

**4. The Principal Additional Director)
General)
Directorate General of GST Intelligence)
Mumbai Zonal Unit)
having his office at NTC House, III Floor,))
15 NM Road, Ballard Estate,)
Mumbai – 400 001)** **..... Respondents**

Mr.Prithviraj Chaudhari, a/w. Mr.Aansh Prashant Desai for the Petitioner.

Mr.Jitendra B.Mishra for the Respondents.

**CORAM : R.D. DHANUKA &
S.M.MODAK, JJ.**

DATE : 28TH FEBRUARY, 2022.

ORAL JUDGMENT [PER R.D.DHANUKA, J] :-

Rule. Mr.Mishra, learned counsel for the respondents waives service. By consent of parties, writ petition is heard finally.

2. By this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for a declaration that the circular dated 23rd February, 2021 is ultra vires the provisions of the Central Goods and Services Tax Act, 2017 (for short CGST Act, 2017) or in the alternative to read down the circular dated 23rd February, 2021 to make the recording of reasons or grounds of attachment mandatory in the attachment order or Form DRC-22 issued in terms of Rule 159(1) of the CGST Rules.

3. The petitioner also prays for writ of certiorari for quashing and setting aside the impugned freezing orders dated 7th December, 2021 issued by the respondent no.3 and further seeks writ of mandamus in

terms of prayer clause (d) of the petition.

4. It is the case of the petitioner that the petitioner purchased the goods locally from wholesale traders which are consolidated at the level of the wholesale trader and thereafter are dispatched to the warehouse of the logistics company, from where the goods are sent to the CFS Terminals at the customs stations. The said goods are released from export only after due verification by the customs officers. On 18th February, 2021, the office of the respondent no.3 initiated investigation against the petitioner and conducted search at the petitioner's premises during which the original documents were seized.

5. Summons dated 18th February, 2021 were served by hand during the course of search. The statement of the petitioner's employees were recorded on the very same day. On 23rd February, 2021, the CBIC issued the circular laying down detailed guidelines for field formations in relation to the attachment under section 83 of the CGST Act. On or about 7th December, 2021, the petitioner was informed by its banks that the accounts of the petitioner with various banks had been frozen by the office of the respondent no.3. The petitioner accordingly filed this

writ petition.

6. Mr. Chaudhari, learned counsel for the petitioner invited our attention to section 83 of the CGST Act and would submit that the attachment order under section 83 has to be in writing and has to be issued in FORM GST DRC 22 under Rule 159(1) in the manner as may be prescribed. Learned counsel invited our attention to the impugned letter of provisional attachment and would submit that the said letter of provisional attachment was not addressed to the petitioner but was addressed to the bank manager with a copy caused to the petitioner. He submits that the said provisional order was not in compliance with the section 83 of the CGST Act and was not issued in the manner prescribed under Rule 159.

7. Learned counsel invited our attention to the circular dated 23rd February, 2021 and more particularly, clauses 3.1.2, 3.1.4 and 3.1.5 and would submit that unless the opinion formed by the Commissioner is communicated to the petitioner, the petitioner would not be able to raise any objection. He submits that the said circular providing that the Commissioner shall record such an opinion on file and not

communicate the same to the taxable person would not amount to an order of provisional attachment under section 83 of the CGST Act. In support of this submission, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Radha Krishan Industries vs. State of Himachal Pradesh, 2021(48) G.S.T.L. 113(S.C.)*** and in particular paragraph (48) and would submit that none of the principles laid down by the Hon'ble Supreme Court in the said judgment for exercising powers under section 83 of the CGST Act have been complied with by the Commissioner.

8. Learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Bachhittar Singh vs. State of Punjab and Another, 1962 Supp (3) SCR 713*** and in particular paragraph (9) and would submit that any opinion formed by the Commissioner and recorded in the file but not communicated to the petitioner would not partake the character of the order and thus based on such opinion, if any, found by the Commissioner which only formed part of the file cannot be enforceable under section 83 of the CGST Act. It is submitted by the learned counsel for the petitioner that the respondents had already conducted search and the investigation is still

going on against the petitioner.

9. Learned counsel for the petitioner submits that since the petitioner has impugned the validity of the circular issued by the respondents, the petitioner is not required to avail of the alternate remedy available against the order of provisional attachment passed by the Commissioner. He submits that if the respondents are ready and willing to furnish a copy of the reasons/opinion formed by the Commissioner before issuing the said impugned letter of provisional attachment, the petitioner would file objection contemplated under Rule 159(5) of the CGST Rules, 2017.

10. Mr.Mishra, learned counsel for the Revenue on the other hand invited our attention to paragraphs 48, 55 and 56 and would submit that the impugned circular has been issued by the respondents in compliance with the principles of law laid down by the Hon'ble Supreme Court in case of **Radha Krishan Industries** (supra). The petitioner thus cannot challenge the validity of the said circular.

11. It is submitted by the learned counsel that the Commissioner has already formed his opinion under section 83 unamended which was

applicable when the said order was passed as to why it was necessary to protect the interest of the Government Revenue and to pass a provisional order of attachment on the bank account of the petitioner. It is submitted that there is a remedy of appeal provided against the said order of the provisional attachment under section 83 of the CGST Act and thus on this ground itself, this Court shall not entertain this writ petition.

12. The next submission of the learned counsel is that under Rule 159(5), the petitioner instead of raising an objection to the said order of provisional attachment within the time prescribed, has chosen to file this writ petition.

13. Learned counsel invited our attention to some of the paragraphs of the affidavit in reply and would submit that the petitioner has already admitted to its offence during its appearance in respect to the summons issued by the respondents. The petitioner company is being run by various dummy persons. The petitioner is fully aware of the action initiated by the respondents. If the opinion formed by the Commissioner before issuance of the order of provisional attachment

would have been issued to the petitioner at the first instance, the petitioner in that event would have withdrawn the amount lying in the bank account which would have been against the interest of revenue.

14. It is submitted by the learned counsel for the revenue that in any event, the petitioner is now fully aware of the reasons which are recorded by the respondents in the affidavit in reply to the petition.

REASONS AND CONCLUSION :-

15. The unamended section 83 of the CGST Act reads thus:-

Section 83 : Provisional attachment to protect revenue in certain cases.-

(1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, 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 or any person specified in sub-section (1A) of section 122, 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).

The said provision was amended on 1st July, 2017 and reads thus:-

1. Substituted by s.115 of The Finance Act, 2021 dated 28-03-2021 for

“(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.”

This amendment shall be effective from a date to be notified.

16. A perusal of the said unamended provisions which are applicable when the said impugned order of provisional attachment was issued indicates that if the Commissioner was 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 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. In this case, the proceedings under section 67 of the CGST Act are pending against the petitioners.

17. Under Rule 159 of the CGST Rules the mode and manner of exercising powers by the Commissioner under section 83 of the CGST

Act is provided. The Commissioner shall send a copy of the order of attachment to the concerned Revenue Authority or Transport Authority or any such Authority to place the encumbrance on the said moveable or immovable property, which shall be removed only on the written instructions from the Commissioner to that effect. The Commissioner is required to attach any property under Rule 159 by passing an order in FORM GST DRC-22 to that effect mentioning therein the details of property which is attached including the bank account in accordance with the provisions of section 83.

18. It is thus clear that the copy of such order in FORM GST DRC-22 has to be communicated to the party with which the assets of the assessee would be found. We are not inclined to accept the submission of the learned counsel for the petitioner that the said communication issued in FORM GST DRC-22 to various banks by the Commissioner ought to have been addressed to the petitioner at the first instance. In our view, Mr.Mishra, learned counsel for the revenue is right in his submission that if the said communication would have been issued to the petitioner at the first instance, there was likely that the petitioner would have withdrawn the amounts lying in the bank account which

would not have been in the interest of revenue. It is not in dispute that the copy of the communication was sent to the petitioner simultaneously. In our view, at this stage when the powers were exercised by the Commissioner under section 83 read with Rule 159 (1), the Commissioner was not required to communicate the reasons for issuing any reasons for passing order of provisional attachment.

19. Under Rule 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. Under Rule 159(6), the Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in FORM GST DRC-23.

20. On conjoint reading of Rule 159 read with circular dated 23rd February, 2021 and more particularly clauses 3.1.3, 3.1.4 and 3.1.5 would clearly indicate that the Commissioner has to form an opinion

and must exercise due diligence and duly consider as well as carefully examine all the facts of the case, including the nature of offence, amount of revenue involved, established nature of business and extent of investment in capital assets. He should have reasons to believe that the taxable person, against whom the proceedings referred in section 83 are pending, may dispose of or remove the property, if not attached provisionally. The basis on which the Commissioner has formed such an opinion, should be duly recorded on file.

21. In our view the safeguard as provided in clause 3.1.5 in the said circular by providing that the power of provisional attachment must not be exercised in a routine/mechanical manner and careful examination of all the facts of the case is important to determine whether the case is fit for exercising power under section 83. The collective evidence, based on the proceedings/enquiry conducted in the case, must indicate that a *prima facie* a case has been made out against the taxpayer, before going ahead with any provisional attachment. The remedy of attachment being, by its very nature, extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution.

22. In our view, none of those safeguards set out in the said circular dated 23rd February, 2021 would affect the rights of the petitioner as the said circular though grants power to the Commissioner to record reasons in file, however with a caution that the power must not be exercised in the routine or mechanical manner and shall be exercised only after careful examination of the facts of the case.

23. A perusal of the affidavit in reply indicates that according to the respondents, there are certain material against the petitioner noticed by the respondents while carrying out investigation. At this stage we are not expressing any opinion on the correctness of the reasons recorded by the respondents in the affidavit in reply.

24. The Hon'ble Supreme Court in case of **Radha Krishan Industries** (supra) have dealt with section 83 of the CGST Act and has laid down various principles thereby safeguarding the rights of the assessee as well as of the revenue. Paragraphs 48, 55 and 56 of the said judgment read thus :-

48. Now in this backdrop, it becomes necessary to emphasize that before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for

the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in [Section 83](#) is, in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre- conditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the

Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.

55. A significant aspect of Rule 159(5) is that upon the levy of a provisional attachment, the person whose property is attached is empowered to file an objection within seven days on the ground that the property was or is not liable to attachment. In using the expression “was or is no longer liable for attachment”, the delegate of the legislature has comprehended two alternative situations. The first, evidenced by the use of the words “was” indicates that the property was on the date of the attachment in the past not liable to be attached. That is the reason for the use of the past tense “was”. The expression “is not liable to attachment indicates a situation in praesenti. Even if the property, arguably, was validly attached in the past, the person whose property has been attached may demonstrate to the Commissioner that it is not liable to be attached in the present.

56. The second significant aspect of sub-Rule (5) is the mandatory requirement of furnishing an opportunity of being heard to the person whose property is attached. This is in consonance with the principles of natural justice and ensures that a fair procedure is observed. Sub-Rule (5) provides for a post- provisional attachment right of:

- (i) Submitting an objection to the attachment;
- (ii) An opportunity of being heard.

Sub - Rule (5) contains clear language to the effect that a person whose property is attached is entitled to two procedural entitlements: first, the right to submit an objection on the ground that the property was not or is not liable to be attached; and second, an opportunity of being heard to the person filing an objection. This is a clear indicator that in addition the filing of an objection, the person whose property is

attached is entitled to an opportunity of being heard. It is not open to the Commissioner, as has been stated in the present case, to hold the view that the only safeguard under sub-Rule 5 is to submit an objection without an opportunity of a personal hearing. Such a construction would be plainly contrary to sub-Rule 5 which contemplates both the submission of an objection to the attachment and an opportunity of being heard. The opportunity of being heard can be availed of as a matter of right by the person whose property is attached. Both the right to submit an objection and to be afforded an opportunity of being heard are valuable safeguards. The consequence of a provisional attachment is serious. It displaces the person whose property is attached from dealing with the property. Where a bank account is attached, it prevents the person from operating the account. A business entity whose bank account is attached is seriously prejudiced by the inability to utilize the proceeds of the account for the purpose of business. The dual procedural safeguards inserted in sub-Rule 5 of Rule 159 demand strict compliance.

The Commissioner who hears the objections must pass a reasoned order either accepting or rejecting the objections. To allow the Commissioner to get by without passing a reasoned order will make his decision subjective and defeat the purpose of subjecting it to judicial scrutiny. The Commissioner must deal with the objections and pass a reasoned order indicating whether, and if not, why the objections are not being accepted. Sub- Rule 6 of Rule 159 allows for the release of a property which either was or is no longer liable for attachment. The form in which such an order has to be passed, namely form GST DRC-23, states that “now there is no such proceeding pending against the defaulting person which warrants attachment” of the account or as the case may be, the property. Sub- Rules 5 and 6 do not expressly contemplate a situation in which the

person whose property is attached can object on the ground that the attachment is in excess of the amount likely to be due for which proceedings have been launched under the Act. Nor does it provide for a specific opportunity to the taxable person to offer any alternative form of security in lieu of the attachment. Such an opportunity must be read in to the provision to allow for a fair working in practice. Whether any alternative security that is furnished by the taxable person should be accepted and if so, its sufficiency, is a matter for the Commissioner to determine. Undoubtedly, the taxable person may not have a right to demand that only a particular form of security must be accepted. The Commissioner has to decide whether the form of security offered would secure the interest of the revenue. Where the taxable person sets up the plea that the extent of the attachment is excessive or where the taxable person offers an alternative form of security, these are also matters which ought to be determined by the Commissioner in the exercise of powers under Rule 159(5). The scope of objection can also extend to the nature of the property which is being provisionally attached.

Now, it is in this backdrop that we proceed to a determination of whether the petition under [Article 226](#) was maintainable and if it was, whether Commissioner exercised the powers under [Section 83](#) read with Rule 159 in accordance with law.

25. The Hon'ble Supreme Court has also dealt with Rule 159(5) providing the right to the assessee to raise an objection. It is held that the Commissioner who hears the objections must pass a reasoned order either accepting or rejecting the objections. To allow the Commissioner to get by without passing a reasoned order will make his decision

subjective and defeat the purpose of subjecting it to judicial scrutiny.

The Commissioner must deal with the objections and pass a reasoned order indicating whether, and if not, why the objections are not being accepted. Rule 159(6) allows for the release of a property which either was or is no longer liable for attachment.

26. The question that arises for the consideration of this Court is whether the remedy of the petitioner to lodge his objection to the order of provisional attachment under section 83 read with Rule 159(1) of the CGST Rules can be effectively exercised without communication of the opinion of the Commissioner atleast at that stage or not.

27. A perusal of the scheme of section 83 of CGST Act and Rule 159 clearly indicate that the remedy provided to an assessee to lodge the objection can be exercised effectively only if the petitioner knows the reasons or opinion *prima facie* formed by the Commissioner before exercising the power under section 83 of the CGST Act read with Rule 159(1) to enable the petitioner to record the objections to the *prima facie* opinion formed by the Commissioner. Unless such *prima facie* opinion atleast at this stage is communicated to the petitioner, the

petitioner would not be able to lodge the objection and to canvass that the *prima facie* opinion formed by the Commissioner was not in accordance with section 83 read with Rule 159(1) and there was no threat of loss of revenue to the respondents.

28. Insofar as the judgment of the Supreme Court in case of ***Bachhittar Singh*** (supra) relied upon by the learned counsel for the petitioner is concerned, a perusal of the said judgment indicates that the order passed in the said judgment has dealt with the order passed by the Commissioner in file and was not communicated to the petitioner. The question arose in that matter whether such order which remained in file and not having been communicated to the petitioner could be termed as an enforceable order or not. In that context the Hon'ble Supreme Court held that merely because the opinion is formed and the order is passed which remains on file without communication of such order or opinion would not partake the character an enforceable order. If the party against whom such an order is passed remains on file, the aggrieved party will not come to know about such order and would not have remedy to challenge such order. In our view, the said judgment would not advance the case of the petitioner. We have perused the provisions

of section 83 read with Rule 159(1). In our view, the petitioner would be entitled to the copy of the opinion formed by the Commissioner before filing an objection.

30. Insofar as the objection raised by the learned counsel for the respondent that the petitioner ought to have filed an appeal against the order of provisional attachment and this petition is not maintainable on that ground is concerned, in view of the fact that the petitioner has impugned the validity of the circular issued by the respondents, the same cannot be challenged before the Appellate Authority. We are thus not inclined to reject the writ petition on the ground of an alternate remedy available to the petitioner under the provisions of CGST Act.

31. We accordingly pass the following order :-

- (a) The respondent no.4 is directed to furnish a certified copy of the opinion/reasons formed by the Commissioner under section 83 of the CGST Act read with Rule 159 of the CGST Rules under clause 3.1.4 of the circular dated 23rd February, 2021 to the petitioner within one week from today. The petitioner is allowed

to raise objection to the *prima facie* opinion formed by the Commissioner within one week from the date of respondent no.4 furnishing such copy of the opinion to the effect that the property attached was not liable of the petitioner.

(b) The respondent no.4 shall grant an opportunity of being heard to the petitioner before passing the final order. If the respondent no.4 is satisfied that the bank accounts of the petitioner were no longer liable for attachment, shall withdraw the provisional attachment by issuing an order in FORM GST DRC-23 and if not satisfied, may reject such objection.

(c) This exercise shall be done within two weeks from the date of filing objection. The order that would be passed by the respondent no.4 shall be communicated to the petitioner within one week from the date of passing order.

(d) If the order is adverse against the petitioner, the petitioner would be at liberty to file appropriate proceedings.

(e) Writ petition is dismissed with aforesaid directions. Rule is discharged. No order as to costs. The parties to act on the authenticated copy of this order.

[S.M.MODAK, J.]

[R.D.DHANUKA, J.]