
[2022] 138 taxmann.com 323 (Andhra Pradesh)/[2022] 92 GST 490 (Andhra Pradesh)[06-05-2022]

GST : As order of provisional attachment passed without recording reasons cannot stand judicial scrutiny, interim suspension of same was to be ordered

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[2022] 138 taxmann.com 323 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

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

v.

Senior Intelligence Officer-3*

A.V. SESA SAI AND RAVI NATH TILHARI, JJ.

W.P. NO. 12360 OF 2022

MAY 6, 2022

Provisional Attachment - Order without reasons - Writ petition was filed to quash order of provisional attachment which was passed without recording anything with regard to formation of opinion that too when no proceedings were pending - Other than stating that in order to protect interest of government impugned order was passed, no other reason was assigned by department in impugned order - Contention of department that reasons for ordering provisional attachment were recorded in note file and there was no need to extract/state same in provisional order, could not stand judicial scrutiny - Assessee could not be expected to file any objection unless reasons were recorded in impugned order - Department had failed to adhere to mandatory requirement of formation of opinion - Petitioner contended that relevant proceedings under section 67 were concluded as department conducted inspection, search and seizure, summons were issued and statements of director and employees were recorded - Copy of order of seizure was filed by petitioner - Contentions of department that impugned order was communicated to petitioner and proceedings under section 67 were still pending, were not acceptable - Petitioner had made out prima facie case - Thus, interim suspension of order on provisional attachment was to be ordered [Sections 67 and 83 of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Paras 14 to 16] [In favour of petitioner]

CASE REVIEW

Radha Krishan Industries v. State of Himachal Pradesh [2021] 127 taxmann.com 26/86 GST 665 (SC) (para 10) and *Anjani Impex v. State of Gujarat* [2020] 122 taxmann.com 299 (Guj.) (para 11) followed.

CASES REFERRED TO

Radha Krishan Industries v. State of Himachal Pradesh [2021] 127 taxmann.com 26/86 GST 665 (SC) (para 7) and *Anjani Impex v. State of Gujarat* [2020] 122 taxmann.com 299 (Guj.) (para 7).

Vemireddy Bhaskar Reddy, *Ld. Counsel for the Petitioner*. **Y.N. Vivekananda**, *Ld. Government Pleader for the Respondent*.

ORDER

W.P. No.12360 of 2022

1. Rule Nisi. Call for records.

2. Notice returnable in four weeks.

I.A.No.01 of 2022

3. The orders of provisional attachment, dated 1-4-2022 and 6-4-2022, are under challenge in the present Writ Petition.

4. According to the petitioner, it is a company engaged in the business of Iron scrap. During the course of search operations conducted by the respondent authorities, under section 67 of the A.P. General Sales Tax Act, 2017 (for brevity, 'the Act'), on 31-3-2022, the respondent authorities seized the Books of Accounts and issued summons, directing the Director and employees of the petitioner- company under section 70 of the Act. It is stated that, in pursuance of the same, the deponent of the writ affidavit and the employees of the petitioner-company attended for the enquiry and their statements were recorded. By way of the impugned provisional orders of attachment, the accounts of the petitioner in the respondents 6 and 7-banks have been provisionally attached. As mentioned *supra*, the said orders of provisional attachment are under challenge in the present Writ Petition.

5. Heard Sri Vemireddy Bhaskar Reddy, learned counsel for the petitioner, and Sri Y.N. Vivekananda, learned Government Pleader for respondents.

6. Broadly, there are two contentions raised by the learned counsel for the petitioner. They are:

(1) Fourth 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.

7. In support of his submissions and contentions, learned counsel for the petitioner places reliance on a judgment of the Hon'ble Supreme Court in the case of *Radha Krishan Industries v. State of Himachal Pradesh* [2021] 127 taxmann.com 26/86 GST 665 and the judgment of the Gujarat High Court in the case of *Anjani Impex v. State of Gujarat* [2020] 122 taxmann.com 299.

8. On the contrary, learned Government Pleader, strongly resisting the Writ Petition, contends that there is absolutely no illegality nor there exists any procedural infirmity in the impugned action and, in the absence of the same, invocation of the jurisdiction of this Court, under article 226 of the Constitution of India, is impermissible. It is further submitted by the learned Government Pleader that the fourth respondent herein, after recording valid reasons, in the Note File, with an intention to protect the interest of the Government revenue, issued the impugned provisional order of attachment of the bank accounts of the petitioner. It is also the submission of the learned Government Pleader that there is absolutely no necessity to mention the particulars of all the reasons in the provisional orders of attachment and the same would be evident from the language employed in section 83 of the Act and rule 159 of the Rules framed thereunder.

9. In order to consider the issue in the present Writ Petition, reference to the provisions of section 83 of the Act is necessary and expedient. Section 83 of the Act reads as follows:

"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)".

10. A reading of the above provision of law makes it very much evident that the Commissioner is empowered to pass an order of provisional attachment during the pendency of any proceedings under section 62 or 63 or 64 or 67 or 73 or section 74 of the Act, if the Commissioner is of the opinion that, for the purpose of protecting the interest of the Government revenue, the same is essential. The scope and ambit of the said provision of law fell for consideration before the Hon'ble Supreme Court in the case of *Radha Krishan*

Industries (supra) and the Hon'ble Supreme Court, at paragraphs 48, 49, 50, 51, 53, 54 to 56 and 59, held in the following manner:

"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 PART D 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 preconditions 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. By utilizing the expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorized not merely because it is expedient to do so (or profitable or practicable for the revenue to do so) but because it is necessary to do so in order to protect interest of the government revenue. Necessity postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would PART D stand defeated. Necessity in other words postulates a more stringent requirement than a mere expediency. 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 preemptive 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.

50. These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine of proportionality. Proportionality mandates the existence of a proximate or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. Moreover, the words embodied in sub-section (1) of section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the PART D basis of which the formation of opinion is based in regard to the existence of the statutory requirement. While dealing with a similar provision contained in Section 4536 of the Gujarat Value Added Tax Act 2003, one of us (Hon'ble Mr Justice MR Shah) speaking for a Division Bench of the Gujarat High Court in *Vishwanath Realtor v. State of Gujarat* 37 observed:

"8.3 Section 45 of the VAT Act confers powers upon the Commissioner to pass the order of provisional attachment of any property belonging to the dealer during the pendency of any proceedings of assessment

or reassessment of turnover escaping assessment. However, the order of provisional attachment can be passed by the Commissioner when the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary so to do. Therefore, before passing the order of provisional attachment, there must be an opinion formed by the Commissioner that for the purpose of protecting the interest of the Government Revenue during the pendency of any proceedings of assessment or reassessment, it is necessary to attach provisionally any property belonging to the dealer. However, such satisfaction must be on some tangible material on objective facts with the Commissioner. In a given case, on the basis of the past conduct of the dealer and on the basis of some reliable information that the dealer is likely to defeat the claim of the Revenue in case any order is passed against the dealer under the VAT Act and/or the dealer is likely to sale his properties and/or sale and/or dispose of the properties and in case after the conclusion of the assessment/reassessment proceedings, if there is any tax liability, the Revenue may not be in a position to recover the amount thereafter, in such a case only, however, on formation of subjective satisfaction/opinion, the Commissioner may exercise the powers under section 45 of the VAT Act." (emphasis supplied) Section 45 (1) provides as follows:

51. We adopt the test of the existence of "tangible material". In this context, reference may be made to the decision of this Court in the *Commissioner of Income-tax v. Kelvinator of India Limited* 38. Mr Justice SH Kapadia (as the learned Chief Justice then was) while considering the expression "reason to believe" in section 147 of the Income-tax Act 1961 that income chargeable to tax has escaped assessment *inter alia* by the omission or failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year, held that the power to reopen an assessment must be conditioned on the existence of "tangible material" and that "reasons must have a live link with the formation of the belief". This principle was followed subsequently in a two judge Bench decision in *Income-tax Officer, Ward No. 162 (2) v. Techspan India Private Limited* 39. While advertent to these decisions we have noticed that Section 83 of the HPGST Act uses the expression "opinion" as distinguished from "reasons to believe". However for the reasons that we have indicated earlier we are clearly of the view that the formation of the opinion must be based on tangible material which indicates a live link to the necessity to order a provisional attachment to protect the interest of the government revenue.

53. Under sub-rule (1) of rule 159, an attachment of property by the Commissioner under section 83 is effected by passing an order mentioning the details of the property which is attached. The form in which the order is to be made is prescribed in form GST DRC-22. This form is extracted below: PART D.

54. Under sub-rule (5) of rule 159, the person whose property is attached is allowed seven days' time to file an objection that the property attached "was or is not liable to attachment". Sub-Rule (5) stipulates that the Commissioner may "after affording an opportunity of being heard to the person filing the objection" release the property by an order in form GSTDRC-23. Similarly, under sub-Rule PART D (6) upon being satisfied that the property was or is no longer liable to be attached, the Commissioner is empowered to release the property by issuing an order in Form GST DRC- 23 for the releasing of the property under attachment. The Form is extracted below :

55. A significant aspect of Rule 159(5) is that upon the levy of a provisional attachment, the person whose property is attached is empowered to file an objection within seven days on the ground that the property was or is not liable to attachment. In using the expression "was or is no longer liable for attachment", PART D the delegate of the legislature has comprehended two alternative situations. The first, evidenced by the use of the words "was" indicates that the property was on the date of the attachment in the past not liable to be attached. That is the reason for the use of the past tense "was". The expression "is not liable to attachment indicates a situation *in praesenti*. Even if the property, arguably, was validly attached in the past, the person whose property has been attached may demonstrate to the Commissioner that it is not liable to be attached in the present.

56. The second significant aspect of sub-rule (5) is the mandatory requirement of furnishing an opportunity of being heard to the person whose property is attached. This is in consonance with the principles of natural justice and ensures that a fair procedure is observed. Sub-rule (5) provides for a post- provisional attachment right of:

- (i) Submitting an objection to the attachment;
- (ii) An opportunity of being heard.

Sub-rule (5) contains clear language to the effect that a person whose property is attached is entitled to two procedural entitlements: first, the right to submit an objection on the ground that the property was not or is not liable to be attached; and second, an opportunity of being heard to the person filing an objection. This is a clear indicator that in addition the filing of an objection, the person whose property is attached is entitled to an opportunity of being heard. It is not open to the Commissioner, as has been stated in the present case, to hold the view that the only safeguard under sub-rule 5 is to submit an objection without an PART D opportunity of a personal hearing. Such a construction would be plainly contrary to sub-rule 5 which contemplates both the submission of an objection to the attachment and an opportunity of being heard. The opportunity of being heard can be availed of as a matter of right by the person whose property is attached. Both the right to submit an objection and to be afforded an opportunity of being heard are valuable safeguards. The consequence of a provisional attachment is serious. It displaces the person whose property is attached from dealing with the property. Where a bank account is attached, it prevents the person from operating the account. A business entity whose bank account is attached is seriously prejudiced by the inability to utilize the proceeds of the account for the purpose of business. The dual procedural safeguards inserted in sub-rule 5 of rule 159 demand strict compliance.

The Commissioner who hears the objections must pass a reasoned order either accepting or rejecting the objections. To allow the Commissioner to get by without passing a reasoned order will make his decision subjective and defeat the purpose of subjecting it to judicial scrutiny. The Commissioner must deal with the objections and pass a reasoned order indicating whether, and if not, why the objections are not being accepted. Sub-rule 6 of rule 159 allows for the release of a property which either was or is no longer liable for attachment. The form in which such an order has to be passed, namely form GST DRC-23, states that "now there is no such proceeding pending against the defaulting person which warrants attachment" of the account or as the case may be, the property. Sub-rules 5 and 6 do not expressly contemplate a situation in which the person PART D whose property is attached can object on the ground that the attachment is in excess of the amount likely to be due for which proceedings have been launched under the Act. Nor does it provide for a specific opportunity to the taxable person to offer any alternative form of security in lieu of the attachment. Such an opportunity must be read in to the provision to allow for a fair working in practice. Whether any alternative security that is furnished by the taxable person should be accepted and if so, its sufficiency, is a matter for the Commissioner to determine. Undoubtedly, the taxable person may not have a right to demand that only a particular form of security must be accepted. The Commissioner has to decide whether the form of security offered would secure the interest of the revenue. Where the taxable person sets up the plea that the extent of the attachment is excessive or where the taxable person offers an alternative form of security, these are also matters which ought to be determined by the Commissioner in the exercise of powers under rule 159(5). The scope of objection can also extend to the nature of the property which is being provisionally attached. Now, it is in this backdrop that we proceed to a determination of whether the petition under article 226 was maintainable and if it was, whether Commissioner exercised the powers under section 83 read with rule 159 in accordance with law.

59. The sole ground which has weighed with the High Court in holding that the writ proceedings were not maintainable is that "the writ petitioner has not only (an) efficacious remedy, rather alternative remedy under the GST Act". In addition, the High Court has observed that the writ petition filed by GM Power tech against whom similar allegations have been leveled had been dismissed by relegating it to the pursuit of an alternative remedy. The learned senior counsel appearing on behalf of the appellant submitted that GM Powertech had been relegated to the pursuit of an alternative remedy since an order of assessment had been passed against it. However, insofar as the appellant is concerned, the writ proceedings were instituted to challenge the levy of a provisional attachment under section 83 and there is no alternative remedy provided under the Act for challenging an order under section 83.'

11. Similar issue fell for consideration before a Division Bench of the Gujarat High Court in the case of *Anjani Impex (supra)*. Paragraphs 15 to 17 of the said judgment, read as follows:

'15. A Coordinate Bench of this Court, to which one of us J.B. Pardiwala, J. was a party, had the occasion to discuss section 83 of the Act in the case of *Valerius Industries vs. Union of India*, Special Civil Application No. 13132 of 2019, decided on 28th August, 2019, wherein this Court drew the following conclusion:

"[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 C/SCA/9822/2020 ORDER 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."

16. We are of the view that none of the above referred conditions are fulfilled in the present case.

17. In the result, this writ application stands partly allowed. The relief with regard to the order in Form GST DRC-01A is not granted, whereas the order of provisional attachment of immovable property under section 83 of the Act is quashed and set aside'.

12. A perusal of the impugned orders of provisional attachment shows that the fourth respondent herein stated in the said orders that, as per the information available with the Department and in order to protect the interest of the Government revenue, in exercise of the powers conferred under section 83 of the Act, the account is provisionally attached.

13. In this context, it may be appropriate to refer to the provisions of rule 159 of the Sales Tax Rules. According to sub-rule (5) of rule 159 of the Rules, the assessee 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 before the Commissioner 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.

14. 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 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.

15. 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.

16. 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.

17. In view of the above reasons, having regard to the submissions 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.

18. 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.

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

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*In favour of petitioner.