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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 14190/2024

TRILOKI TRADING .....Petitioner

Through: Mr. Kanhaiya Singhal, Mr. Ujwal Ghai, Mr. Udit Bakshi and Mr. Bhuwesh Bhola, Advs.

versus

DIRECTORATE GENERAL OF GST INTELLIGENCE (DGGI) HQRS. & ORS. .....Respondents

Through: Mr. Anurag Ojha, Sr. Standing Counsel with Mr. Subham Kumar and Mr. Dipak Raj, Advs. for R-1 & R-2

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **08.10.2024**

CM APPL. 59394/2024 (Exemption)

Allowed, subject to all just exceptions.

This application stands disposed of.

W.P.(C) 14190/2024 & CM APPL. 59393/2024 (Stay of the operation of Form GST DRC-22 dt. 28.05.2024)

1. The writ petitioner is aggrieved by the order dated 28 May 2024, pursuant to which the respondents have proceeded to provisionally attach the bank account maintained by it in exercise of powers conferred by Section 83 of the **Central Goods and Services Tax Act, 2017**[1].

2. Learned counsel for the writ petitioner contends that the impugned order is liable to be set aside since it fails to record or

[1] CGST Act

reflect any satisfaction having been formed by the competent authority that the provisional attachment was warranted in order to protect the interest of Government revenue.

3. Our attention was also drawn to the following principles that were enunciated by the Supreme Court in **Radha Krishan Industries vs. State of Himachal Pradesh & Ors.**[2]:

> "**B.2.** ***Challenge on merits : Improper invocation of Section 83***
>
> **19.8.** The power of provisional attachment under Section 83 of the HPGST Act is a drastic power and must be exercised with extreme care and caution.
>
> **19.9.** The power under Section 83 of the HPGST Act cannot be exercised unless there is sufficient material on record to justify that the assessee is about to dispose of the whole or part of its property to thwart the ultimate collection of tax.
>
> **19.10.** The existence of relevant material is a precondition to the formation of an opinion by the Commissioner.
>
> **19.11.** The third respondent failed to show any material on record to indicate that the appellant is a "fly by night operator" or is disposing off assets to defeat the collection of tax.
>
> **19.12.** The stated reason for provisional attachment—the initiation of proceedings and passing of an order under Section 74 against the appellant's supplier, GM Powertech—is insufficient to invoke the powers of provisional attachment against the appellant.
>
> **19.13.** The third respondent has failed to show that there is a threat to the interests of the Revenue on account of the appellant's alleged involvement in the said ITC fraud of GM Powertech.
>
> **19.14.** The appellant has paid an output tax of Rs 12,49,90,267.14 (Rs 12.49 crores) for the relevant period, which is more than ITC of Rs 3.25 crores which the appellant has allegedly taken fraudulently.
>
> **19.15.** Even if the Revenue has to attach the properties of the assessee, immovable properties must be attached. Attachment of bank accounts and trading assets should be a last resort only as it paralyses the business of the assessee.
>
> **19.16.** The pendency of proceedings under Sections 62, 63, 64, 67, 73 or 74, of the HPGST Act, is a precondition for invoking the provisions of Section 83 of the HPGST Act.

[2] (2021) 6 SCC 771

19.17. The provisional attachment of the appellant's assets was made on 28-10-2020, *before* the proceedings were initiated against the appellant under Section 74 of the HPGST Act on 27-11-2020. Thus, the provisional attachment was made without jurisdiction and in violation of Section 83.

19.18. The provisions of Section 83 of the HPGST Act do not provide for making provisional attachment a second time, once the first attachment is withdrawn. Moreover, the HPGST Act, does not provide the third respondent the power of review to review his earlier decision regarding provisional attachment.

19.19. The first provisional attachment against the appellant was "withdrawn completely with immediate effect" in January 2019 and the same had gained finality. Thus, the impugned orders of provisional attachment for the second time, are without the authority of law and should be set aside.

19.20. Provisional attachment of 100% of the alleged amount is not permissible as per law.

19.21. While Section 83 of the HPGST Act does not provide for the percentage of alleged amount to be attached, the powers under this section must be guided by other provisions of the Act.

19.22. Under Section 74 of the HPGST Act, once the tax demand becomes payable, an assessee can only challenge this demand in appeal after depositing 10% of the disputed amount and the remaining demand is stayed. In contrast, the provisional attachment of 100% of the alleged amount even before the finalisation of the tax demand is contrary to the legislative intent.

19.23. The third respondent has taken a contradictory stand with respect to collection of tax from the appellant. Even if it is admitted that the transaction between the appellant and GM Powertech was a fake transaction without actual movement of goods, it follows that the appellant cannot claim refund of ITC nor would the appellant be liable to pay tax on outward supplies. However, the appellant has already paid Rs 12.49 crores of tax on outward supplies.

19.24. The third respondent has raised a demand of Rs 39 crores against GM Powertech for illegally availing ITC. Once the tax demand has been confirmed against GM Powertech, refusal to grant ITC to the appellant would amount to double collection of tax."

4. As we view the provisional attachment order, we find that an allegation is levelled that it had come to the notice of the respondents that the petitioner firm had made suspicious and fraudulent payments

to a particular account. It is further alleged that it had also wrongly availed of **Input Tax Credit**[3] to the tune of INR 19,37,431/-. It is in the aforesaid backdrop that the respondents take the position that a protective order as contemplated under Section 83 of the CGST Act was warranted.

5. However, and notwithstanding the above, we find that Rule 159 of the **Central Goods and Services Tax Rules, 2017**[4] confers a right upon the writ petitioner to file objections and seek revocation of a provisional attachment that may be made. That Rule reads as follows:-

> "**159. Provisional attachment of property**.— (1) Where the Commissioner decides to attach any property, including bank account in accordance with the provisions of Section 83, he shall pass an order in Form GST DRC-22 to that effect mentioning therein, the details of property which is attached.
>
> (2) The Commissioner shall send a copy of the order of attachment [in FORM GST DRC-22] to the concerned Revenue Authority or Transport Authority or any such Authority to place encumbrance on the said movable or immovable property, which shall be removed only on the written instructions from the Commissioner to that effect [or on expiry of a period of one year from the date of issuance of order under sub-rule (1), whichever is earlier] [and a copy of such order shall also be sent to the person whose property is being attached under Section 83].
>
> (3) Where the property attached is of perishable or hazardous nature, [and if the person, whose property has been attached,] pays an amount equivalent to the market price of such property or the amount that is or may become payable [by such person], whichever is lower, then such property shall be released forthwith, by an order in Form GST DRC-23, on proof of payment.
>
> (4) Where [such person] fails to pay the amount referred to in sub-rule (3) in respect of the said property of perishable or hazardous nature, the Commissioner may dispose of such property and the amount realized thereby shall be adjusted against the tax, interest, penalty, fee or any other amount payable by [such person].

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[3] ITC

[4] CGST Rules

(5) <u>Any person whose property is attached may [file an objection in FORM GST DRC-22A] 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.</u>

(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."

6. In our considered opinion, bearing in mind the nature of allegations which stand levelled against the petitioner and stand reflected in the impugned order, the end of justice would merit the petitioner being accorded the liberty to move and seek lifting of the provisional attachment in terms of Rule 159.

7. We, accordingly, dispose of the writ petition by permitting the writ petitioner to move in terms of Rule 159 within a period of one week from today. Any application for revocation of provisional attachment so made may be examined and disposed of in accordance with law and preferably within a period two weeks therefrom.

8. All rights and contentions of respective parties on merits are kept open.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

OCTOBER 8, 2024/*ns*