

# EY Tax Alert

**Delhi HC holds tax cannot be recovered in guise of *suo-moto* payment by taxpayer during the course of search proceedings**

Tax Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

## Executive summary

This Tax Alert summarizes a recent ruling<sup>1</sup> of the Delhi High Court (HC). The writ petition dealt with the issue whether the amount deposited by assessee during the search proceedings can be considered as a voluntary payment of tax.

In the writ petition, assessee alleged that it made payment of tax, interest and penalty under coercion during the course of search proceedings.

The HC observed that the Central Goods and Services Tax Act, 2017 (CGST Act) and the Rules framed thereunder, makes provisions to enable a person to *suo-moto* pay arrears of tax, along with interest and penalty. Thus, when the taxpayer takes recourse through such route, the proper officer is restrained from serving any notice, unless the amount which is self-ascertained by the taxpayer falls short of the amount payable as per the law. In such cases, the proper officer is required to issue an acknowledgement accepting the payment.

In the present case, although the payments were made in GST DRC-03, no document has been given by the officers acknowledging acceptance of payment. Failure to follow the prescribed procedure will, as in this case, lead to a conclusion that the deposit of tax, interest and penalty was not voluntary, more so when such deposit was made before the search was concluded.

Accordingly, HC directed Revenue to return the amount so deposited along with interest. Further, it also directed Central Board of Indirect Taxes and Customs (CBIC) to align its Instruction<sup>2</sup> on deposit of tax during the course of search, inspection or investigation with the directions issued by Gujarat HC<sup>3</sup>.

<sup>1</sup> TS-667-HC(DEL)-2022-GST

<sup>2</sup> Instruction No. 01/2022-2023 dated 25 May 2022

<sup>3</sup> Bhumi Associate vs. Union of India [MANU/GJ/0174/2021]

## Background

- ▶ Assessee is engaged in trading of ready-made garments as also, sale of such goods on behalf of third parties on commission basis.
- ▶ According to the Revenue, assessee had made cash sales on behalf of third parties, against which it received commission in cash. It had failed to disclose such transactions and pay tax on the commission received.
- ▶ Consequently, a search was conducted at the assessee's premises, alleged to be unregistered.
- ▶ A *Panchnama* was drawn along with the signatures of the witnesses and issued to the assessee. Simultaneous searches were also carried out at the premises of the principals on whose behalf the goods were sold on commission basis.
- ▶ Assessee made deposit of an amount equal to tax on the alleged undisclosed commission along with interest and penalty *via* GST DRC-03 during the search.
- ▶ Consequently, assessee filed a writ petition before Delhi High Court (HC) seeking refund of amount deposited, alleging coercion.

## Assessee's contentions

- ▶ Deposit made during the search proceedings was not voluntary and the signature of the authorized representative of the assessee was obtained *via* coercion.
- ▶ There was violation of Section 67(5) of the Central Goods and Services Tax Act, 2017 (CGST Act) since the copies of the documents seized was not made available by the Revenue.
- ▶ CCTV cameras were switched off during the search and therefore, the enquiry conducted was not backed by camera recording.
- ▶ The independence of the two witnesses was also questioned as one of the witnesses was a computer operator working in tandem with the officers who were conducting the search and the other one was seen to be driving the vehicle of the officers included in the search party.

The same is in violation of the instruction<sup>4</sup> issued by Central Board of Indirect Taxes and Customs (CBIC) GST- Investigation Wing.

- ▶ The deposit made during the search was in contravention of Rule 142(1A) and Rule 142(2) of the Central Goods and Services Tax Rules, 2017 (CGST Rules).

There was no notice issued by the proper officer ascertaining the tax, interest and penalty, as envisaged in Rule 142(1A).

Further, even if it is assumed that the amount was deposited on self-ascertainment, the proper officer was

obliged to issue acknowledgement in GST DRC-04 as per Rule 142(2).

- ▶ The deposit of the amount, if construed as having been made on self-ascertainment, a show-cause notice (SCN) cannot possibly be issued. However, the Revenue is repeatedly issuing summons for enquiries and/or investigations.
- ▶ In seeking deposit of the amount payable while the search proceedings were on, Revenue had violated Instruction<sup>5</sup> issued by GST - Investigation Wing which deals with deposit of tax during the course of search, inspection or investigation.
- ▶ The authorized representative of the assessee was detained for several hours and was allowed to leave only after he appended his signature on the documents, copies of which was also not provided.

It is in these circumstances that the statements made by the said representative and the documents supposedly signed by him were the result of coercion exerted on him.

- ▶ Therefore, bearing in mind the above-mentioned circumstances, the amount deposited during the search was not done voluntarily, but under coercion.

## Revenue's contentions

- ▶ The authorized representative of the assessee had accepted that the goods were sold in cash on behalf of the third parties, and on which commission was also received in cash.
- ▶ The fact that the said third parties had accepted, that such transactions took place, and deposited amount of tax, interest and penalty, would show that the assessee voluntarily made such deposits.
- ▶ Moreover, the objection concerning the deposit of amount made during the search was taken only after the second summon was issued.

Thus, the allegation of coercion is an afterthought, which was raised only after summons had been served on the assessee.

## HC ruling

- ▶ The CGST Act and the CGST Rules makes provisions to enable a person to pay tax, along with interest and penalty, before being served with a notice, when such tax has either been short paid or not paid or erroneously refunded or where input tax credit has been wrongly availed.
- ▶ Thus, if the taxpayer takes recourse through such route, the proper officer is restrained from serving any notice unless the amount which is self-ascertained by the taxpayer falls short of the amount payable by law.
- ▶ As per Rule 142 (1A), proper officer is required to communicate details of tax, interest and penalty payable *via* GST DRC-01A before serving SCN.

<sup>4</sup> Instruction No. 1/20-21 [GST-Investigation] dated 2 February 2021

<sup>5</sup> Instruction No. 01/2022-2023 dated 25 May 2022

Where, however, if the taxpayer before service of the notice seeks to make the payment of amount due, he is required to inform the officer of such payment in Form GST DRC-03. The proper officer, thereafter, is required to issue an acknowledgement accepting the payment via GST DRC-04 in terms of Rule 142(2).

- ▶ In the present case, although the payments were made in GST DRC-03, no document has been given by the officers demonstrating the acknowledgment of acceptance of payment.

Therefore, the stand taken by Revenue, that this was a voluntary payment based on self-ascertainment, is not established, as the regime incorporated under the provisions of Section 73 and 74, and the above-mentioned Rules, have not been adhered to.

- ▶ Further, the fact that the deposits were made when the search had not concluded would show that the payments were not voluntary.
- ▶ The malaise of officials seeking to recover tax dues (in contrast to voluntary payments being made by assessee towards tax dues) during search, inspection or investigation was sought to be addressed by the Instruction issued by GST- Investigation Wing (*supra*).

This Instruction was issued in the backdrop of the guidelines issued by the Gujarat HC<sup>6</sup>.

- ▶ It is important to note that while the said Instruction is in line with the directions contained in the Gujarat HC order (*supra*), the Instruction falls short, inasmuch as it sidesteps direction number two, which states that even if the assessee comes forward to make voluntary payment in the prescribed form, he/ she should be advised to file the same the day after the search has ended and the concerned officers have left the premises of the assessee.

The reason behind this is also to give space to the concerned person to seek legal advice, and only thereafter deposit tax, interest and penalty, wherever applicable, upon a proper self-ascertainment.

- ▶ The safeguards put in place by the CGST Act, CGST Rules and by the Court, to ensure that unnecessary harassment is not caused to the assessee, required adherence by the Revenue. Otherwise, collection of such amounts would give it a color of coercion, which is not backed by the authority of law.
- ▶ Failure to follow the prescribed procedure will, as in this case, lead to a conclusion that the deposit of tax, interest and penalty was not voluntary.
- ▶ Accordingly, HC directed Revenue to return the amount so deposited along with interest.
- ▶ Further, it also directed CBIC to align Instruction No. 01/2022-2023 (*supra*) with the directions issued by Gujarat HC (*supra*).

## Comments

- a. Judgement of Delhi HC is likely to provide relief in cases where taxes are recovered through coercive means during the course of search, inspection or investigation proceedings and treated as *suo-moto* payments.
- b. Direction to CBIC to align its Instruction with the guidelines provided by the Gujarat HC is a welcome move and may aid in streamlining the search and investigation proceedings.

<sup>6</sup> Bhumi Associate vs. Union of India [MANU/GJ/0174/2021]

# Our offices

## Ahmedabad

22nd Floor, B Wing, Privilon  
Ambli BRT Road, Behind Iskcon  
Temple, Off SG Highway  
Ahmedabad - 380 059  
Tel: + 91 79 6608 3800

## Bengaluru

12th & 13th floor  
"UB City", Canberra Block  
No. 24, Vittal Mallya Road  
Bengaluru - 560 001  
Tel: + 91 80 6727 5000

Ground Floor, 'A' wing  
Divyasree Chambers  
# 11, O'Shaughnessy Road  
Langford Gardens  
Bengaluru - 560 025  
Tel: + 91 80 6727 5000

## Chandigarh

Elante offices, Unit No. B-613 & 614  
6th Floor, Plot No- 178-178A  
Industrial & Business Park, Phase-I  
Chandigarh - 160 002  
Tel: + 91 172 6717800

## Chennai

Tidel Park, 6th & 7th Floor  
A Block, No.4, Rajiv Gandhi Salai  
Taramani, Chennai - 600 113  
Tel: + 91 44 6654 8100

## Delhi NCR

Golf View Corporate Tower B  
Sector 42, Sector Road  
Gurugram - 122 002  
Tel: + 91 124 443 4000

3rd & 6th Floor, Worldmark-1  
IGI Airport Hospitality District  
Aerocity, New Delhi - 110 037  
Tel: + 91 11 4731 8000

4th & 5th Floor, Plot No 2B  
Tower 2, Sector 126  
Gautam Budh Nagar, U.P.  
Noida - 201 304  
Tel: + 91 120 671 7000

## Hyderabad

THE SKYVIEW 10  
18th Floor, "SOUTH LOBBY"  
Survey No 83/1, Raidurgam  
Hyderabad - 500 032  
Tel: + 91 40 6736 2000

## Jamshedpur

1st Floor, Shantiniketan Building,  
Holding No. 1  
SB Shop Area, Bistupur  
Jamshedpur - 831 001  
Tel: + 91 657 663 1000

## Kochi

9th Floor, ABAD Nucleus  
NH-49, Maradu PO  
Kochi - 682 304  
Tel: + 91 484 433 4000

## Kolkata

22 Camac Street  
3rd Floor, Block 'C'  
Kolkata - 700 016  
Tel: + 91 33 6615 3400

## Mumbai

14th Floor, The Ruby  
29 Senapati Bapat Marg  
Dadar (W), Mumbai - 400 028  
Tel: + 91 22 6192 0000

5th Floor, Block B-2  
Nirlon Knowledge Park  
Off. Western Express Highway  
Goregaon (E)  
Mumbai - 400 063  
Tel: + 91 22 6192 0000

## Pune

C-401, 4th floor  
Panchshil Tech Park, Yerwada  
(Near Don Bosco School)  
Pune - 411 006  
Tel: + 91 20 4912 6000

## Ernst & Young LLP

EY | Building a better working world

## About EY

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via [ey.com/privacy](https://ey.com/privacy). EYG member firms do not practice law where prohibited by local laws. For more information about our organization, please visit [ey.com](https://ey.com).

Ernst & Young LLP is one of the Indian client serving member firms of EYGM Limited. For more information about our organization, please visit [www.ey.com/en\\_in](https://www.ey.com/en_in).

Ernst & Young LLP is a Limited Liability Partnership, registered under the Limited Liability Partnership Act, 2008 in India, having its registered office at 22 Camac Street, 3rd Floor, Block C, Kolkata - 700016

© 2023 Ernst & Young LLP. Published in India.  
All Rights Reserved.

This publication contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. Neither EYGM Limited nor any other member of the global Ernst & Young organization can accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication. On any specific matter, reference should be made to the appropriate advisor.



Download the EY India Tax Insights App

[ey.com/en\\_in](https://ey.com/en_in)

[@EY\\_India](https://twitter.com/EY_India)

[in EY](https://www.linkedin.com/company/ey)

[YouTube EY India](https://www.youtube.com/channel/UCv3p08333333333333333333)

[f EY Careers India](https://www.facebook.com/EYCareersIndia)

[@ey\\_indiacareers](https://www.instagram.com/ey_indiacareers)