

A complete approach on how to deal with  
**Bank Attachment**

Topics to be covered

# Analysis of Provision



How to deal  
with the issue?

# Section 83



*“You can’t tax business. Business doesn’t pay taxes. It collects taxes.”*

*— Ronald Reagan*

## Other Statutes

Section 281-B of the Income Tax Act, 1961;

Section 73-C of Chapter 5 of the Finance Act, 1994;

Section 11-DDA of the Central Excise Act, 1944;

Section 127-D of the Customs Act, 1962;

Section 46-A of the Delhi Value Added Tax Act, 2004;

Section 35 of the Maharashtra Value Added Tax, 2002;

Section 45 of the Gujarat Value Added Tax Act, 2003,

## CPC

**Order 38 Rule 5 of the Code of Civil Procedure, 1908, (CPC)** which provides for attachment before judgment.

In **Raman Tech. & Process Engg. Co. v. Solanki Traders**, the Supreme Court of India held that the purpose of attachment before judgment is to prevent the ends of justice from being defeated.

Such power “not be exercised mechanically or merely for the asking” and that a defendant is not debarred from dealing with her/his property merely because a case is filed against him..

## Key Judgements

**Gandhi Trading CIT 1999 SCC OnLine Bom 967** – The Bombay High Court inter alia held that the power of provisional attachment is a drastic power and must only be exercised if there is sufficient material on record to justify the apprehension that the assessee is about to dispose of the whole or any part of her/his property with a view to thwart the ultimate collection of the demand. It was also warned that such power must not be used to harass the assessee.

**Gopal Das Khandelwal v. Union of India 2010 SCC OnLine All 654** – According to the Allahabad High Court, the power of attachment must be exercised for attachment of the property of only the assessee and no one else.

Section 83 : Provisional attachment to protect revenue in certain cases.

- (1) Where during the pendency of any proceedings under **section 62 or section 63 or section 64 or section 67 or section 73 or section 74**, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.
- (2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).



## New Section

- (1) Where, after the initiation of any proceeding under **Chapter XII, Chapter XIV or Chapter XV**, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed.
- (2) .....

## What's the change ?

- First and foremost is the change from “pendency” of proceedings to “initiation” of proceedings.
- Therefore, a provisional attachment can technically now continue, even if there are no pending proceedings under the Chapters 12, 14 and 15.
- **The memorandum explaining provisions of Finance Bill, 2021 expressly states that such change was made so that provisional attachment shall remain valid for the entire period starting from the initiation of any proceeding under the said chapter till the expiry of period of one year from the date of order.**

## What's the change ?

- Secondly, a provisional attachment can be issued under any of the sections mentioned in **Chapters 12, 14 and 15**.
- For instance, merely on **issuance of summons under Section 70**, the Commissioner may provisionally attach the properties of the taxable person.
- Further, even when the taxable person cooperates and produces all documents and evidences and seemingly the purpose of issuing summons is over, an order of provisional attachment can still continue since the condition now is **“initiation” of proceedings and not its “pendency”**.

## What's the change ?

- **Section 79** authorizes the Department **to issue garnishee notices to bank for recovery of dues.**
- Now, as per the amended **Section 83**, not only can the taxable person be subjected to recovery proceedings under **Section 79** **but also attachment of its bank account under Section 83.**

## Interplay with Section 122

Now this amendment has given power to commissioner to provisionally attach bank account, belonging of that taxable person and other person who retained the benefit of transactions covered under **clause (i),(ii),(vii) or clause (ix) of subsection (1) of section 122 of CGST Act**

## Interplay with Section 122

### **Section 122: Penalty for certain offences:**

(1) Where a taxable person who –

(i) Supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply.

(ii) Issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder.

(iii) Takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(iv) Takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

## What's the change ?

- Although the intention of legislature to curb fake invoicing is laudatory, one cannot rule out the possibility of an innocent taxpayer being roped in and having her/his assets blocked only because of the malfeasance of the main taxpayer.
- However, what remains after the amendment is the requirement of the Commissioner to form an opinion on tangible material that provisional attachment is "necessary" for the protection of the interest of the revenue.
- This may prove to be an important safeguard even though the scope of Section 83 may have been enlarged.

## Opinion

The term “opinion” was succinctly explained by **Lord Bramwell in John Derby Allcroft v. Lord (Bishop) 1891 AC 666 (HL)**

“If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him.



## Opinion

In **Barium Chemicals Ltd. v. Company Law Board**, the Supreme Court while construing Section 237 of the Companies Act, 1956, held that:

... Therefore, the words, “reason to believe” or “in the opinion of” do not always lead to the construction that the process of entertaining “reason to believe” or “the opinion” is an altogether subjective process not lending itself even to a limited scrutiny by the court that such “a reason to believe” or “opinion” was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative...

## Opinion

... There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for anyone to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

## Opinion

**Bhikhubhai Vithlabhai Patel v. State of Gujarat**, the Supreme Court was concerned with the term “is of opinion” as appearing in Section 17 of the Gujarat Town Planning and Urban Development Act, 1976, wherein the Supreme Court held that existence of relevant material is condition precedent for formation of opinion and that such opinion cannot be on imaginary grounds or wishful thinking, however laudable they may be.

## Opinion

- The Supreme Court also importantly went on to hold that construction placed on the expression “**reason to believe**” will equally be applicable to the expression “**is of opinion**”.
- Therefore, one may argue that even the jurisprudence developed around **Section 147 of the Income Tax Act, 1961**, which uses the expression “reason to believe” may also apply to **Section 83 of the CGST Act**.
- These inter alia include holding of belief in good faith; such belief not being based on mere suspicion, gossip, or rumor; such belief not being irrational; and the reasons to believe having a rational connection with the formation of belief.

## Necessary

Again, what is also important is the use of the word “**necessary**” as opposed to “**expedient**”.

Necessity would mean something that is indispensable, unavoidable, and impossible to be otherwise or inevitable.

## Necessary

In *J. Jayalalitha v. Union of India*, the Supreme Court, while interpreting the term “as may be necessary” used in Section 3(1) of the Prevention of Corruption Act, 1988, held that:

- *... The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement.*
- *Further, the discretion conferred upon the Government is not absolute.*
- *It is in the nature of a statutory obligation or duty. It is the requirement which would necessitate exercise of power by the Government.*
- *When a necessity would arise and of what type being uncertain the legislature could not have laid down any other guideline except the guidance of “necessity”.*
- *It is really for that reason that the legislature while conferring discretion upon the Government has provided that the Government shall appoint as many Special Judges as may be necessary.*
- *The words “as may be necessary” in our opinion is the guideline according to which the Government has to exercise its discretion to achieve the object of a speedy trial. The term “necessary” means what is indispensable, needful or essential.*

## Rule 159

(1) Where the Commissioner decides to attach any property, including bank account in accordance with the provisions of section 83, he shall pass an order in **FORM GST DRC-22** to that effect mentioning therein, the details of property which is attached.

(2) The Commissioner shall send a copy of the order of attachment to the concerned **Revenue Authority or Transport Authority or any such Authority** to place encumbrance on the said movable or immovable property, which shall be removed only on the written instructions from the Commissioner to that effect.

## Rule 159

(3) Where the property attached is of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such property or the amount that is or may become payable by the taxable person, whichever is lower, then such property shall be released forthwith, by an order in FORM GST DRC-23, on proof of payment.

(4) Where the taxable person fails to pay the amount referred to in sub-rule (3) in respect of the said property of perishable or hazardous nature, the Commissioner may dispose of such property and the amount realized thereby shall be adjusted against the tax, interest, penalty, fee or any other amount payable by the taxable person.



## Rule 159

(5) Any person whose property is attached may, within seven days of the attachment under sub-rule (1), file an objection to the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in **FORM GST DRC- 23**.

(6) The Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in **FORM GST DRC- 23**.

## DRC-22 to be served ?

- It is to be noted that as per **rule 159 (2) of CGST rules**, the commissioner is not required to serve the order in DRC-22 to the person whose property has been attached therefore it has been observed that due to non-communication of the order in DRC-22 to the concerned person, the beneficial right provided to the concerned person under rule 159 (5) cannot be exercised within reasonable period of time **i.e. seven days from the date of attachment, not from the date of service of notice.**
- Therefore the concerned person can not exercise the right.

## DRC-22 to be served ?

- Further to be noted that provisional attachment can be made only of the property belonging to the taxable person against whom the proceedings are pending.
- Taxable person has been defined in **section 2 (107) of the CGST Act** to mean a person who is registered or is liable to be registered under **sections 22 or 24 of the CGST Act.**

## CBIC Guidelines – Clarification with caveats

- The Central Board of Indirect Taxes and Customs (Board), on 23-2-2021 published certain guidelines for provisional attachment of property under Section 83.
- Though the said guidelines do not mention the section under which it is issued, it clear that same has been issued under **Section 168(1) of the CGST Act which empowers the Board to issue instructions/directions to the Central Tax Officers.**
- It was clarified that for forming an opinion, the Commissioner must exercise due diligence and examine facts of the case such as nature of offence, established nature of business and possibility of the assessee disposing of her/his assets.

## CBIC Guidelines – Clarification with caveats

The Board has also laid down certain non-exhaustive illustrations in which the power of provisional attachment can be exercised, such as where the taxable person has:

- a) supplied any goods/services without an invoice;
- b) issued an invoice without supply of goods or services;
- c) fraudulently availed input tax credit;
- d) fraudulently obtained refund;
- e) collected tax but failed to pay the same to the exchequer within three months; and
- f) fraudulently passed on input tax credit.

## Supreme Court's analysis of provisional attachment

- The power to levy a provisional attachment is **draconian** in nature and the legislature was in fact conscious of the draconian nature of the power since it conditioned the exercise of such power by employing specific statutory language.
- The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.
- By using the word “**necessary**” instead of “**expedient**”, the legislature intended that that the interest of the revenue can be protected only by a provisional attachment. Necessity postulates a more stringent requirement than “expediency”.

## Supreme Court's analysis of provisional attachment

- Provisional attachment orders must conform to both statutory and procedural requirements.
- Such provisions do not enable the Commissioner to make pre-emptive strikes merely because property is available for being attached.
- There must exist a proximate or live link between the need for the attachment and the purpose which it is intended to secure.
- Moreover, the Commissioner, in the formation of such belief, acts on some tangible material.
- **Rule 159(5)** provides for post-provisional attachment right of (a) submitting an objection to the attachment; and (b) an opportunity of being heard.
- These dual safeguards have been provided since a business entity whose bank account is attached is seriously prejudiced by the inability to utilise the proceeds of the account (or her/his property) for the purposes of business.

## Supreme Court's analysis of provisional attachment

- The Commissioner who hears such objection must pass a reasoned order accepting or rejecting such objections, lest the purpose of subjecting such order to judicial scrutiny be defeated.
- Although not provided in the rules, an opportunity should be given to the assessee to offer any alternative form of security in lieu of the attachment[82].
- After the final order under Section 74 was passed and an appeal had also been filed, the order of provisional attachment must come to an end.



## Judgements

### **Valerius Industries v. Union of India (Guj HC)**

- The formation of opinion of the Commissioner must be based on some credible material disclosing the necessity to provisionally attach the property of the assessee.
- Further, the reasons to believe for exercise of powers under Section 67 (power of inspection, search and seizure) is in contradistinction to the formation of opinion under **Section 83**.
- Just because a search has taken place does not ipso facto necessitate provisional attachment of properties. If the interest of the revenue is sufficiently secured by reversal of the input tax credit (ITC), provisional attachment may not be justified.

## Judgements

### **Jay Ambey Filament (P) Ltd. v. Union of India**

If the subjective satisfaction under Section 83 is arrived at in absence of any cogent or credible material, then such action amounts to “malice in law”. Mechanical exercise of powers under Section 83 ought to be set aside as being arbitrary.

## Judgements

### **Patran Steel Rolling Mill Commr. of State Tax**

Firstly, no proceedings were pending against the petitioner under the sections mentioned in Section 83 above. Further, it was not the case of the department that the petitioner was a fly by night operator or a habitual offender or that it did not have the means to pay the sum that would be ultimately assessed. In such circumstances, order of provisional attachment was quashed.

## Judgements

### **Vinodkumar Murlidhar Chechani v. State of Gujarat**

The Gujarat High Court has deprecated the practice of issuing orders of provisional attachment in a routine matter even when the law is well settled. It was suggested that Union of India may come up with appropriate guidelines in this regard.

## Judgements

### **Bindal Smelting (P) Ltd. v. Director General–**

Courts are entitled to determine whether the formation of opinion under Section 83 is arbitrary, capricious or whimsical. Mandate of Section 83 is to attach amount lying in fixed deposit account or savings bank account and not an account having a debit balance such as a cash credit account. Attachment of cash credit account having debit balance does not protect interest of revenue, instead it merely ruins the business of a dealer.

## Judgements

### **Ufwindia Global Education v. Union of India**

The effect of proceedings under Section 83 comes to end as soon as the proceedings pending in any of the aforesaid Sections i.e. 63 or 64 or 67 or 73 or 74 are over because pendency of the proceedings is the sine qua non. Since proceedings under Section 67 were over, there did not arise any case for continuance of the provisional attachment[53]. It may also be noted that an order under Section 83 also loses its force after one year from the date of the order, as per Section 83(2) of the CGST Act.

## Judgements

### **Kaish Impex (P) Ltd. Union of India**

Since proceedings were initiated under Section 70 of the CGST Act (“power to summon persons to give evidence and produce documents”), the properties of the assessee could not have been attached, since Section 70 is not one of the sections prescribed in Section 83 of the CGST Act.

Even the prescribed form i.e. DRC-22, specifies the particulars of a registered taxable person and which proceedings have been launched against the aforesaid taxable person indicating a nexus between the proceedings pending against a taxable person and provisional attachment of bank account of such taxable person.

## Judgements

### **Siddharth Mandavia Union of India**

In exercise of powers under Section 83, the taxation authorities cannot attach bank accounts held by persons other than the taxable person – in this case, bank accounts held jointly by the petitioner with his wife and with his minor son. Moreover there was no allegation that any money belonging to the assessee or to his firm had been credited into the joint accounts with his wife or with his minor son.



## Judgements

### **AJE India (P) Ltd. v. Union of India**

Section 83 order was passed against the assessee since proceedings under Section 67 had been initiated. It was held that merely because there is a proceeding under Section 67 would not mean that recourse to such a drastic power as under Section 83 would be an automatic consequence, more so when petitioner has cooperated with the investigation. Interim protection was thus granted.

## Judgements

### **Proex Fashion (P) Ltd. v. Govt. of India –**

Following the judgments in Kaish Impex, Bindal Smelting and Valerius Industries, it was reiterated that powers under Section 83 are far reaching and cannot be invoked when no proceedings under the sections mentioned in Section 83 were pending.



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**Please feel free to contact us**

## **CA. Navjot Singh**

**Partner – Indirect Tax**

**TaxTru Business Advisors**

E: [navjot.singh@taxtru.in](mailto:navjot.singh@taxtru.in)

M: +91 99533 57999

## **FCA. Archana Jain**

**Founder**

**Archana Jain & Co**

E: [Archana.jain@taxtru.in](mailto:Archana.jain@taxtru.in)

M: +91 99990 09508

TAXTRU BUSINESS  
ADVISORS

Archana Jain  
& Co

#F-13 Kirti Nagar, Nearby Derawal Bhawan, Delhi – 110015