

SC: Power of provisional attachment under GST is draconian

The Hon'ble Supreme Court of India in ***M/S Radha Krishan Industries v. the State of HP (Civil Appeal No 1155 of 2021 dated April 20, 2021)*** set aside the judgment passed by the Hon'ble Himachal Pradesh High Court ("**HP High Court**") and the orders of provisional attachment passed by the Joint commissioner. Held that, the power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.

Facts:

M/S Radha Krishan Industries ("**the Appellant**") is a manufacturer of lead according to the specific requirements of its clients. This appeal arises from a judgment and order in ***Writ Petition No. 5648 of 2020 dated January 1, 2021*** of the Hon'ble HP High Court wherein, the Appellant challenged the orders of provisional attachment, issued on October 28, 2020 by the Joint Commissioner of State Taxes and Excise, ("**the Respondent**") attaching the Appellant's receivables from its customers for alleged involvement in illegal claim of ITC amounting to INR 5,03,82,554/- during 2017-18 and 2018-19, while invoking Section 83 of the Himachal Pradesh Goods and Services Tax Act, 2017 ("**HPGST Act**") and Rule 159 of Himachal Pradesh Goods and Services Tax Rules, 2017 ("**HPGST Rules**"). The Hon'ble HP High Court dismissed the writ petition challenging orders of provisional attachment on the ground that an alternate and efficacious remedy is available to the Appellant and held that when a statutory forum of appeal exists, an appeal should not be entertained ignoring the statutory dispensation.

A 'detection case' was registered against GM Powertech, one of the suppliers of the Appellant, through a search and seizure. The partners of GM Powertech were arrested on December 3, 2018 on the ground of raising fraudulent claims of Input Tax Credit ("**ITC**") from fake/fictitious firms and had issued invoices to various recipients in Himachal Pradesh including the Appellant and the notice was issued to the Appellant on the basis that the Appellant had claimed ITC on the supplies received from GM Powertech. Further, in the meanwhile, the Respondent passed an order of provisional attachment dated January 19, 2019, in respect of receivables worth INR 5 crores due from Fujikawa Power, one of the customers of the Appellant that inadvertently referred to Sarika Industries instead of the Appellant. The Appellant responded by a representation dated January 29,

2019, claiming inter alia, that the order of attachment was without affording a hearing and that the ITC had been blocked without prior notice and the order was subsequently withdrawn on January 30, 2019

Subsequent to the dismissal of the petition by the Hon'ble HP High Court, the Appellant sought to inspect the files for GM Powertech, and stated that no documents in regard to the proceedings initiated under Section 74 of the HPGST Act has been provided. In response, the Respondent allowed the Appellant to inspect the Appellant's case file. According to the Respondent, the Appellant failed to exercise this option and did not reply to the issued show cause notices. Thereafter, on February 18, 2021, an order under Section 74(9) of the HPGST Act was passed by the Respondent confirming a tax demand of INR 8,30,27,218/-, which has been assailed by the Appellant before the Appellate Authority.

The Appellant has filed this appeal against the dismissal of the petition challenging the orders of provisional attachment.

Issues:

- Whether the orders of provisional attachment issued by the Respondent against the Appellant are in consonance with the conditions stipulated in Section 83 of the HPGST Act?
- Whether the Hon'ble HP High Court was right in concluding that the provisional attachment could not be challenged in a petition under Article 226 of the Constitution of India?

Held:

The Hon'ble Supreme Court of India in ***Civil Appeal No 1155 of 2021, dated April 20, 2021*** held as under:

- Noted that, the order of provisional attachment was passed before the proceedings against the Appellant were initiated under Section 74 of the HPGST Act. Section 83 of the HPGST Act requires that there must be pendency of proceedings under the Section 62 (assessment of non-filers of returns) or Section 63 (assessment of unregistered persons) or Section 64 (summary assessment in certain special cases) or Section 67 (power of inspection, search and seizure) or Section 73 (determination of tax in non-

fraud cases) or Section 74 (determination of tax in fraud cases) against the taxable person whose property is sought to be attached.

- Further noted that, an order of provisional attachment dated January 19, 2019, was issued by the Respondent which was withdrawn on January 30, 2019, after considering the representations made by the Appellant. On the very ground, without any material change in circumstances, another order dated October 28, 2020 for provisional attachment came to be issued by the Respondent. The Hon'ble HP High Court has not considered this aspect that both the earlier and the subsequent orders of provisional attachment were on the same grounds. Therefore, unless there was a change in the circumstances, it was not open for the Respondent to pass another order of provisional attachment, after the earlier order of provisional attachment was withdrawn after considering the representations made by the Appellant.
- Observed that, that merely because proceedings were pending/concluded against another taxable entity i.e. GM Powertech, the powers of Sections 83 of the HPGST Act could not be attracted against the Appellant or it would be an expansion of a draconian power as contained in Section 83 of the HPGST Act, which must necessarily be interpreted restrictively.
- Stated that, once the final order of assessment is passed under Section 74 of the HPGST Act, the order of provisional attachment must cease to subsist. Therefore, after the final order under Section 74 of the HPGST Act was passed on February 18, 2021, the order of provisional attachment must come to an end.
- Opined that, there were no pending proceedings against the Appellant, the mere fact that proceedings under Section 74 of the HPGST Act had concluded against GM Powertech, would not satisfy the requirements of Section 83 of the HPGST Act. Thus, the order of provisional attachment was ultra vires Section 83 of the HPGST Act.
- Further, held that:
 - The Respondent while ordering a provisional attachment under Section 83 of the HPGST Act was acting as a delegate of the Commissioner in pursuance of the delegation effected under Section 5(3) of the HPGST Act and an appeal against the order of provisional attachment was not available under Section 107(1) of the HPGST Act;

- The Hon'ble HP High Court has erred in dismissing the writ petition on the ground that it was not maintainable;
- The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled;
- The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the government revenue.
- The expression “necessary so to do for protecting the government revenue” implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment;
- The formation of an opinion by the Commissioner under Section 83(1) of the HPGST Act must be based on tangible material bearing on the necessity of ordering a provisional attachment for the purpose of protecting the interest of the government revenue;
- In the facts of the present case, there was a clear non-application of mind by the Respondent to the provisions of Section 83 of the HPGST Act, rendering the provisional attachment illegal;
- Under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards:
 - a. An entitlement to submit objections on the ground that the property was or is not liable to attachment; and
 - b. An opportunity of being heard;
- There has been a breach of the mandatory requirement of Rule 159(5) of the HPGST Rules and the Respondent was clearly misconceived in law in coming into

conclusion that the Respondent had a discretion on whether or not to grant an opportunity of being heard;

- The Respondent is duty bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached;
 - The Appellant having filed an appeal against the order under Section 74(9) of the HPGST Act, the provisions of Sections 107(6) and Section 107(7) of the HPGST Act will come into operation in regard to the payment of the tax and stay on the recovery of the balance as stipulated in those provisions, pending the disposal of the appeal.
- Set aside the judgment and order of the Hon'ble HP High Court dated January 1, 2021 and the orders of provisional attachment dated October 28, 2020 by the Respondent.

Our Comments:

The CBIC vide ***Instruction No. CBEC-20/16/05/2021-GST/359, dated February 23, 2021***, issued guidelines for provisional attachment of property/bank accounts under Section 83 of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") in view of number of cases before various Hon'ble Courts and observations made on the modalities of implementation of provisions by the authorities. To access the same [Click here](#)

To know more, kindly watch our video:

"Whether GST Dept can provisionally attach Property/Bank Account of any Person- Budget 21" by CA Bimal Jain- <https://www.youtube.com/watch?v=CSg6v3jmXbM>

"Whether GST Law is failing as Citizens Friendly Tax Structure" by CA Bimal Jain- <https://www.youtube.com/watch?v=a1LAzvDRyI4&t=42s>

Relevant Provisions:

Section 83 of the HPGST 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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