We are glad to share our GST litigation support communique and get you everything that you need to know from the world of litigation, along with incisive analysis from the CA. Rajat Mohan. This Newsletter brings you key judicial pronouncements from the Supreme Court, various High Courts, AARs, and Appellate Authorities emerging in the GST era and the erstwhile VAT, Service tax, and Excise regime.[1]

Synopsis of all changes in GST is given below for your quick reference:

S.No.	Subject	Authority
1	**Where recovery proceedings were initiated before adjudication of show cause notice under section 73 of Finance Act for service tax dues is not valid**	HC
2	**Order of provisional attachment passed as a result of the mechanical exercise of power is not sustainable**	HC
3	**In the absence of material to implicate the petitioner in the alleged fraudulent transaction, attachment of the petitioners bank account was not legal**	HC
4	**There was no good reason to continue provisional attachment due to non-material amount into two bank**	HC
5	**Period of 7 days prescribed in rule 159(5) of the CGST Rules for moving the objections to the provisional attachment is merely directory and not mandatory**	HC
6	**Advance ruling cannot be given on Services to others by 3rd Parties**	AAR
7	**The question for determination by AAR how to transfer the portion of input tax credit does not come under the ambit of the specification as provided by section 97(2) of the GST Act**	AAR
8	**There is no question of any error apparent from the face of record, where there is dispute in the interpretation of the legal provisions of section 97(2)(e) by the appellate authority which leaves the scope for argument and debate**	AAAR
9	**No ruling in case of non-submission of full details by the applicant**	AAR
10	**No ruling in case of export**	AAR

Where recovery proceedings were initiated before adjudication of show cause notice under section 73 of Finance Act for service tax dues is not valid

The petitioner has registered with the Service Tax Department under the category 'Construction of Residential Complex Service', has been regularly discharging its service tax liability, filing applicable returns. The respondent conducted a service tax audit of the petitioner for the period from April 01, 2015 to June 30, 2017, in the year 2019. There were audit objections. The petitioner filed reply to the objections. However, the petitioner was served with show-cause notice invoking Section 73(1) of the Finance Act, 1994 read with section 174(2) of the CGST Act. The petitioner was required to produce all the evidence upon which they intend to rely in support of their defence. The petitioner was preparing to respond to the show-cause notice. While so, the petitioner received notice directing the petitioner to pay INR 8,62,397/- along with interest. The petitioner filed a reply stating that recovery proceedings under section 87 of the Finance Act, 1994 cannot be initiated without adjudication. However, in spite of submission of reply, respondents served notices dated July 1, 2020 on the Bankers of the petitioner invoking Section 87(b) of the Finance Act, 1994 directing the Bankers of the petitioner

[1] *DISCLAIMER: The views expressed are strictly of the author. The contents of this article are solely for informational purpose. It does not constitute professional advice or recommendation of firm. Neither the author nor firm and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any information in this article nor for any actions taken in reliance thereon.*

to debit freeze the current accounts held by the petitioner in their banks. The bankers were instructed to close all other accounts related to the petitioner and to remit the amount available in the accounts, to the government, within 15 days. On writ:

High Court observed that the petitioner has been issued with show-cause notice and the petitioner has the opportunity to explain its stand and position before the respondent before adjudicating the issues raised in show-cause notice, if the respondents proceed under section 87(b) of the Finance Act and Section 79(1)(c)(i) of the Act read with section 142(8)(a) of the CGST Act, 2017, the petitioner will indeed be put to hardship. Such proceedings are ordinarily to be initiated only after the adjudication process is over.

High Court held that the writ petition is disposed of directing the respondent to give an opportunity to the petitioner to adduce such evidence before the respondent in order to explain the deficiencies pointed out in show-cause notice.

Homestead Projects & Developers (P.) Ltd. v. Commissioner of Central Tax and Central Excise, Calicut [2021] 123 taxmann.com 177 (High court of Kerala)

Order of provisional attachment passed as a result of the mechanical exercise of power is not sustainable.

The applicant is a partnership firm engaged in the business of manufacturing of different types of textile fabrics. An inquiry was initiated against the firm by the CGST Department, Surat by issuing a summons under section 70(1) of the Act. Pending the inquiry, the Department had issued an order in Form GST DRC-01A dated 23rd July, 2020 and secondly, an order of provisional attachment of property under section 83 in Form GST DRC-22 was passed. Petitioner has filed writ petition challenging the action of the authorities.

High Court observed that it was not inclined to interfere with the order passed in Form GST DRC-01A dated 23rd July, 2020. However, it was of the view that the order of provisional attachment of the immovable properties in the form of the industrial unit and the residential premises under section 83 of the Act was not sustainable in law. It was observed that the order of provisional attachment was nothing but a result of the mechanical exercise of power under section 83 of the Act, 2017. The formation of the opinion, though subjective, must be based on some credible material disclosing that is necessary to provisionally attach the goods or the bank account for the purpose of protecting the interest of the government revenue. The statutory requirement of reasonable belief is to safeguard the citizen from vexatious proceedings. "Belief" is a mental operation of accepting a fact as true, so, without any fact, no belief can be formed. It is equally true that it is not necessary for the authority under the Act to state reasons for its belief. But if it is challenged that he had no reasons to believe, in that case, he must disclose the materials upon which his belief was formed. In the absence of any cogent or credible material, if the subjective satisfaction is arrived at by the authority concerned for the purpose of passing an order of provisional attachment under section 83 of the Act, then such action amounts to malice in law.

Thus, the order of provisional attachment of immovable property under section 83 was quashed and set aside. Writ petition was allowed partly.

Anjani Impex *v.* State of Gujarat - [2020] 122 taxmann.com 299 (High court of Gujarat)

In the absence of material to implicate the petitioner in the alleged fraudulent transaction, attachment of the petitioners bank account was not legal.

The petitioner is a supplier of diamonds. It had supplied diamonds to M/s. Nebal Tradings during the period 2017-18 and 2018-19 and the said transaction was duly declared in the GST return filed by the petitioner and the appropriate tax also paid. A communication was issued by authorities to the Banker

of the petitioner to freeze its Bank account on the ground that an entity by name Nebal Trading had transferred certain amounts to the petitioner's account. Petitioner has sought quashing of the communication and lifting of the attachment over the Bank account of the petitioner.
The court observed that there is absolutely no basis in law for proceeding against the petitioner in connection with offenses alleged to have been committed by M/s Varma enterprises. The mere fact that a part of the money that was obtained from alleged fraudulent transactions have found its way to the Bank account of the petitioner cannot, without anything to suggest the complicity of the petitioner in such transactions, be the basis for the attachment of the Bank accounts of the petitioner. Thus, there being no material to implicate the petitioner in the alleged fraudulent transaction, communication issued by the authorities cannot be legally sustained. The impugned communication was dismissed. Bank was directed to treat the attachment over the Bank account of the petitioner with it as lifted.
Glonia Impex *v.* Assistant Commissioner (SIIB), Cochin - 2020] 122 taxmann.com 164 (High court of Kerala)

There was no good reason to continue provisional attachment due to non-material amount into two bank
The writ-applicant is engaged in the business of trading of ferrous and non-ferrous metal scrap. Spot visit was carried out by the flying squad of the department on 11th August 2020 at the premises of the writ-applicant. The department is prima facie of the view that the purchases made by the writ-applicant from the JSK Metacast and Uttam Metal and Alloys respectively are not genuine So, during the course of the search carried out by the department, the registers, documents and books of accounts for the period between 1st July 2017 and 11th August 2020 were collected and taken into possession. Ordered has been passed w.r.t provisional attachment of cash credit/current bank account and one savings bank account held by the writ-applicant with the HDFC Bank Limited. Petitioner filed this petition before High Court seeking relief in this regard.
High Court observed that "Halbury's Laws of India (Direct Tax II, Vol 32), held that When property, which is the subject matter of provisional attachment, is sufficient to satisfy tax liability and safeguard the interest of revenue, the petitioner can seek the release of provisional attachment in respect of other properties and amounts due from debtors and depositors."It also observed that Division Bench of the Punjab and Haryana High Court in the case of Bindal Smelting Private Limited v. Additional Director General quote the relevant observation thus:
"HC is of opinion that respondent can attach an account only if there is some balance in the form of FDR or savings. The power of attachment of bank account cannot be exercised as per whims and caprices of the Authority. The Commissioner is bound to ensure that by attachment of property or bank account, the interest of revenue is going to be protected. In case a property is mortgaged with bank and value of the property is less than the outstanding dues of bank, provisional attachment is meaningless and action remains only on paper. In the absence of a record showing that interest of revenue is protected by attaching property or bank account, action deserves to be declared as taken without application of mind and formation of an opinion on the basis of cogent material. Thus, attachment of current account having debit balance does not protect the interest of revenue, instead merely ruins the business of a dealer. Such an action of attachment of "over cash credit" account for the sake of recovery of confirmed demand, may in some peculiar case, maybe still permitted but not at the stage of pending investigation"
HC also referred the Coordinate Bench of this Court in the case of M/s.Patran Steel Rolling Mill vs. Assistant Commissioner of State Tax. HC quote the relevant observation thus:
As per section Section 83 of the GGST Act provides that where 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. On a plain reading of the said provision, it is evident that before resorting to such drastic action, the Commissioner is required to form an opinion that it is necessary to do so to protect the interest of the revenue. For the purpose of arriving at such an opinion, the Commissioner should first form an opinion that the petitioner would not be in a position to pay the tax dues after the assessment proceedings are over.HC further observed that In case of Barium Chemicals Ltd. v. Company Law Board [AIR 1967 SC 295], the Supreme Court pointed out, on consideration of several English and Indian authorities that the expressions "is satisfied", "is of the opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. The Supreme Court while construing Section 237 of the Companies Act, 1956 held If it is shown that the circumstances do not exist or that they are such that it is impossible for anyone to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute." HC also observed that The expression 'is of the opinion' or 'has reason to believe' as noted above are of the same connotation and are indicative of the subjective satisfaction of the Commissioner, which depends **upon the facts and circumstances of each case**. It is settled law that 'opinion' must have a rational connection with or relevant bearing on the formation of the opinion. The rational connection postulates that there must be a direct nexus or live link between the protection of interest and available property which might not be available at the time of recovery of taxes after the final adjudication of the dispute. But having regard to fact that there was hardly a balance of Rs.22,065 in two bank accounts, there was no good reason to continue provisional attachment. HC have noticed over a period of time that in each and every matter in which proceedings under section 67 of the Act are initiated, an order of provisional attachment of the bank accounts under section 83 of the Act would follow. This mechanical exercise of the power is not appreciated. The Legislature has thought fit to confer upon the authority the power to provisionally attach the property of the assessee in the hope that such power is not exercised casually but, only after due and proper application of mind. The only reason that can be attributed is the mechanical exercise of power under section 83 of the Act. This should stop at the earliest. So much judicial time is wasted in all such matters wherein the law is so well settled. Court request the Union of India as well as the CBDT to read this judgment thoroughly and consider issuing appropriate instructions or guidelines at the earliest with respect to the exercise of power under section 83 of the Act, 2017.

Vinodkumar Murlidhar Chechani Vs State of Gujarat [2021] 124 taxmann.com 272 (High court of Gujarat)]

Period of 7 days prescribed in rule 159(5) of the CGST Rules for moving the objections to the provisional attachment is merely directory and not mandatory

In pursuance of the search operation which was conducted between November 1, 2019 and November 30, 2019, at various places of the petitioner, under section 67(2) of the CGST Act, proceeded to issue provisional attachment orders under section 83 of the CGST Act. The petitioner filed objections to the original attachment, which have been rejected, only on the ground that the petitioner had not moved under rule 159(5) of the CGST Rules within a period of 7 days of attachment. High Court observed that as per rule 159(5) read as follows "159(5) Any person whose property is attached 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, 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." High Court observed that the period of 7 days prescribed in rule 159(5) is a directory and not a mandatory period. Therefore, on account of delay on the part of the

objector, if he prefers his objections beyond the period of 7 days, the objections cannot be rejected on the ground of limitation. No consequence is prescribed either in the Act or in the Rules to say that if the objections are not preferred within 7 days, they shall not be entertained.
Therefore, High Court held that the period of 7 days prescribed in rule 159(5) of the CGST Rules for moving the objections to the provisional attachment is merely directory and not mandatory. Objections raised by the petitioner, therefore, could not be rejected on that ground alone.
RR India (P.) Ltd. v. Union of India [2021] 123 taxmann.com 113 (High court of Delhi)

Advance ruling cannot be given on Services to others by 3rd Parties
The applicant is engaged in providing Consultancy services. The applicant submitted that M/s. WAPCOS is to provide various type of technical consultancy services to SSNNL to execute the Physical Inspection of Saurashtra Branch Canal (which is having a length of 104.46 kms.). M/s. WAPCOS has in turn, made an agreement with the applicant for the same vide which the applicant will provide these services to M/s. SSNNL through M/s. WAPCOs i.e. the applicant is a sub-consultant in the instant case. Applicant further submitted that M/s. SSNNL is receiving such type of services from various consultants and is paying GST is most of similar cases.
The applicant sought advance ruling on the following issues:

- Whether GST is applicable for the consultancy services rendered by various consultancy agencies to Sardar Sarovar Narmada Nigam Limited(SSNNL)?
- If such consultancy services are exempted from GST, whether the sub-consultant is also exempted from the payment of GST? If not, what is the rate of GST applicable to the sub-consultant?

AAR observed that as per Section 97 of the CGST Act, 2017 :-
(1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and manner and accompanied by such fee as may be prescribed, stating the question on which the advance ruling is sought.
(2) The question on which the advance ruling is sought under this Act, shall be in respect of, --

a) classification of any goods or services or both;
b) applicability of a notification issued under the provisions of this Act;
c) determination of time and value of supply of goods or services or both;
d) admissibility of input tax credit of tax paid or deemed to have been paid;
e) determination of the liability to pay tax on any goods or services or both;
f) whether applicant is required to be registered;
g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term."

From the above AAR observed that the provisions for seeking Advance Ruling made under the CGST Act is limited to the activities conducted of the applicant only.
In respect of Question 1,

a) AAR observed that the same is not related to the agreement made by them with M/S. WAPCOS or the agreement made between M/s. WAPCOS and M/s. SSNNL but is related to the liability of GST on the consultancy services rendered by various consultancy agencies to SSNNL.
b) AAR also observed that the said question to be absolutely irrelevant, hypothetical and speculative which does not in anyway pertain to the services supplied/rendered by the applicant. Therefore, no advance ruling given by AAR.

In respect of 2nd Question, AAR observed that said question is also irrelevant to the instant issue since it is connected to the first question. Accordingly, no advance ruling given by AAR.

Posiedon Hydro Infratech, [2021] 123 taxmann.com 465 (AAR - GUJARAT)

The question for determination by AAR how to transfer the portion of input tax credit does not come under the ambit of the specification as provided by section 97(2) of the GST Act.

The applicant intends to manufacture and sell carbonated soft drinks (CSDs) and non-carbonated beverages (NCBs) sold under trademarks owned by Pepsico. The applicant has submitted an application for Advance Ruling on the question how to transfer the portion of input tax credit as belonging to Sandila unit (covered by the Infrastructure & Industrial Investment Policy 2012 of the State of Uttar Pradesh for claiming refund of UP GST component paid in cash in the prescribed percentage of the Policy), lying in common electronic credit ledger of one common U.P. registration opted for 7 units including Sandila unit while migrating to the GST regime with effect from July, 2017. AAR observed that the question for determination under the advance ruling does not come under the ambit of the specification as provided by section 97(2) of the GST Act on which Advance Ruling is being sought. Clarification, as required by the party, do not fall within the specification as provided by section 97(2) of the GST Act.

Varun Beverages Ltd., *In re* - [2021] 124 taxmann.com 16 (AAR- UTTAR PRADESH)

There is no question of any error apparent from the face of record, where there is dispute in the interpretation of the legal provisions of section 97(2)(e) by the appellate authority which leaves the scope for argument and debate.

The appeal had been filed by Appellant against the Advance Ruling dated 10.08.2018, which was disposed of vide AAAR Order dated 22.03.2019. However, the Appellant filed the application under section 102 of the CGST Act, 2017 on 23.08.2019 for the rectification of the ruling dated 22.03.2019, issued by AAAR on the ground that the Appellate Authority for the Advance Ruling had committed an error of law, apparent on the face of record, in as much as while disposing the case, it had not applied its mind to the true meaning purport of the expression “intermediate services” and without discussing its ramifications on the issue at hand, disposed of the case “declaring that it has no jurisdiction” to give any opinion or verdict, because it lacked the basic jurisdiction to “determine place of supply” under section 97(2) of the CGST Act, 2017. It was also alleged that the Appellate Authority had also /failed to appreciate the ramification of the CBIC Circular No. 107/29/2019-GST dated 18.07.2019, which clarifies the issues relating to the “intermediary services” in as much as the definition of intermediary inter alia provided specific exclusion of a person i.e. that of a person who supplies such goods or services or both or securities on his own account.

AAAR observed that the primary issue raised by the Appellant in the advance ruling application was to determine as to whether the services rendered by the Appellant was export of service or not, and not the classification of services as is being made out by the Appellant vide the submissions being made in the present application. Vide the impugned Order dated 22.03.2019, it was decided that since issue of determination of the export of services invariably requires the determination of the place of supply of services, which is not specified among the list of questions/issues, provided under section 97(2) of the CGST Act, 2017, on which advance ruling was sought under the GST Act, the advance ruling on the said question could not be given. In view of this, AAAR did not go into the details of the nature of services being rendered by the Appellant to their clients, as the same was not considered relevant in the context of the question asked by the Appellant. It was observed that the provision of section 97(2)(e) of the CGST Act, 2017 gives the jurisdiction to decide whether any goods or services or both are liable to GST or not. The aforesaid provision does not enable the authority to determine the place of supply of any goods or services or both. Hence, the Appellant has misinterpreted the provision of section 97(2)(e) in much as they believe that the said provision confers on the Advance Ruling Authority or the Appellate Authority for the Advance Ruling the jurisdiction to determine even

the place of supply in respect of goods or services or both. Thus, there was clearly a dispute in the interpretation by the Appellate Authority and that of the Appellant with regard to section 97(2)(e) of the CGST Act, 2017.

AAAR held that since there is a dispute in the interpretation of the legal provisions of section 97(2)(e) of the CGST Act, 2017, which certainly leaves the scope for argument and debate, there is absolutely no question of any error apparent from the face of the record, as was being made out by the Appellant. Thus, the allegations, made by the Appellant with regard to the error crept in the impugned AAAR Order dated 22.03.2019, which is apparent from the face of record, was without any rationale, and hence does not merit consideration. Applicant's application rejected.

Micro Instruments, *In re* - [2020] 122 taxmann.com 228 (AAAR-MAHARASHTRA)

No ruling in case of non-submission of full details by the applicant

The applicant is engaged in recycling of the waste tyres used by vehicles and pyrolysis oil is recovered during the said process of recycle, along with other products like Iron and Steel and carbon black. The applicant has submitted that Pyrolysis oil can also be sold as a liquid fuel. The applicant, has raised the question regarding the classification of Tyre Pyrolysis Oil and the rate of tax applicable thereon.

AAR observed that to arrive at the proper classification the Applicant was requested to submit the composition of the subject product, in respect of which, classification is sought. The applicant submitted that the composition of the subject product would vary depending on the types of raw materials used, namely tyres. The applicant has not shown an inclination to submit the required details and therefore, in absence of submissions of full details, this authority could not arrive at the correct classification of the subject product. The applicant has not made any submissions in respect of the chemical composition of their product nor have submitted any test report which shows the composition of their product.

Thus, in view of non-submission of details, Authority could not pass a Ruling on the questions raised by the Applicant.

Royal Carbon Black (P.) Ltd., *In re* - [2020] 122 taxmann.com 205 (AAR - MAHARASHTRA)

No ruling in case of export

The applicant is engaged in the business of providing IT software-related consulting services in the area of Oracle ERP w.r.t Oracle Financials. Doyen is a provider of software services in Oracle domain. M/s. Doyen Systems has entered into a contract with the foreign client to provide software support services to the ERP applications. M/s. Doyen Systems has entered into a 'Consultancy agreement' with the applicant, by which the applicant is obligated by Doyen systems to provide 'Professional and Consultancy services' The consultancy charges are agreed on an hourly basis in USD and the payment is made in Indian Rupees with the conversion rate averaged. The applicant has sought advance ruling on the question of whether the services provided by it shall be treated as local services or export of services?

AAR held that in respect of the questions whether, such supply of services is 'export of services', zero-rated supply', this authority cannot answer the questions as they are not covered in Section 97(2).

Rajesh Rama Varma, *In re* - [2020] 117 taxmann.com 708 (AAR - TAMILNADU)

About the author

CA. Rajat Mohan is Fellow Member of Institute of Chartered Accountants of India (F.C.A.) and Fellow of Institute of Company Secretaries of India (F.C.S.). Furthermore, he also has qualified post qualification course of Institute of Chartered Accountants of India on 'Information Systems Audit' (D.I.S.A.).

He has authored more than half a dozen books on indirect taxes, GST being his forte with publishers like Taxsutra, Wolters Kluwer and Bharat Law House. He has been authoring books on GST since 2010 every year, which has gained wide popularity in India and internationally also. He is a regular contributor of articles on GST, which are published on several online portals and in the columns of reputed tax journals and magazines. His views are well respected by media which is the reason that his name is placed regularly in national dailies and top-notch online news portals including Times of India, Economic Times, Hindustan Times, Indian Express, The Hindu, LiveMint, Hindu Business Line, Business Standard, Bloomberg, Business Today, Financial Express, Firstpost, NDTV, ETRetail, Monday News Alerts and various others.

For any areas of improvement do let us know.

M: +91-9910044223| **E:** rajat@amrg.in