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High Court's protective shield against the mindless provisional attachment

In terms of S.83 of the CGST Act, 2017, the Commissioner has the powers to provisionally attach the property, including bank account belonging to a taxable person under certain specified circumstances. When any proceedings under the specified provisions are pending against a taxable person, the Commissioner, for the purpose of protecting the interest of the Government revenue, can resort to such drastic action of the provisional attachment of the property.

The powers of provisional attachment can be exercised by the Commissioner in terms of S. 83 (as in force on date) in cases where any proceedings are pending under any of the following provisions against a taxable person:

- a. S.62 (Assessment of non-filers of returns);
- b. S. 63 (Assessment of unregistered persons);
- c. S.64 (Summary assessment in certain special cases);
- d. S.67 (Power of inspection, search and seizure);
- e. S. 73 (Determination of tax not paid, etc. for any reason other than fraud, etc.)
- f. S.74 (Determination of tax not paid, etc. by reason of fraud, etc.)

From the careful perusal of the aforesaid specified provisions which may act as a trigger point for the action under S.83, it will be evident that the objective behind S. 83 is to ensure that a taxable person facing any proceedings under any of the said provisions will not dispose of or part with any property in any manner so as to escape the liability and thereby endangering the Government revenue. While GST regime is hardly 4 years' old, still, during this short period, innumerable cases of 'bogus ITC' involving substantial amounts are coming to the light with an alarming regularity! It is, therefore, not surprising that the power available under S. 83 is being exercised by the Commissioner, more as a 'rule' rather than as an 'exception' and often, arbitrarily! Consequently, more often than not, the High Courts are compelled to step in and intervene in such cases of arbitrary action of the provisional assessment.

Recently, in the case of **Sri Marg Human Resources Pvt. Ltd. vs. Principal ADG-2021-TIOL-1281-HC-MAD-GST, the Madras High Court**, by its judgement dated May 26, 2021, vacated the attachment Orders under challenge before it after considering the totality of the facts of the case. In this case, the Department had alleged the availment of the fraudulent ITC of Rs. 21 crores on the basis of the bogus invoices by the Company. During the investigation, the Department had already recovered Rs. 5.68 crores and taking note of this fact, the High Court, while ordering an additional deposit of Rs. 1.00 crore, vacated the Orders of attachment of the Bank Account of the Petitioner. The High Court, in this case, made the following significant observation:

"9. No doubt, vide powers have been vested with the Officers under Section 67 of the CGST Act, 2017. The said proceedings also entails a provisional attachment of assets during the pendency of the proceedings under Sections 62, 63, 64, 67, 73 and 74 of the said Act. However, such protection cannot be made against the future receivables."

The High Court further observed:

"It is made clear that the attachment proceedings cannot be at the cost of provision (protection?) under Article 19 (1)(g) of the Constitution of India."

In the case of **Dharmesh Gandhi vs. Asst. Commissioner (Anti-Evasion) – 2021-TIOL-597-HC-MUM-GST, the Bombay High Court**, by its judgement dated March 10, 2021, had ordered the immediate release of the bank accounts of the family members of the taxable person from provisional attachment. The High Court further allowed the objection to be filed by other Petitioners i.e. the taxable persons before the Commissioner and directed the Commissioner to pass an appropriate order after hearing the parties within the specified period. The High Court, followed its earlier judgement in the case of **Siddarth Mandavia vs. UOI – 2020-TIOL-1861-HC-MUM-GST** in which it was, inter alia, held that the bank account of only the taxable person can be provisionally attached under Section 83 of the CGST Act, 2017.

In yet another recent judgement delivered on May 12, 2021 in the case of **Roshni Sana Jaiswal vs. Commissioner of Central Taxes, GST Delhi (East) – 2021-TIOL-1126-HD-DEL-GST, the Delhi High Court** quashed the provisional attachment orders passed against a person other than a taxable person, holding the same as unsustainable. The High Court very tersely observed: **"In the zeal to protect the interest of the revenue, the respondent cannot attach any and every property, including bank accounts of persons, other than the taxable person."**

It may be noted that in terms of sub-section (2) of Section 83 (as in force on date), any Order of the provisional attachment made under sub-section (1) shall cease to have effect after the expiry of a period of one year from the date of the order. In the context of Section 83(2), **the Punjab & Haryana High Court, in the case of Parvati Steel Re-Rolling Mills vs. Deputy Excise & Taxation Commissioner, Ludhiana – 2021-TIOL-115-HC-P&H-GST**, by its judgement dated February 09, 2021 has held that the attachment over the Petitioner's bank account lapsed and ceased to operate on expiry of one year from the date of order in terms of Section 83(2) of the Punjab GST Act, 2017. The High Court duly noted and followed the following judgements in this case:

1. **M/s. A. P. Steel and Sri Sanjay Kumar Mishra vs. ADG, DGCI, Bangalore Zonal Unit – 2020 (4) GSTL 169 (Kar.)**
2. **M/s. Namaskar Enterprise vs. Commissioner of GST – 2020-TIOL-1383-HC-AHM-GST.**

It will be evident from the aforesaid judgements and other judicial pronouncements that instead of exercising the unfettered power available under S. 83 only in the exceptional cases, the same is being exercised quite mindlessly and illegally by the Commissioners across the country forcing the High Courts to step in and control the authorities from pursuing such action. As a matter of fact, one gathers an impression that for the Department, the provision of S. 83 has become a handy 'tool' of recovery beyond the law. No doubt, there cannot be any sympathy for the 'tax evaders', but even while acting against them, the statutory provisions and the established principles of law cannot be thrown out of window! Unfortunately, instead of taking a lesson from the various judgements of the High Courts, significant amendments reflecting the bureaucratic and dictatorial mind-set have been carried out to S. 83 by the Finance Act, 2021. While the amendments have become part of the CGST Act, 2017 on the enactment of the Finance Bill, 2021 on March 28, 2021, they have yet not been notified and put into effect. We shall discuss the nature, scope and the implications of these amendments in due course of time.

[Concluded]