

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 14TH DAY OF SEPTEMBER 2021

BEFORE

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

WRIT PETITION No.4467/2021 (T-RES)

Between:

M/s. Bundl Technologies Private Limited
No.55, Sy. No.8-14, Ground Floor,
I & J Block, Embassy Tech Village,
Outer Ring Road,
Devarbisanahalli,
Bengaluru - 560 103
(Rep. by Panduranga Acharya,
Director - Legal).

... Petitioner

(By Sri Lakshmikumaran, Advocate for
Sri Ravi Raghavan, Advocate)

And:

1. The Union of India
Through its Revenue Secretary,
Department of Revenue,
Ministry of Finance,
128-A/North Block,
New Delhi - 110 001.
2. Directorate General of Goods and
Services Tax Intelligence,
New Delhi,
5th Floor, MTNL Telephone,
Exchange Building,
8, Bhikaji Cama Place,
New Delhi, Delhi - 110 066.

3. Senior Intelligence Officer,
Directorate General of Goods and
Services Tax Intelligence,
Hyderabad Zonal Unit - 500 016
H.No.1-11-222/4,
Lane opp: HDFC Bank.
4. Deputy Director
Directorate General of Goods and
Services Tax Intelligence,
Hyderabad Zonal Unit - 500 016
H.No.1-11-222/4,
Lane opp: HDFC Bank.
5. Additional Director
Directorate General of Goods and
Services Tax Intelligence,
Hyderabad Zonal Unit - 500 016
H.No.1-11-222/4,
Lane opp: HDFC Bank.
6. Principal Additional Directorate General,
Directorate General of Goods and
Services Tax Intelligence,
Hyderabad Zonal Unit - 500 016
H.No.1-11-222/4,
Lane opp: HDFC Bank.
7. The State of Karnataka
Through its Principal Secretary
Finance Department
Vidhana Soudha,
Bengaluru - 560 001.
8. Commissioner of State Tax,
Goods and Service Tax,
Bengaluru - 560 071. ... Respondents

(By Sri M.B. Naragund, Addl. Solicitor General for
Sri Amit Deshpande, Advocate)

This Writ Petition is filed under Articles 226 of the Constitution of India, praying to direct the respondents to forthwith refund the amount of Rs.27,51,44,157/- illegally collected from the petitioner and etc.

This Writ Petition coming on for preliminary hearing in 'B' Group this day, the Court made the following:

ORDER

This order has been divided into the following Sections to facilitate analysis:-

I	Case as made out in the Pleadings	
II	Case as made out by way of oral submissions	
III	Analysis: A) Refund and alternative remedy B) Self-ascertainment and Section 74(5) of CGST Act C) Amount paid under coercion D) Right of Bona fide Tax Payer to be treated with dignity E) Video recording of Investigation F) Other prayers	

The petitioner has filed the present writ petition seeking for; issuance of a writ of mandamus directing the respondents to refund an amount of Rs.27,51,44,157/- illegally collected from the petitioner, issuance of an appropriate writ in the nature of direction to the respondents not to take any coercive action against the petitioner and its officials during the pendency of ongoing investigation, issuance of a writ directing the respondents to pay interest of 12% p.a. on the amount the refund of which is sought for, issuance of a writ directing the respondents to provide the petitioner the copies of statement of officials of the petitioner recorded during investigation, issuance of a writ to direct the respondents to provide the petitioner the details of information collected by the respondents from 'M/s.Greenfinch Team Management Pvt. Ltd. (hereinafter referred to as 'Greenfinch'). The petitioner has also sought for issuance of a writ or order holding Section 16(2)(c) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST') / Karnataka Goods and Services Tax Act, 2017 (hereinafter referred to as 'KGST') as

unconstitutional which prayer is sought without prejudice to the other reliefs.

I. CASE AS MADE OUT IN THE PLEADINGS:-

2. The facts that are made out by the petitioner is that the petitioner operates an e-commerce platform under the name 'Swiggy' and is registered under the Central Goods and Services Tax Act, 2017. It is stated that the delivery of food is done through delivery partners that include electronic pick-up by those who are engaged by the petitioner. It is specifically stated that during holidays and festive season owing to spike in food orders, the third party service providers are engaged. It is stated that the third party service providers charge consideration for delivery and supply of food alongwith Goods and Services Tax (hereinafter referred to as 'GST') and the GST paid by the petitioner to third party service providers is availed as Input Tax Credit by the petitioner.

3. It is further submitted that investigation is stated to have been initiated by the respondent - Department as

regards third party service providers, i.e. 'Greenfinch' by the Directorate General of Goods and Services Tax Intelligence, Hyderabad Zonal Unit (hereinafter referred to as 'DGGI') on the ground that 'Greenfinch' was a non-existent entity and accordingly, the Input Tax Credit availed by the petitioner and the GST component paid by it to 'Greenfinch' against the invoices raised by 'Greenfinch' were fraudulent.

4. The petitioner further submits that during the course of such investigation, the statement of Directors and employees have been recorded, at Delhi and Hyderabad.

It is specifically asserted that on 29.11.2019 during the course of investigation, the petitioner was forced to make payment of Rs.15.00 Crore under the threat of arrest of its Directors and accordingly, on 30.11.2019 at about 4.00 a.m., a sum of Rs.15.00 Crore was deposited in the GST cash ledger.

5. It is further submitted that subsequently, i.e., on 26.12.2019 in response to the summons issued to the Directors of the petitioner to appear before the DGGI Office, the Directors were present at the DGGI Office at 11.00 a.m. at Hyderabad on 26.12.2019. It is averred that the Directors were present till late hours on the said date and at around 8.00 p.m., the Directors were locked in the DGGI Office and there were threats of arrest held out during investigation.

It is further asserted, that as the Directors were not allowed to leave during the early hours of 27.12.2019 at around 1.00 a.m., the petitioner was forced to make further payment of tax of Rs.12,51,44,157/-, which payment has been made in order to secure the release of the three Directors. Accordingly, it is asserted that in all a sum of Rs.27,51,44,157/- has been illegally collected from the petitioner during the investigation proceedings under threat and coercion, which payment has been obtained by the

Department without following the due process of law as provided under the CGST Act.

Accordingly, while asserting that as no show cause notice was issued by the Department even after about ten months of initiation of investigation, the petitioner was constrained to seek refund of the amount of Rs.27,51,44,157/- by way of its letter dated 29.09.2020.

6. It is further submitted that the respondent No.5 having declined to refund the amount collected illegally, the petitioner on 16.12.2020 made out a formal refund application which was filed before the jurisdictional GST Office.

7. The respondents upon notice have appeared and filed their detailed statement of objections and have raised various contentions, including that the entity 'Greenfinch' is a fictitious entity and the petitioner has resorted to wrongful availment of Input Tax Credit on the invoices of 'Greenfinch' without actual receipt of services.

8. It is further submitted that the investigation has been initiated relating to wrongful availment of Input Tax Credit during which it was noticed that 'Greenfinch' so also its suppliers were non-existing entities and in the course of such investigation, summons were issued to the Directors and Officers of the petitioner Company.

It is submitted that various offences under Section 132(5) of CGST Act, 2017 have been committed by the petitioner as well as 'Greenfinch'.

9. It is specifically asserted that the irregularities on the part of the petitioner that have been made out, has huge revenue implications which encompass investigation at various locations in the country, which complex investigation has been hampered due to the Covid-19 pandemic and accordingly the investigation which is in progress is still inconclusive.

10. The respondents have specifically asserted that the letter of the petitioner dated 30.11.2019 is contrary to

the stand of the petitioner that the payment has been made involuntarily, which reads as follows:

"As an extension of our goodwill conduct and bona fide, we have deposited INR 15,00,00,000/- [Rupees Fifteen Crores only] with the Exchequer of Government during the pendency of inspection proceedings..."

Accordingly, it is submitted that the deposit made by the petitioner was voluntary.

11. It is further submitted that there is absence of evidence to substantiate the petitioner's allegations of involuntary payment. It is also asserted that the power of investigation has been exercised legitimately while issuing summons to the petitioner and its Directors and the allegation of coercion has been specifically denied.

II. CASE AS MADE OUT BY WAY OF ORAL SUBMISSIONS:-

12. Sri Lakshmikumar, learned counsel appearing for Sri Ravi Raghavan for the petitioner has made submissions, while Additional Solicitor General,

Sri M.B.Naragund has made submissions on behalf of the respondents.

13. During the course of submissions, the learned counsel appearing on behalf of the petitioner, has specifically asserted that the aspect of payment under duress and coercion is borne out from the admitted facts as is reflected in the pleadings and could also be made out from the assertion of the respondents and accordingly, the contention that the matter involves disputed questions of fact which ought not be decided in the proceedings in exercise of writ jurisdiction requires to be rejected.

14. It is further pointed out that there is no dispute relating to the investigation between 28.11.2019 and 30.11.2019 as well as the investigation between 26.12.2019 and 27.12.2019. It is asserted that during the course of investigation between 28.11.2019 and 30.11.2019, the petitioner has made deposit in the Electronic Cash Ledger and payment Challans were

generated and money was credited to the Electronic Cash Ledger between 6.00 a.m. and 6.30 a.m.

15. It is submitted on behalf of the petitioner that the letter of intimation of payment of Rs.15.00 Crore had been made out, but as the respondents had objected to the use of the word "under protest", finally at 9.42 a.m. on 30.11.2019, the letter was mailed to the DGGI Office asserting that the payment was made 'under protest.'

16. It is also asserted that the petitioner had received calls from DGGI Office for filing of DRC-03 which came to be filed on 02.12.2019.

17. Similarly, as regards the investigation between 26.12.2019 and 27.12.2019, it was submitted that the Directors were summoned and their statements were recorded and on 26.12.2019, that the gates of DGGI Office were locked and the Directors were not permitted to leave the premises till 2.30 a.m. on 27.12.2019.

It is further submitted that a sum of Rs.12,51,44,157/- was deposited in the Electronic Cash Ledger and challans were generated and the Directors were forced to file Form DRC-03, which came to be filed and the process concluded on 27.12.2019 at 1.00 a.m.

It is also submitted that the letter was made out at 1.12 a.m. setting out the details of payment while asserting that the statements of Directors were recorded during this period of investigation.

18. It is also asserted that during the relevant period with respect to which investigation has been initiated by the Department asserting the false availment of Input Tax Credit, the petitioner was filing its GST returns regularly and were paying tax.

It is submitted that the regular payment of tax by the petitioner is reflected in the rejoinder to the affidavit dated 19.04.2021 of the petitioners as per the Table at para-45 which is as follows:-

Period	Tax paid through ITC	Tax paid in cash	Total tax
Jul 2017 - Mar 2018	58,83,73,787	38,53,44,490	97,37,18,277
2018-2019	2,83,88,86,686	1,06,23,32,105	3,90,12,18,791
2019-2020	4,91,19,25,183	3,79,01,08,499	8,70,20,33,682
2020-2021 (excl.Mar 21)	2,12,87,99,829	2,02,52,72,569	4,15,40,72,398
Total	10,46,79,85,485	7,26,30,57,663	17,73,10,43,148

Accordingly, it is submitted that the petitioner's credibility as tax payer could never have been in doubt in light of their filing of returns and payment of substantial tax, and while noticing their record as a tax payer, the manner in which the investigation has been proceeded and the payments obtained reflected an unfair and arbitrary treatment of a bona fide tax payer. It is submitted that the dispute, if any, of wrongful availment of Input Tax Credit relating to certain transactions, is a matter for adjudication after investigation and that the petitioner is ready to comply with lawful demand and would co-operate with the adjudication process till the orders reach finality.

19. It is submitted that the payments made were to be construed as one made 'under protest' which could be gathered from the communication made by the petitioner to the Department after such payments were made.

20. It is also asserted that, as no show cause notice under Section 74 of CGST Act has been issued and payments of the petitioner has remained with the Department, that the investigation is still not concluded and in light of prolonged investigation, the petitioner has a legitimate right to seek for refund of tax, which would not in any way come in the way of their obligation to honour the demand made after adjudication.

21. The respondents represented through learned Additional Solicitor General have raised various contentions pointing out to the non-existence of 'Greenfinch' and its suppliers and have also asserted that the investigation is such that no fetters are required to be put on the power of investigation.

22. It is asserted that the question of exercise of coercion is not made out. The payments even as per the communication of the petitioner was made as a goodwill gesture and that the payments made are to be construed as payment of tax in furtherance of self-ascertainment as contemplated under Section 74(5) of the CGST Act.

23. Insofar as the specific assertion regarding the locking of premises, it was submitted that the closing down of premises was only in order to secure safety of the premises and the inmates as is required to be done after office hours and that the Officers or the Directors of the petitioner Company at the relevant period of time were given access to interact with the legal and other professionals and all that was done during the course of investigation was only in exercise of their legitimate rights of investigation.

24. It was also the specific stand of the learned Additional Solicitor General that during the whole process of

investigation, the officials were not authorized to arrest and the authorization was only for the purpose of other investigation and the apprehension in the mind of the petitioner as also of their Officers during investigation (on two occasions) when the payments were made, were unreasonable apprehensions and the investigation per se cannot be construed to be coercive.

It is further submitted that the generation of DRC-03 would conclude the issue regarding the Department's assertion of self-ascertainment.

25. It is also asserted that in light of refund being claimed, the petitioner has exercised its statutory right of refund and if that were to be so, the petitioner is bound to follow the procedure to its logical end, by invoking the remedies as available under the statutory Scheme of the Act and rushing to the Court invoking the Writ jurisdiction is impermissible.

III. ANALYSIS:-

After hearing the matter at length, the same is considered as hereunder:-

A) Refund and alternative remedy:-

26. The petitioner having exercised its option for refund by filing their applications (copies of their applications are annexed at Annexure-'Q'), the present Writ Petition is not maintainable and that the petitioner is to pursue its statutory remedies, is a matter that requires consideration.

27. It must be noticed that no doubt the application for refund has been filed by the petitioner invoking the statutory remedy, but insofar as such of the applications, the Department has responded by way of communication at Annexure-'A' dated 13.10.2020, wherein it is concluded at Paras-3 and 4 as follows:

" 3. Parallely proceedings under Section 74 of CGST Act 2017 against M/s.Greenfinch have been initiated also and they are independent and mutually exclusive of proceedings initiated against M/s.BTPL.

Both the proceedings will be brought to their logical/legal conclusion separately. Cooperation of M/s.Greenfinch is not a relevant issue in respect of Section 74 proceedings against M/s.BTPL.

4. Under these circumstances, it is too early and naive to presume that M/s.BTPL have not wrongfully availed/utilised ITC and have not committed an offence. Pending issuance of notice under Section 74 of CGST Act, 2017 claiming refund of the deposits made during the course of investigation appears to be not only premature, but also not in line with the provisions of Section 54 of the ibid Act."

Clearly the said communication would reveal that the Department has merely asserted that the claim for refund is premature, as the same is made during the course of investigation.

28. Apart from construing the communication at Annexure-A dated 13.10.2020 to be one of deferment of refund, it is pointed out by the learned counsel appearing for the petitioner that in the event the petition is to be allowed, their only relief would be an appropriate direction

to have their refund applications processed as per law and mere pendency of the investigation according to them would not entail the retention of amount. It must also be noted that even otherwise if there is an amount that has been wrongfully withheld which could be demonstrated to be so, there is no bar for exercising writ jurisdiction to issue appropriate directions directing the respondent to make good the petitioner's claim for refund and this would come out from the legal position as enunciated by the Apex Court in the case of Godavari Sugar Mills Ltd. v. State of Maharashtra and Others reported in (2011) 2 SCC 439 wherein, the court after analysing the previous decisions has observed as follows:

"7. The High Court relying upon the decision of this Court in Suganmal v. State of M.P. [AIR 1965 SC 1740] has held that the prayer in the writ petition being one for payment of interest, it should be considered to be a writ petition filed to enforce a money claim and therefore, not maintainable.

8. The observations in Suganmal [AIR 1965 SC 1740] related to a claim for refund of tax and have to be understood with reference to the nature of the

claim made therein. The decision in Suganmal [AIR 1965 SC 1740] has been explained and distinguished in several subsequent cases, including in U.P. Pollution Control Board v. Kanoria Industrial Ltd. [(2001) 2 SCC 549] and ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. [(2004) 3 SCC 553] The legal position becomes clear when the decision in Suganmal [AIR 1965 SC 1740] is read with the other decisions of this Court on the issue, referred to below:

(i) xxx

(ii) xxx

(iii) xxx

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment, etc. While a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the respondents had no authority to retain the money collected



without any authority of law, the High Court has the power to direct refund in a writ petition. (Vide *Salonah Tea Co. Ltd. v. Supdt. of Taxes* [(1988) 1 SCC 401 : 1988 SCC (Tax) 99 (2)] .)

(v) xxx

vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. (Vide *Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd.* [(2005) 8 SCC 242])

We are therefore of the view that reliance upon *Suganmal* [AIR 1965 SC 1740] was misplaced, to hold that the writ petition filed by the appellant was not maintainable."

29. As rightly pointed out by the Apex Court, the power of the High Court to issue appropriate direction directing refund either where assessment was without jurisdiction or where tax was collected without authority of law is vested in the High Court and there is a difference

between existence of power and exercise of such jurisdiction which depends on facts of the case on hand. If the court does come to a conclusion that the collection of amount which even if were to be taxes, is without authority of law, the court possesses the power to issue appropriate direction upon determination of the validity of collection of amount/tax as being illegal to issue appropriate directions. The mere fact that application has been made for refund does not in any way take away the right of the petitioner to seek for appropriate direction in the present proceedings, as the application for refund has merely been deferred and in effect, no decision is taken, even otherwise, the question of alternate remedy is of no significance, when the eventual direction in the present writ is only for consideration of the refund application.

As already noticed, the learned counsel for the petitioner has fairly submitted that the eventual remedy that the petitioner is seeking insofar as refund application is, a direction to consider the application de hors the

investigation being carried out and in light of such stand, it cannot be stated that the statutory remedy of refund would displace the petitioner from the present proceedings and the petition is to be dismissed on such ground.

B) Self-ascertainment under Section 74(5) of CGST Act:-

30. The stand of the respondent that payment has been made voluntarily and that such payment is to be construed to be the payment in furtherance of self-ascertainment under Section 74(5) of CGST Act, is a matter that requires consideration.

31. It would be relevant to take note of the two correspondences addressed by the petitioner i.e., letter dated 30.11.2019 made at the first instance, which communication has not been disputed by the respondent authority, which reads as follows:

"As an extension of our goodwill conduct and bona fide, we have deposited INR 15,00,00,000/- [Rupees Fifteen Crores only] with the Exchequer of Government during the pendency of inspection proceedings. The above deposit is without prejudice

to and with full reservation of our rights and contentions to seek necessary refund at the appropriate time and therefore should not be regarded as an admission of liability. The Challan of payment of the aforesaid deposit is enclosed herewith for your ready reference as Annexure-'E'."

32. The other communication of 27th December, 2019 at 1.12 a.m., detailing the Input Tax Credit has a description "subject: submissions related to investigation" is also to be noted.

33. It requires to be noticed that Section 74 of the CGST Act provides for a procedure that is self-explanatory, the relevant extract is reproduced as follows:-

"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) xxx
- (3) xxx
- (4) xxx

(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 percent 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."

34. Clearly the procedure prescribed would make out that under Section 74(1) of the CGST Act, a show-cause notice may be issued calling upon the assessee to pay the amount specified in the notice along with interest under Section 50 and a penalty equivalent to the tax specified in the notice.

Sub-sections (4) and (5) of Section 74 of CGST Act are of particular interest to the case on hand.

Under sub-section (5) of Section 74, 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 of CGST Act 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. Upon such ascertainment as contemplated

under sub-section(5) of Section 74 of CGST Act, further legal procedure is contemplated to complete such process of ascertainment as contained in the provision. Section 74 includes sub-section (6) which provides for 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 sub-section (7) of Section 74, the 'proper officer' is at liberty if he concludes that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue a notice as provided under sub-section (1) in respect of amount which falls short of the amount actually payable.

Sub-section(8) of Section 74 provides that the person chargeable with tax under sub-section (1) pays the said tax along with interest and penalty within the time prescribed, and all proceedings in respect of the notice shall be deemed to be concluded.

35. Accordingly, it is clear that the procedure of self-ascertainment under sub-section (5) of Section 74 contains a scheme that is concluded after following the procedure under sub-sections (6), (7) and (8) of Section 74 of the CGST Act. In the present case, it must be noted that though there is payment of tax and even if it is accepted that payment of tax is also followed by requisite Challan DRC-03, the mere payment of tax cannot be construed to be a payment towards self-ascertainment as contemplated under Section 74 (5) of CGST Act.

36. The letter of the petitioner dated 30.11.2019 is clear and unambiguous, wherein it is asserted by the petitioner that the amount is made in furtherance of their good will conduct and bona fide and that it is made during the pendency of the inspection proceedings and the deposit is without prejudice and with reservation of rights, and contention to seek necessary refund at the appropriate time and should not be regarded as an admission of liability.

37. Clearly, the payment of tax by itself even if construed to be voluntary will not by itself in any way lead to a conclusion that the same is paid in furtherance of self-ascertainment under Section 74(5) of CGST Act. The scheme of self-ascertainment as contained in sub-sections (5), (6), (7), (8) of Section 74 of CGST Act would not admit of making of payment and continuance of investigation. Upon payment of tax after collection of the same with penalty, if the same is accepted even before the issuance of notice under Section 74(1) during investigation, there ends the matter and there is nothing further to be proceeded with.

38. If it is that the petitioner has paid tax on self-ascertainment, the question of respondents contending that the investigation is pending would also indicate that the contention of self-ascertainment as made out by the respondent is clearly an afterthought. The respondents have not taken the stand that self-ascertained tax falls short and if that were to be so, it could have proceeded to

issue notice as contemplated under Section 74(7) and could have even rejected the self-ascertainment in its entirety while asserting that it would issue notice under Section 74(1) of CGST Act, if facts so warrant. The stand of the respondents is ambiguous as self-ascertainment is put forward only as defence to the assertion of the petitioner that the payment of amount has been made involuntarily. Accordingly, the contention of payment being made by way of self-ascertainment is liable to be rejected.

C. Amount paid under coercion:-

39. The Directors of the petitioner Company in response to the summons issued under Section 70 of the CGST Act appeared before the Authorities at 20.00 hours on 28.11.2019 and were there till 4.00 a.m. on 29.11.2019 (as per para-13 of the statement of objections of respondent Nos.3 to 6 filed on 24.03.2021).

40. The investigation is stated to have resumed at 2.00 p.m., on 29.11.2019 and continued till 5.00 a.m., of 30.11.2019 (para 15 of the aforesaid objections). It is

relevant to note that Rs.15.00 crore was paid on 30.11.2019 and a letter was addressed to the Authorities on 30.11.2019 and served on the Authorities on 02.12.2019 that payment was being made under protest.

41. As a part of further investigation, the Directors of the petitioner Company were asked to appear by way of summons and in response to the same, the following persons appeared before the Authorities on 26.12.2019 as follows:-

- a) Sriharsha Majety at 11.00 hours
- b) Rahul Jaimini at 14.00 Hours
- c) Sri Obul Lakshmi Nandan Reddy at 16.00 hours

The proceedings have extended till 2.30 a.m. on 26.12.2019. The Letter was addressed to the respondents which is duly acknowledged enclosing the DRC-03 Forms as per the communication at Annexure-'M' dated 27.12.2019. The payment of Rs.12.51 crores was made on 26/27.12.2019 (as per Annexure-K enclosed with affidavit of respondent dated 29.07.2021).

As regards to the specific allegation of locking of main doors during the investigation in the last week of December, 2019 the stand of respondent Nos.1 to 6 in the affidavit dated 29.07.2021 at para 5 is revealing as follows.

" Hence, controlling access by way of locking the main gate from inside during late hours when all the officers are present inside the office is only to restrict entry of unauthorised persons from outside keeping in view the safety of case records."

42. Accordingly, the allegation of locking of doors is admitted and in light of the same, the apprehension expressed by the petitioner is understandable.

43. The above sequence of events relating to investigation and payments sourced from the pleadings of the respondents would demonstrate a nexus between the investigation and contemporaneous payment.

44. The observations at Para 28 of the statement of objections filed on 24.03.2021 which would be of relevance reads as follows:-

"They have taken a conscious decision to deposit the I.T.C. involved through the cash ledger maintained online in order to avert action under the provisions of Section 132 of the Act but reserved their right to lodge a claim at on a later date."

45. Insofar as the aspect as to whether amount is paid under coercion as asserted by the petitioner, suffice it to say that the amounts are paid contemporaneous to the very dates when investigation was being made and during times when the petitioner's Officers or Directors were at the place of investigation, which fact is not in dispute. If it is that the petitioners were otherwise regularly filing their returns and paying taxes as evidenced from the table extracted supra at Para 18, the dispute if any as regards to the wrongful availment of input tax credit as regards certain set of transactions is a matter that was pending investigation. But, instead of allowing investigation to proceed and be concluded, it appears that the Department has acted in undue haste insofar as to ensure that taxes were paid during the process of investigation. While

considering the time at which the amount was deposited in the Cash Ledger and the date of deposit, it would indicate that amounts were paid during times when there was no legal obligation to make payment.

46. No doubt, at the hearing of the matter, the Additional Solicitor General asserts fairly that authorization for arrest was absent and gates were closed from inside only to restrict entry of unauthorised persons from outside and for the safety of case records (Affidavit of R.1 to R.6 dated 29.07.2021). Such justification cannot amount to negation of the apprehension in the mind of the petitioner of probable arrest as the authorities themselves have taken the stand that the petitioners by wrongful availment of I.T.C. for Rs.27.50 Crores had committed non-bailable offences under Clause (c) r/w Clause (b) of Section 132 of CGST Act, 2017. As rightly contended and pointed out by the learned counsel for petitioner that they were unaware that the authorization that was made over to the appropriate investigating authorities had excluded power of

arrest. The manner in which investigation was carried out in late hours of the night and the early hours of the morning with physical closing of the gates during the investigation would reasonably create an apprehension in the mind of any person including the persons of the standing of Directors of the Assessee Company and its officers. The fear of police powers are such that would shake a man irrespective of their position in society. It must be noted that even under Section 132(1)(b) and (c)(i) to (iii) of the GST Act, 2017, the wrongful availment of I.T.C. is an offence and is punishable with imprisonment. In the context of the facts as made out, the payment cannot be stated to have been made voluntarily. Such amount having been paid, retention of the said amount as referred to above by the Department right from November, 2019 till date where investigation is not concluded would call upon the department to honour legitimate claims being made for refund of the amount which cannot be grudged. Lapse of time and lack of conclusion of investigation has only exacerbated the

situation conferring upon the petitioners a right to seek for refund of the amount.

LIST OF AUTHORITIES RELIED BY RESPONDENTS

47. Insofar as the Judgment in the case of Commr. of C.C.E. & S.T., Hyderabad-II v. Peers Technologies Pvt Ltd. - 2019 (27) G.S.T.L. 701 (Tri.-Hyd.) is concerned, it ought to be noted that though the Court had rejected the contention of threat, coercion and duress while observing that necessary complaint ought to have been made to the appropriate officers and within a reasonable period of time, the facts of the said case would indicate, the presence of a letter by the Director of the assessee firm admitting that they had not declared full value of services rendered. Further it is to be noticed that a notebook was recovered during search and a letter was given explaining that the figures in the note book reflect value of services which were not included in the 'ST-3' returns. It is in the light of such incriminating material contained in the note

book that the Court appears to have disbelieved the contention of threat, coercion and duress.

48. In the present case, the facts are different and the mere delay will not have the effect of taking away the timing of payment as the circumstances in which the payment was made leads to the inevitable conclusion that payment was made involuntarily.

49. In the case of *Acto, Anti-Evasion, Alwar v. Khandelwal Foods Products - 2018 (8) G.S.T.L. 112 (Raj.)*, in the reply to show cause notice, the Respondent assessee had accepted the excess stock and that he had no explanation to offer, the said admission was sought to be retracted before the appellate authority. However, in the present case there is no such statement admitting any lapse on their part and infact the deposit was made while clarifying that it would not amount to admission of liability as per the letter dated 30.11.2019. Accordingly, the above Judgment cannot be made applicable to the present facts.

50. The Judgment in S.I. Property Kerala Pvt Ltd. v. Commr. of C. EX., Cus. S.T. and C.T., Thiruvananthapuram - 2019 (29) G.S.T.L. 632 (Ker.) was rendered in the context of an application for refund being made after the period of limitation prescribed under Section 11B (1) of the Central Excise Act, 1944, by virtue of which amount received had lost the colour of tax. The payment of service tax was made between 27.08.2012 and 06.03.2013. The application for refund was filed on 23.10.2014 after the period of one year. The refund was required to be claimed within the period of one year in terms of Section 11B(1) of the Central Excise Act and the exemption of operation of limitation was available where duty was paid under protest. As there was no material to indicate that payment was made under protest, the Court held that exemption of limitation was not applicable. It is only incidentally that a question of payment made under coercion and threat was raised which was disbelieved as no material was produced in support of the contention. The facts in the present case are entirely different and

accordingly the order passed in S.I. Property Case (supra) does not come to aid of the respondent.

51. The Judgment in Suresh Kumar P.P. v. Dy. Director, Directorate General of GST Intelligence (DGGT), Thiruvananthapuram - 2020 (41) G.S.T.L. 17 (Ker.) though holds that the allegations of harassment and high handedness cannot be considered in a petition under Article 226 of the Constitution of India, the same is not an inflexible rule and if the facts and circumstances are such as made out in the present case and where the sequence of the events are not in dispute, the inference and conclusion that payments were made involuntarily could still be made.

D) Right of Bona fide Tax Payer to be treated with dignity:-

52. Insofar as the grounds relating to compelling the petitioner to make payment under duress, the observation of the Apex Court in the case of Dabur India Limited and Another v. State of Uttar Pradesh and Others and connected matters (1990) 4 SCC 113 at Para 31 would

be an apt observation that would be applicable in the present case also.

"Before we part with this case, two aspects have to be adverted to--one was regarding the allegation of the petitioner that in order to compel the petitioners to pay the duties which the petitioners contended that they were not liable to pay, the licence was not being renewed for a period and the petitioners were constantly kept under threat of closing down of their business in order to coerce them to make the payment. This is unfortunate. We would not like to hear from a litigant in this country that the Government is coercing citizens of this Country to make payment of duties which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take steps but not take extra legal steps or manoeuvre "

53. It must be noted that filing of return and payment of substantial taxes by the petitioner would clearly warrant for treating such tax payers with certain element of dignity. The details of tax paid during the relevant period of time speaks for itself.

Period	Tax paid through ITC	Tax paid in cash	Total tax
Jul 2017 - Mar 2018	58,83,73,787	38,53,44,490	97,37,18,277
2018-2019	2,83,88,86,686	1,06,23,32,105	3,90,12,18,791
2019-2020	4,91,19,25,183	3,79,01,08,499	8,70,20,33,682
2020-2021 (excl.Mar 21)	2,12,87,99,829	2,02,52,72,569	4,15,40,72,398
Total	10,46,79,85,485	7,26,30,57,663	17,73,10,43,148

Such a tax payer who has been filing returns and paying taxes but who may dispute the Department's claim as regards certain transactions only can be construed to be bona fide tax payer.

54. The Apex Court in the case of D.K.Basu v. State of West Bengal - (1997) 1 SCC 416 has observed thus:

"22. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in

custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. It cannot be said that a citizen 'sheds off' his fundamental right to life the moment a policeman arrests him. Nor can it be said that the right to life of a citizen can be put in 'abeyance' on his arrest. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21, whether it occurs during investigation, interrogation or otherwise "

The judgment is rendered in the context of development of 'custody jurisprudence' which lists out protection of those in custody. A bona fide tax payer is required to be treated better than a 'detenu and arrestee'.

55. No doubt, the power of investigation cannot be interfered with nor can the court direct investigation be made in a particular manner, however, during all such investigation, it cannot be held that the Fundamental Rights including the right of a bona fide tax payer to be treated with appropriate dignity as enshrined under Article 21 of the Constitution of India would be kept in abeyance. We would not like to elaborate further but to leave it to the wisdom of

the respondents as to the manner in which bona fide tax payers are to be treated.

E) Video Recording of Investigation:-

56. Insofar as video recording of the investigation process, this court by a considered interim order in the present proceedings on 20.04.2021 has recorded a legal mandate of installing of CC TV in all offices where interrogation is being carried out. The order reads thus:

"After the matter is heard for sometime, insofar as the request made on behalf of the petitioner that interrogation must be video recorded, note is taken of the directions of the Apex Court in the case of Paramvir Singh Saini v. Baljit Singh and Others reported in [(2021) 1 SCC 184], in particular, directions at Para 19 which reads:

"19. The Union of India is also to file an affidavit in which it will update this Court on the constitution and workings of the Central Oversight Body, giving full particulars thereof. In addition, the Union of India is also directed to install CCTV cameras and recording equipment in the offices of:

- (i) Central Bureau of Investigation (CBI)
- (II) National Investigation Agency (NIA)

- (iii) Enforcement Directorate (ED)
- (iv) Narcotics Control Bureau (NCB)
- (v) Department of Revenue Intelligence (DRI)
- (vi) Serious Fraud Investigation Office (SFIO)
- (vii) Any other agency which carries out interrogations and has the power of arrest.

As most of these agencies carry out interrogation in their office (s) CCTVs shall be compulsorily installed in all offices where such interrogation and holding of accused takes place in the same manner as it would in a police station."

It becomes clear that the Union of India has been directed to install CCTV in all the offices where interrogation is being carried out.

The respondent authorities would fall within Clause (vii) and accordingly, in terms of directions issued by the Apex Court, further interrogation is to be made with video recording in terms of the aforesaid directions at Para 19 of the said judgment."

57. While the respondents would contend that the application is only for installing of CC TV only, the consequential direction that is made in the order dated 20.04.2021 is for video recording. Installation of CC TV as ordered by the Apex Court would taken within itself

recording of all that would fall within the range of CC TV .
If that were to be so, video recording, taking note of the judgment of in the case of Paramvir Singh Saini (Supra) would be a direction in keeping with the legal requirements. We are making it clear that recording of interrogation which direction is limited to maintaining of records relating to interrogation would make it possible as and when circumstances are so made out for summoning of the same as may be required at an appropriate stage.

F) Other prayers:-

58. Insofar as recording of statements of petitioners and their officers during investigation is concerned, we leave it open to the respondents to consider the request as per law at an appropriate stage.

59. Insofar as the legal attack of validity of Section 16(2)(c) of the CGST Act as unconstitutional, suffice it to say that the court would not readily embark upon adjudication of constitutional validity of the provision when the grievance of the petitioner would otherwise be

redressed. In the present case, in light of disposal of the writ petition, providing substantial relief to the petitioner and as the legality of the said provision has not been adverted to in detail in oral arguments, the court refrains from adjudication relating to the constitutional validity of Section 16(2)(c) of the Act and the contentions of the parties as regards constitutional validity of Section 16(2)(c) is kept open.

60. As regards to the grant of relief of refund, the learned Additional Solicitor General did indicate that time limit could be prescribed for completion of investigation and on failure to do so the court could consider request for refund. It must be noticed that the court does not desire to place any sort of fetter on the power of investigation and it would be unwise to impose any kind of time limit, for it is the authority which should be permitted to complete its investigation in a manner as may be desired by it as is permissible.

61. The consideration of the right of refund in the present factual matrix would be independent of the process of investigation and the two cannot be linked together in light of the discussion supra.

62. Accordingly, refund applications at Annexure-'Q' are to be considered and suitable orders be passed within a period of four weeks from the date of release of the order while making it clear that consideration of refund applications must be made in light of the observations.

Accordingly, the petition is disposed off.

Sd/-
JUDGE

NP/VGR