

CWP-21989-2020 (O&M)
Date of decision : 16.02.2021

Skylark Infra Engineering Pvt. Ltd. Petitioner

Versus

Additional Director General, DGGI and another Respondents

CORAM : HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE RAJESH BHARDWAJ

Present: Mr. Jagmohan Bansal, Advocate
for the petitioner.

Mr. T.K. Joshi, Advocate and
Mr. Ruchir Bhatia, Advocate
for respondent No.1.

AJAY TEWARI, J. (Oral)

1. This petition has been filed challenging the provisional attachment of the bank account of the petitioner purportedly under Section 83 of the Central Goods and Service Tax Act, 2017 (for short 'the CGST Act').
2. As per the impugned order, the account has been frozen in view of Section 74 of the said CGST Act. Section 74 is reproduced herein below:-

“74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid

or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a

penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded”.

3. The precise contention of the learned counsel for the petitioner is that the proceedings under Section 74 can be initiated only once notice under sub-Section (1) is issued and in the present case, no such notice has been issued even till today.

4. Learned counsel for respondent No.1 has pointed out to sub-Section (5) to contend that once the petitioner had voluntarily deposited some amount, the notice would not be required and it would not be deemed that the proceedings under Section 74 are pending.

5. Learned counsel for the petitioner pointed out to sub-Section (7) and has argued that if the assertion of learned counsel for respondent No.1 is accepted then this sub-Sections would become otiose.

6. We find that sub-Section (7) clearly says that if the proper Officer comes to the conclusion that the amount voluntarily deposited by the assessee falls short of the amount actually payable, he shall proceed to issue the notice as provided under sub-Section (1).

7. Learned counsel for the petitioner has relied upon Para 5 of the judgment passed by the Single Bench of the Karnataka High Court titled as Anandbhavan Properties Pvt. Ltd. Vs. Union of India, 2020(34) G.S.T.L. 143(Kar.) which read as under:-

“5. Perusal of Annexures-D and E, it is not relevant to Section 74 of the Act. Under Section 74 of the Act, petitioner has not been issued notice. The pendency of proceedings under Section 83 of the Act would be only after issuance of notice. In the absence of issuance of notice under Section 74 of the Act or any other sections quoted in Section 83 of the Act, one cannot draw inference that there is pendency of any proceedings under Section 74 of the Act in the present case. Respondents have not apprised by producing any documentary evidence to show that one of the ingredients under Section 74 of the Act has been invoked so as to pass the impugned order under Section 83 of the Act. Accordingly, writ petition stands allowed. Annexures-D and E are set aside.”

8. Faced with this, learned counsel for respondent No.1 has argued that actually the entire amount of the petitioner were frozen and the petitioner wrote a letter (Annexure P-13) wherein they had requested that they would be satisfied if all of their bank accounts were de-frozen and the account which they have in the HDFC Bank be kept under the lien of the Department to the extent of the demand of the revenue viz. Rs.3.31 crores. As per learned counsel for the respondent-revenue, this action was taken pursuant to the request of the petitioner.

9. Learned counsel for the petitioner has then argued that this offer was made because the petitioner was facing a situation where all its accounts were frozen and it had to remit payment on time. The request was made without prejudice to the rights of the petitioner. Consequently, this argument of the learned counsel for the respondent No.1 has to be rejected.

10. Resultantly, in the end we are left with the situation where till date no notice has been issued under sub-Section (1) of Section 74. To this effect, the learned counsel for the petitioner has relied upon the Division Bench judgment of this Court in the matter of Bindal Smelting Pvt. Ltd Vs. Addl. Dir. Gen. Directorate Gen. Of GST Intelligence, 2020(34)G.S.T.L. 592(P&H), wherein it was held as under:-

“10. Applying the above quoted provisions of CGST Act, 2017 and taking cue from afore-cited judgments of Gujarat High Court, which has noticed consistent judicial pronouncement and Bombay High Court, we find that in the present case attached account is Over Cash Credit account and Petitioner had debit balance of Rs.6.42 Crore, thus question arises that whether continuation of attachment would protect interest of revenue or not. The Petitioner is running unit and more than 100 families are dependent upon Petitioner. Till date no proceedings under Section 74 of CGST Act are pending which would start as soon as show cause notice is issued. The Respondent has seized record of the Petitioner who has further supplied various documents as well put personal appearance through Directors and employees.

The object and intention of legislature to endow Commissioner with power of attachment under [Section 83](#) is very clear. It is drastic and far-reaching power which must be used sparingly and only on substantive weighty grounds and reasons. The power should be exercised only to protect interest of revenue and not to ruin business of any taxable person. Primarily [Section 83](#) permits to attach property. Property means an asset which may be movable, immovable, tangible, intangible or in the form of some instrument. Cash in hand as well bank account is property, in the form of liquidity which is better than immovable property and directly affects working in the form of working capital of a dealer. A dealer may be having 15 of 17 CWP No.31382 of 2019(O&M) #16# cash in hand or in account in the form of fixed deposit or saving account. The mandate of [Section 83](#) in our considered opinion is to attach amount lying in an account in the form of FDR or saving and it cannot be intention or purport of [Section 83](#) to attach an account

having debit balance. No purpose leaving aside securing interest of revenue is going to be achieved except closure of business which cannot be permitted unless and until running of business itself is prohibited by law. The contention of Respondent that they have power to attach bank account irrespective of nature of account cannot be countenanced.....”

11. Learned counsel for respondent No.1 has not been able to cite any contrary judgment.

12. In the circumstances, this petition is allowed and impugned order attaching the bank accounts is *set aside*. It is, however, clarified that the revenue would be at liberty to take appropriate steps after initiating the proceedings in accordance with law.

13. Since the main case has been decided, the pending Civil Misc. Application(s), if any, also stands disposed of.

(AJAY TEWARI)
JUDGE

(RAJESH BHARDWAJ)
JUDGE

16.02.2021
m. sharma

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No