

Bombay HC stayed provisional attachment of the bank accounts noting assessee's cooperation

The Hon'ble Bombay High Court in ***AJE India Private Limited v. Union of India and Ors. [Writ Petition (ST.) No. 97165 of 2020 decided on December 22, 2020]*** has stayed the order wherein assessee's bank accounts were provisionally attached for recovering alleged tax dues, and held that, merely because there is a proceeding under Section 67 of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") it would not mean that recourse to such a drastic power as given under Section 83 of the CGST Act would be an automatic consequence, more so when Petitioner has cooperated with the investigation process.

Facts:-

AJE India Private Limited ("**Petitioner**"), is engaged in the business of manufacture and supply of carbonated fruit drinks, such as, Big Cola, Big Orange Cola, Big Lemon and similar other products. The Petitioner has been manufacturing such fruit juice-based drinks since December, 2017 having more than 5% juice content in apple drink and 2.5% in respect of lemon drink. The Petitioner has been classifying such goods under **Tariff Item 2202 99 20 of the Customs Tariff Act, 1975** and specified at **Serial No. 48 under Schedule-II of Notification No. 1/2017-Central Tax dated June 28, 2017 as "fruit pulp or fruit juice-based drinks"**, taxable at the rate of 12%. On the basis of such classification, the Petitioner has been filing its GST returns and paying the taxes regularly.

The departmental authorities ("**Respondent No. 2**") was of view that the Petitioner had misclassified its goods which led to short payment of GST due amounting to Rs. 33 crores during the period from December, 2017 to February, 2020, and initiated investigation in March, 2019, which was however dropped and was again revived in January, 2020 but no progress was made because of Covid-19 pandemic and the resultant lockdown. Then on September 21, 2020, officials of Respondent No. 2 visited the Petitioner's factory for further investigation. Summons were issued to the Petitioner on September 21, 2020 itself for appearance of director and other authorized representatives which was complied with and statement of one of the foreign directors was recorded on September 22, 2020. Subsequently, the order dated November 18/19, 2020 was issued by Respondent No.2 addressed to the Branch Manager, for provisionally attaching bank accounts of the Petitioner under Section 83 of the CGST Act. On filing objection against such provisional attachment, before Respondent No. 2, the Petitioner was denied the lifting of provisional attachment. Hence, the present writ petition has been filed.

Issue:-

Whether ordering such provisional attachment of the bank accounts is legal and valid?

Held:-

The Hon'ble Bombay High Court in ***Writ Petition (ST.) No. 97165 of 2020 decided on December 22, 2020***, held as under:

- Conjoint reading of Section 67 of the CGST Act and Section 83 of the CGST Act would indicate that the proper officer must have reasons to believe that the taxable person has suppressed any taxable transaction to evade payment of tax. It is not necessary for us at this stage to delve into the meaning of the expression reasons to believe employed in Section 67 which has its own connotation in fiscal statutes. Suffice it to say, requirement of Section 67(1)(a) is that the proper officer should have reasons to believe that the taxable person has suppressed any taxable transaction to evade payment of tax.
- Referred to the decision of Commissioner of Customs (Appeals), Kolkata dated June 8, 2020, wherein, while referring to the decision of the Hon'ble Supreme Court in *M/s Parle Agro (P) Ltd v. Commissioner of Commercial Taxes, Trivandrum* and the larger bench of CESTAT in *Brindavan Beverages Private Limited v. Commissioner of Customs*, it was held that products falling under regulation 2.3.30 of the Food Safety and Standards (Food Products, Standards and Food Additives) Regulations, 2011, would qualify as fruit juice based drinks, thus, carbonated beverages with fruit juice falling under clause 3A of regulation 2.3.30 would be treated as fruit juice based drink only and classifiable under tariff Item 2202 99 20.

It was stated that the Court is afraid and cannot subscribe to such a view taken by the Commissioner that an appeal against the aforesaid decision of Commissioner of Customs (Appeals) has been filed and therefore, the said order had lost relevancy. Besides being devoid of any particulars, it shows complete disregard to an order of an appellate authority.

- It is quite clear that the Petitioner had disclosed the details of its goods and had applied the classification which it thought was appropriate. On that basis it had filed its CGST returns and had been assessed. It is not the case that the Petitioner has defaulted in payment of tax as per its returns or assessment.
- Whether recourse to Section 83 of the CGST Act is warranted at this stage has not been dealt with in the record of the investigation. Merely because there is a proceeding under Section 67 of the CGST Act would not mean that recourse to such a drastic power as under Section 83 of the CGST Act would be an automatic consequence, more so when the Petitioner has cooperated with the investigation.
- That apart, Section 83 of the CGST Act speaks of provisional attachment of any property including bank account. The record is silent as to whether any attempt has been made for

provisional attachment of any property of the Petitioner and instead why the bank accounts should be attached.

- Besides, **by use of the word “may” in sub-section (1) of Section 83 of the CGST Act, Parliament has made it quite clear that exercise of such a power is discretionary. When discretion is vested in an authority, such discretion has to be exercised in a just and judicious manner, as it admittedly is a very drastic power having serious ramifications.** Such power having the potential to adversely affect property rights of persons as well as life and liberty under Article 21 of the Constitution of India has to be exercised in a fair and reasonable manner.
- **Being possessed of power is one thing and exercise of such power is altogether another thing. Because the Commissioner is conferred with the power of provisional attachment under Section 83 of the CGST Act it would not ipso-facto mean that he can straight away proceed to provisionally attach any property including bank accounts of a taxable person merely on the ground of pendency of proceedings under Section 67 of the CGST Act.**
- The Petitioner had already offered its land, building and plant and machinery having estimated gross value of approximately ₹ 44 crores to secure the interest of the revenue. In such circumstances, recourse to Section 83 of the CGST Act by Respondent No. 2 straight away is not justified. Prima facie, such an exercise appears to be harsh and excessive, thus arbitrary.

Consequently, the HC stayed the order dated November 18/19, 2020 and directed withdrawal of the provisional attachment of the bank accounts of the Petitioner mentioned in the said order forthwith. Further directed the Petitioner to furnish an undertaking by way of affidavit to not to alienate its land, building, plant and machinery during pendency of the proceeding. And listed the matter on March 9, 2021 for final hearing.

Comments:-

Recently the Hon'ble Gujarat High Court in ***Jay Ambey Filament Pvt. Ltd v. Union of India (R/Special Civil Appeal No. 11503 of 2020 decided on October 12, 2020)*** has quashed and set aside the order of provisional attachment of the five bank accounts of the Petitioner under Section 83 of the CGST Act. The Court referred to the judgment in ***Valerius Industries v. Union of India (Special Civil Application No.13132 of 2019 decided on August 28, 2019)*** wherein it was held that, the power of provisional attachment under Section 83 of the CGST 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. The authority before exercising power 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 CGST Act for the purpose of provisional attachment.

The Court was of the view that none of the referred conditions were fulfilled in this case.

Similarly, the Hon’ble Gujarat High Court in case of ***Patran Steel Rolling Mill v. Asst. Commissioner of State Tax (R/Special Civil Application No. 16931 of 2018 decided on December 20, 2018)*** held that:

“The authorities should keep in mind that bringing the business of a dealer to a halt does not in any manner serve the interest of the revenue. Therefore, while taking action under section 83 or 67(2) of the GGST Act, the concerned authorities should take care to ensure that equities are maintained and while securing the interest of the revenue, they should attempt to see that the dealer is in a position to continue with the business. This court does not intend to lay down any absolute proposition that in no case drastic action should be taken, but that the respondents should consider the background and history of the dealer as well as his financial position to ascertain as to whether or not he would otherwise be in a position to pay the dues that may be assessed upon the culmination of any assessment proceedings that may be initiated. **If the dealer is a fly by night operator or a habitual offender or does not have sufficient means to pay the dues that may arise upon assessment, such action may be justified.....”**

Therefore, the Authorities before taking any such action of attachment under Section 83 of the CGST Act, must keep in mind that it does not adversely affect property rights of persons as well as life and liberty. Such powers need to be exercised in a fair and reasonable manner.

Relevant Provisions:-

Section 67 of the CGST Act:

“Power of inspection, search and seizure-

67. (1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that—

(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in

excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act,

he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

(4) The officer authorised under sub-section (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

(5) The person from whose custody any documents are seized under sub-section (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

(6) The goods so seized under sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

(7) Where any goods are seized under sub-section (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

(8) The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (2), be disposed of by the proper officer in such manner as may be prescribed.

(9) Where any goods, being goods specified under sub-section (8), have been seized by a proper officer, or any officer authorised by him under sub-section (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

(10) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

(11) Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.

(12) The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.”

Section 83 of the CGST Act:

“Provisional attachment to protect revenue in certain cases

83. (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).”

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