalty liability even prior to the issuance of a SCN and such acceptance will have to be in the form of either self-ascertainment or an ascertainment by the proper officer.
- Stated that, the records must contain material to show following:
 - the assessee accepts the ascertainment made by it.
 - the revenue has applied its mind and arrived at the position that the self-ascertainment by the assessee is inadequate.
 - An ascertainment by the officer, of the the balance tax liability, 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 and the Petitioner has consistently and vehemently contested the liability to tax. With this, the requirement of 'ascertainment' under Section 74(5) of the CGST Act fails.

- Held that, merely because an assessee has signed a statement admitting tax liability under the stress of investigation 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) 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.
- Further held that, had such self ascertainment/self-assessment been made, there would be no further proceedings, as Section 74(6) of the CGST Act states that with ascertainment of demand in Section 74(5) of the CGST Act, no proceedings for SCN under Section 74(1) of the CGST Act shall be issued. However in the present case, the enquiry and investigation are on-going, personal hearings have been afforded and both the parties are fully geared towards issuing/receiving a SCN and taking matters forward. Thus, the understanding and application of Section 74(5) of the CGST Act is wholly misconceived.
- Directed the Respondents to refund the amount of INR 2 crore collected during investigation within a period of 4 weeks of the judgment. Further, restrained the Respondents from demanding any amount from the Petitioner except by following the due process of law.

Comments:

To know more, kindly watch our video on **“No GST to be paid during Search & Seizure unless accepted as GST liability”** by CA Bimal Jain:
<https://www.youtube.com/watch?v=tOnb5p6z1os>

Relevant Provision:

Section 74 of the CGST Act:

“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 wilfull-misstatement or suppression of facts.

74. (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 and 125 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."

We have recently released the 6th Edition of our GST Book titled "**GST LAW AND COMMENTARY – WITH ANALYSES AND PROCEDURES**", in a set of 3 Volumes. We thank you all for the support and your enduring response.

Have a look at the complete tour of the Book at: <https://rb.gy/3hifj3>

Order your copy now and be a part of GST learning excursion in most comprehensive and lucid form !!

This book can be ordered online at: <https://rb.gy/benrpb>

DISCLAIMER: The views expressed are strictly of the author and A2Z Taxcorp LLP. The contents of this article are solely for informational purpose. It does not constitute professional advice or recommendation of firm. Neither the author nor firm and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any information in this article nor for any actions taken in reliance thereon.