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Widening the powers of the Provisional Attachment – A brief analysis of the budgetary amendment

In the previous article (see, "Tax Wire" Issue: 08 dated June 12, 2021), we briefly discussed the provisions of S. 83 of the CGST Act, 2017 ('the Act') empowering the Commissioner to resort to the provisional attachment in the specified circumstances and the protective shield provided by the various High Courts by its judgements to the taxpayers against the arbitrary action of the authorities in terms of S. 83 of the Act. However, instead of learning a lesson from these judicial pronouncements, the Government has amended the provisions of S. 83 by the Finance Act, 2021 substantially widening the scope thereof. But before we discuss these amendments, it will be advantageous to have a look at a few significant judicial rulings rendered in the context of S.83 in force as on date.

In the case of **Valerius Industries vs. UOI – 2019-TIOL-2094-HC-AHM-GST**, the Gujarat High Court, while examining the validity of the action of the Department in terms of S.83, observed and summarised its conclusions as under:

"52. Our final conclusions may be summarized as under:

[1] The order of provisional attachment before the assessment order is made, may be justified if the assessing authority or any other authority empowered in law is of the opinion that it is necessary to protect the interest of revenue. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far fetching, which would warrant the formation of the belief.

[2] The power conferred upon the authority under Section 83 of the Act for provisional attachment could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.

[3] The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution.

[4] The power under Section 83 of the Act for provisional attachment should be exercised only if there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his / her property with a view to thwarting the ultimate collection of demand and

in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.

[5] The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

[6] The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings.

[7] The authority before exercising power under Section 83 of the Act for provisional attachment should take into consideration two things: (i) whether it is a revenue neutral situation (ii) the statement of "output liability or input credit". Having regard to the amount paid by reversing the input tax credit if the interest of the revenue is sufficiently secured, then the authority may not be justified in invoking its power under Section 83 of the Act for the purpose of provisional attachment."

With the above observations, the High Court quashed and set aside the orders of provisional attachment and blockage of the Input Tax Credit under challenge before it. The conclusions of the Gujarat High Court in the aforesaid judgement were endorsed in the recent judgement delivered on April 20, 2021 by **Supreme Court in the case of M/s. Radha Krishna Industries vs. State of Himachal Pradesh and Ors. – 2021-TIOL-179-SC-GST**. In this case, the Apex Court was considering the validity of the departmental action of the provisional attachment under S. 83 against the Petitioner who had been charged with the involvement in an ITC fraud amounting to Rs. 5.03 crores during 2017-18 and 2018-19. The High Court of Himachal Pradesh had, by its Order dated January 1, 2021, dismissed the Writ Petition instituted by the Petitioner under Article 226 of the Constitution challenging the orders of provisional assessment on the ground that an alternate remedy was available. This order of the High Court was under the challenge before the Supreme Court.

The Supreme court, after considering the facts of the case, the relevant statutory provisions and the rival submissions, allowed the Appeal of the Petitioner and set aside the impugned judgement of the High Court and the orders of the provisional attachment passed by the authorities. In its uniquely structured and scintillating judgement, the Apex Court has made the following significant observations:

"48. Now in this backdrop, it becomes necessary to emphasize that before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in Section 83 is, in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre-conditions by the

Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue."

"49..... A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallized. An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. Each of these ingredients must be strictly applied before a provisional attachment on the property of an assessee can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorize Commissioners to make pre-emptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue."

The Court has further observed:

"70.The appellant, having filed an appeal under Section 107, is required to comply with the provisions of sub-Section (6) of Section 107 while the recovery of the balance is deemed to be stayed under the provisions of sub-Section (7). As observed herein above and under Section 83, the order of provisional attachment may be passed during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74. Therefore, once the final order of assessment is passed under Section 74 the order of provisional attachment must cease to subsist. Therefore, after the final order under Section 74 of the HPGST Act was passed on 18 February, 2021, the order of provisional attachment must come to an end."

Unfortunately, in the blatant disregard of the various judicial pronouncements and the observations made therein, substantial amendments have been carried out to S. 83 by the Finance Act, 2021 and the scope thereof has been dangerously widened.

The existing S. 83, inter alia, empowers the Commissioner to resort to the action of the provisional attachment during the pendency of any proceedings under S.62 or S. 63 or S. 64 or S. 67 or S. 73 or S. 74 of the Act against a taxable person. Moreover, any such action in terms of S. 83, as it exists as on date, can only be taken against a taxable person against whom any proceedings under the specified provisions are pending. However, in terms of the amended S. 83, the Commissioner has been empowered to initiate the action of the provisional attachment **after the initiation of any proceeding** under any of the following provisions of the CGST Act, 2017:

1. Chapter XVII

- S.59. Self-assessment.
- S.60. Provisional assessment.
- S.61. Scrutiny of returns.
- S.62. Assessment of non-filers of returns.
- S.63. Assessment of unregistered persons.
- S.64. Summary assessment in certain special cases.

2. Chapter XIV

- S.67. Power of inspection, search and seizure.
- S.68. Inspection of goods in movement.

- S.69. Power to arrest.
- S.70. Power to summon persons to give evidence and produce documents
- S.71. Access to business premises.

3. Chapter XV

- S.73. Determination of tax not paid or short paid
- S.74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud!
- S.75. General provisions relating to determination of tax
- S.76. Tax collected but not paid to Government
- S.77. Tax wrongfully collected and paid to Central Government or State Government
- S.78. Initiation of recovery proceedings
- S.79. Recovery of tax
- S.80. Payment of tax and other amount in instalments
- S.81. Transfer of property to be void in certain cases
- S.82. Tax to be first charge on property
- S.83. Provisional attachment to protect revenue in certain cases
- S.84. Continuation and validation of certain recovery proceedings

A cursory look at the above provisions will tell the readers how unreasonably the scope of the provision has been widened through the amendment! For instance, a mere issue of the summons under S.70 may be sufficient for the Commissioner to initiate the action of provisional assessment against the person specified under the amended provision! Yet another subtle but significant amendment made to this provision relates to the person against whom the action thereunder may be initiated. Presently, the action of provisional attachment can be taken only against a '**taxable person**'. However, in terms of the amended provision, such action, besides a taxable person, can also be taken against **any person specified** in S. 122 (1A) of the Act. The persons specified under S. 122 (1A) are:

1. Supplier of any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;
2. Who 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;
3. Who 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;
4. Who takes or distributes input tax credit in contravention of section 20, or the rules made thereunder.

Here, it may be pointed out that the amended provision of S. 83 has become part of the CGST Act, 2017 on March 28, 2021 on the enactment of the Finance Bill, 2021 on the said date. However, it has yet not come into force and will become effective on the appointed date to be declared by the Central Government by a notification in the official gazette.

One really need not dwell at length on these unreasonable, unjustified, unbridled and unannounced widening of the scope of the power vested in the Commissioner under S. 83 of the Act. Whatever may be the factor behind these amendments – whether it is arrogance borne out of power or bureaucratic mind-set or annoyance towards the Courts' penetrating and wise observations or sheer vengeance – one thing is certain and that is, the taxpayers may brace themselves for mounting troubles once the amended provision of S. 83 of the Act comes into operation!

[Concluded]