

[2024] 158 taxmann.com 91 (Andhra Pradesh)/[2024] 85 GSTL 65 (Andhra Pradesh)[27-12-2023]

GST : Where provisional attachment order issued under section 83 did not contain any reasons except mentioning that in order to protect interest of revenue and in exercise of powers conferred under section 83 said order was issued, same was to be set aside

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[2024] 158 taxmann.com 91 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Arhaan Ferrous and Non Ferrous Solutions (P.) Ltd.

v.

Senior Intelligence Officer*

U. DURGA PRASAD RAO AND SMT. VENKATA JYOTHIRMAI PRATAPA, JJ.

WRIT PETITION NO. 12360 OF 2022

DECEMBER 27, 2023

Provisional attachment - Recording of reason - Petitioner-company was engaged in business of iron scrap - During course of search operations conducted by respondent authorities under section 67, books of account of petitioner were seized and summons were issued to its director and employees - Since investigation revealed that location of business premises of input suppliers of petitioner was fake and since input tax credit passed on by them was irregular, considering quantum of irregularly availed ITC, respondent authorities found it essential to provisionally freeze bank account of petitioner – HELD : In order to pass an order of provisional attachment under section 83, formation of opinion on basis of tangible material which indicates necessity to order provisional attachment to protect interest of Government respondent is mandatory - Unless reasons are recorded broadly, assessee cannot be expected to file any objections under provisions of rule 159(5) - Since impugned provisional attachment order did not contain any reasons except mentioning that in order to protect interest of revenue and in exercise of powers conferred under section 83 said order was issued, same was to be set aside [Section [83](#) of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017 - Rule [159](#) of Central Goods and Services Tax Rules, 2017/ Andhra Pradesh Goods and Services Tax Rules, 2017] [Paras 10 and 11] [In favour of assessee]

CASE REVIEW

Radha Krishan Industries v. State of Himachal Pradesh, [\[2021\] 127 taxmann.com 26/48 G.S.T.L. 113/86 GST 665 \(SC\)](#) (para 7) and *Anjani Impex v. State of Gujarat*, [\[2020\] 122 taxmann.com 299 \(Guj.\)](#) (para 7) followed.

CASES REFERRED TO

Radha Krishan Industries v. State of Himachal Pradesh, [\[2021\] 127 taxmann.com 26/48 G.S.T.L. 113/86 GST 665 \(SC\)](#) (para 2) and *Anjani Impex v. State of Gujarat*, [\[2020\] 122 taxmann.com 299 \(Guj.\)](#) (para 2).

ORDER

U. Durga Prasad Rao, J. - In this Writ Petition the petitioner challenges the provisional attachment order dated 1-4-2022 and 6-4-2022 issued under Form GST DRC - 22 by the 4th respondent as illegal, arbitrary and

to *set aside* the same and pass such other orders deemed fit.

2. Petitioner's case succinctly is thus:

- (a) Petitioner is a company engaged in the business of iron scrap and during the course of search operations conducted by the respondent authorities U/s 67 of A.P. Goods & Service Tax Act, (for short 'AP GST Act, 2017') on 31-3-2022, the respondent authorities seized the books of accounts and issued summons directing the Director and employees of the petitioner company U/s 70 of the AP GST Act, 2017 and accordingly the deponent of the writ affidavit and the employees of the petitioner company attended the enquiry and their statements were recorded. Thereafter by way of impugned provisional orders of attachment the accounts of the petitioner maintained with the respondents 6 and 7 banks have been provisionally attached. Challenging such attachment, the writ petition is filed.
- (b) It should be noted that in I.A.No.1 of 2022 the petitioner sought for interim suspension of the provisional attachment orders dated 1-4-2022 and 6-4-2022. This Court heard learned counsel for the petitioner Sri Bhaskar Reddy Vemi Reddy and Sri Y.N. Vivekananda, learned Government Pleader for respondents. Learned counsel for the petitioner mainly raised the following two contentions before this Court:
 - (1) The 4th respondent herein in the impugned orders of provisional attachment did not record anything with regard to the formation of opinion or subjective satisfaction and the same is contrary to the provisions of Section 83 of the Act.
 - (2) As on the date of the orders of provisional attachment, there were no proceedings pending under section 67 of the Act nor any proceedings have been initiated either under section 73 or 74 of the Act.

And to buttress the above contentions, the petitioner relied upon the judgment of Hon'ble Supreme Court in *Radha Krishan Industries v. State of Himachal Pradesh* AIR 2021 SC 2114 = MANU/SC/0293/2021/[[2021](#)] [127 taxmann.com 26/48 G.S.T.L. 113/86 GST 665](#) and judgment of the Gujarat High Court in *Anjani Impex v. State of Gujarat* 2020 [43] G.S.T.L. 23 = MANU/GJ/1423/2020/[[2020](#)] [122 taxmann.com 299](#). Learned Government Pleader resisted the writ petition and also interim application contending that there was absolutely no illegality nor any procedural infirmity in the impugned action. He further contended that only after recording valid reasons in the note file and with an intention to protect the interest of Government revenue, the 4th respondent issued impugned provisional order of attachment of the bank accounts of the petitioner. He thus opposed the writ petition as well as the interim application. This Court passed an elaborate order with the following observations:

"Admittedly, except saying that the orders of provisional attachment are passed in order to protect the interest of the Government revenue, no other reasons are assigned by the fourth respondent in the impugned orders of the provisional attachment. When sub-Rule (5) of Rule 159 of the Rules specifically provides for filing objections against the orders of provisional attachment, the contention that the reasons for ordering provisional attachment were recorded in the Note File and that there is no need to extract the same or state the same in the provisional order of attachment, in the considered opinion of this Court, cannot stand for judicial scrutiny. The Hon'ble Supreme Court, in the above referred judgment, also categorically ruled that the formation of opinion on the basis of tangible material which indicates the necessity to order provisional attachment to protect the interest of the Government revenue is mandatory.

Unless reasons are recorded broadly, the assessee cannot be expected to file any objections under the provisions of sub-Rule (5) of Rule 159 of the Rules. The Hon'ble Supreme Court, in the above referred judgment, held that exercise of unguided discretion under section 83 of the Act would not be permissible as it will leave citizens and their legitimate business activities to the peril of arbitrary power. Having regard to the language employed by the legislature in Section 83 of the Act and Rule 159(5) of the Rules and the judgments referred to *supra*, this Court is of the opinion that the fourth respondent failed to adhere to the mandatory requirement of formation of opinion. It is also the submission of the learned counsel for the petitioner that, by pressing into service the provisions of Section 67 of the Act, the respondent authorities conducted inspection, search and seizure. It is also submitted by the learned counsel that, pursuant to the summons issued under section 70 of the Act, the Director and the employees appeared before the competent authority and their statements were also recorded and the documents were also seized. It is further submitted that, in view of the same, it cannot be said that the proceedings under

section 67 of the Act are pending. In order to show that the respondents have concluded proceedings under section 67 of the Act, a copy of the order of seizure *vide* Form GST INS-02 under Rule 139(2) of the Rules is filed as a material paper.

On the other hand, it is submitted by the learned Government Pleader that the provisional orders of attachment were communicated to the petitioner and the proceedings under section 67 of the Act are still incomplete and are pending.

In view of the above reasons, having regard to the submission of the learned counsel for the petitioner and the judgments referred to above, this Court is of the opinion that the petitioner has made out *prima facie* case for grant of interim relief.

For the aforesaid reasons, there shall be interim suspension of the provisional attachment orders, dated 1-4-2022 and 6-4-2022, till 15-7-2022.

Post the matter for hearing on 5-7-2022."

3. It should be noted that subsequently the 4th respondent filed counter affidavit alleging that on specific intelligence information that M/s RP Enterprises, M/s AR Traders, and M/s AN Traders have been passing on fake Input Tax Credit without actually purchasing goods in favour of the petitioner Company, investigation was taken up under the provisions of AP GST Act, 2017 and during the course of study of records available with the Department, it came to light that 90% of the input supplies of the petitioner company, were received from the aforesaid three firms but there were no corresponding purchases of scrap by the said three input suppliers and therefore the Special Commissioner, APSDRI has ordered for conducting searches at different locations under the provisions of Section 67 of the APGST Act, 2017. During such search of the aforesaid three traders it was identified that no such firms in existence at the given address. Accordingly, searches at the principal place of business of the petitioner along with the residential premises of the Managing Director of the petitioner company were also conducted in the presence of independent witnesses. Since the investigation revealed that the location of the business premises of the input suppliers of the petitioner Company are fake and since the input tax credit passed on by them is irregular, considering the quantum of irregularly availed ITC, it was considered essential to provisionally debit freeze the bank account of the petitioner company till completion of the investigation of the subject case and accordingly orders *vide* DRC-22, dated 1.04.02022 and 6-4-2022 were issued U/s 83 of the APGST Act, 2017 to respondents 6 and 7 banks.

4. In the counter, it is further submitted that ultimately investigation was completed and revised assessment order was passed U/s 74 of the APGST Act, 2017 on 6-6-2023 confirming the demand of Rs. 21,58,53,496/- against the petitioner company along with the penalties.

5. It is contended that Section 83 authorizes the provisional attachment not only during the pendency of any proceedings U/s 62 or 63 or 64 or 67 or 73 or Section 74 but "after initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV". Presently the case is under Chapter XV of APGST Act, 2017 and hence the action of the respondents is legally tenable. It is further contended that the proceedings under order DRC-22 was issued with the following reasons:

- (a) None of the input suppliers were operating at the declared addresses;
- (b) Addresses provided by the input suppliers was fake address;
- (c) The whereabouts of the proprietors input supplier firms are unknown to the Department.
- (d) The Managing Director of the petitioner company is able to contact the proprietors of these fake firms;
- (e) The petitioner company is able to contact the proprietors of these fake firms and make bank transfers to the bank accounts of these fake firms;
- (f) That no record pertaining to the petitioner company were not available in their business/residential premises;
- (g) That even on the day of the search *i.e.*, 31-3-2022, the petitioner company has issued E-Waybills for a total value of Rs. 1,44,43,260/-, thereby passing on suspected irregular ITC of Rs. 25,99,787/- to their clients;

(h) That the amounts transferred from the petitioner company to the fake input supplier firms were subsequently diverted to individuals/firms/companies which have no declared business dealings them

6. It is further contended, reasons for action U/s 83 of the APGST Act r/w DRC-22 were sent to the petitioner by post. It is further submitted that the petitioner did not approach the Court with clean hands and as per the bank statements, in ICICI bank the petitioner has Rs. 1,42,24,933/- and in Axis Bank the petitioner has Rs. 1,81,025/-whereas the tax liability of the petitioner as per the Assessment Order is Rs. 21,58,53,496/-. Thus the funds available in the bank account do not even meet the requirement of the 10% of the appeal amount. The respondent thus prayed to dismiss the writ petition.

7. Heard Sri Bhaskar Reddy Vemi Reddy, learned counsel for the petitioner and Sri Y.N. Vivekananda, learned Government Pleader for respondents. Both the learned counsel reiterated their pleadings in their respective arguments.

8. The point for consideration is whether there are merits in the writ petition to allow?

9. POINT: As can be seen, in the interim order passed in I.A No. 1 of 2022 this Court in the light of the principles laid down by Hon'ble Supreme Court in *Radha Krishan Industries (supra)* and judgment of the Gujarat High Court in *Anjani Impex (supra)*, observed that in the orders of the 4th respondent, except saying that provisional attachment orders were issued in order to protect the interest of the Government revenue, no reasons were assigned in the provisional attachment order. This Court observed, when sub-Rule (5) of Rule 159 of the Rules specifically provides for filing objections against the orders of provisional attachment, the contention that the reasons for ordering provisional attachment were recorded in the Note File and that there is no need to extract the same or state the same in the provisional order of attachment, cannot stand for judicial scrutiny. It is further observed, the Hon'ble Supreme Court in the above referred judgment also categorically ruled that the formation of opinion on the basis of tangible material which indicates the necessity to order provisional attachment to protect the interest of the Government revenue is mandatory. It is further observed that unless reasons are recorded broadly, the assessee cannot be expected to file any objections under the provisions of Rule 159(5) of the Rules. This Court further observed that as per the aforesaid judgment of Hon'ble Supreme Court the exercise of unguided discretion under section 83 of the Act would not be permissible as it will leave citizens and their legitimate business activities to the peril of arbitrary power. In the interim order this Court opined that the 4th respondent failed to adhere to the mandatory requirement of formation of opinion. On such observations this Court passed the interim order.

10. In our considered view, even after filing of the counter by the respondents, there is no scope to reverse the opinion expressed by this Court in the interim order. No doubt in the counter it is claimed by the respondents that order DRC-22 under section 83 was issued with the above extracted (a) to (h) reasons. However, on perusal of the provisional attachment order dated 1-4-2022 issued by the 4th respondent under Form GST DRC 22 r/w Rule 159(1), it does not contain any reasons except mentioning that in order to protect the interest of the revenue and in exercise of the powers conferred U/s 83 of the Act the said order was issued. Needles to emphasize that reasons are live-nerve of any order of the public authority, without which the effected party cannot effectively oppose and submit his stand. Thus, in essence the reason given by this Court for passing interim order holds good even in the main writ petition also. The averments in the counter and passing of the assessment order will not improve the case of respondents in the main writ petition to uphold the provisional attachment order passed by the 4th respondent. Therefore, the writ petition deserves to be allowed.

11. Accordingly, the writ petition is allowed and the impugned proceedings in Form GST DRC-22 Ref. No. :APSDRI/T1/GST/INT/06/2022, dated 1-4-2022 and Form GST DRC-22 Ref. No. APSDRI/T1/GST/INT/06/2022, dated 6-4-2022 issued by the 4th respondent are hereby set aside. No costs.

As a sequel, interlocutory applications pending if any, shall stand closed.

AJAY