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2022 (2) TMI 997 - GUJARAT HIGH COURT

M/S UTKARSH ISPAT LLP VERSUS STATE OF GUJARAT

R/SPECIAL CIVIL APPLICATION NO. 188 OF 2022

Dated: - 27-1-2022

Provisional attachment of multiple properties - factory premises - plant and machinery - bank accounts including the fixed deposits - whether the respondent No.3 could have provisionally attached the property owned by Shri Niraj Jaydev Arya (one of the partners of the LLP) in exercise of power under Section 83 of the Act, 2017? - Applicability of Section 90 of GST Act - HELD THAT:- The respondent No.3, having realized that it is only the property belonging to a taxable person that can be provisionally attached under Section 83 of the Act and the partner of an LLP not being a taxable person in the case on hand, thought fit to take the aid of Section 90 and Section 137 resply of the Act for the purpose of provisionally attaching a property owned by the partner of the LLP.

Sub-section (84) of Section 2 of the Act, 2017 defines the term "person" to include an individual, a Hindu Undivided Family, a company, a firm, a limited liability partnership, etc. Therefore, the Act recognizes a firm as a dealer and as a person. The legislature having treated an LLP as a taxable entity, distinct from the individual partners constituting it, it was not open for the respondent No.3 to provisionally attach the immovable property owned by a partner of the firm - This Court is of the view that the respondent No.3 was wholly unjustified in provisionally attaching a personal property owned by a partner of the firm under Section 83 of the Act, 2017.

Whether the respondent No.3 was justified in provisionally attaching the stock lying at the factory premises and the attachment of sundry debtors? - HELD THAT:- The authority should ensure that the attachment does not hamper the normal activities of the taxable person. It has been clarified that the raw materials and input required for the production or finished goods should not normally be attached by the department - In the case on hand, it is not approved that the provisional attachment of the goods, stock and receivables, more particularly, when the entire stock and receivables have been pledged and a floating charge has been created in favour of the Kalupur Commercial Bank Limited for the purpose of availing the cash credit facility with the provisional attachment of the goods, stock and receivables the entire business will come to a standstill.

The Form GST DRC – 22 for attachment of the stock lying at the factory premises dated 25th November 2021, the Form GST DRC – 22 for attachment of the sundry debtors (M/s. Utkarsh Bars Private Limited) dated 26th November 2021 and the GST DRC – 22 for attachment of the immovable property of Shri Niraj Jaydev Arya (one of the partners of the firm) dated 27th November 2021 are hereby quashed and set aside - this writ application succeeds in part.

Judgment / Order

HONOURABLE MR. JUSTICE J.B.PARDIWALA AND HONOURABLE MS. JUSTICE NISHA M. THAKORE

MR.AVINASH PODDAR FOR THE PETITIONER

MR UTKARSH SHARMA, AGP & MS MOHINI BHAVSAR ADVOCATE WITH MR BHARAT JANI FOR THE RESPONDENTS

JUDGMENT

PER : HONOURABLE MS. JUSTICE NISHA M. THAKORE

1 By this writ application under Article 226 of the Constitution of India, the writ applicant, a registered partnership firm, through one of its partners, has prayed for the following reliefs:

“a) To quash and set aside the following orders of provisional attachment of properties in FORM GST DRC-22 dated 25.11.2021, 26.11.2021 and 27.11.2021 issued by Respondent No.3 as the same being dehors the provisions of section 83 of the CGST Act, 2017:

(i) Form GST DRC 22 for attachment of Factory & Shed Dated 25/11/2021;

(ii) Form GST DRC 22 for attachment of Plant & machinery including 66 KVA Substation Dated 25/11/2021;

(iii) Form GST DRC 22 for attachment of stock lying at factory premises Dated 25/11/2021;

(iv) Form GST DRC 22 for attachment of Bank Current Accounts and FDs Dated 25/11/20 21;

(v) Form GST DRC 22 for attachment of Sundry Debtors (Utkarsh Bars Pvt. Ltd.) Dated 26/11/2021;

(vi) Form GST DRC 22 for attachment of immovable property of Mr. Niraj Jaydev Arya dated 27.11.2021;

(b) To issue a writ of mandamus or any other appropriate writ, order or direction, directing the Respondent No.4 to allow the petitioner to utilize its drawing power and allow the petitioner to conduct business operations on the ground that the risk of respondent no.4 is sufficiently covered and secured;

c) To issue a writ of mandamus or any other appropriate writ, order or direction, as an ad-interim relief, to release the provisionally attached stock and the debtors so as to enable the petitioner to run his business smoothly and other ad-interim relief as the Court deems fit;

d) To issue order(s), direction(s), writ(s) or any other relief(s)) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice;

e) To award Costs of and incidental to this application be paid by the Respondents.”

2 The facts giving rise to this writ application may be summarized as under:

3 The writ applicant is a limited liability partnership firm and is engaged in the business of procuring various type of M.S. Scrap used for the manufacturing of the TMT bars. The writ applicant is duly registered under the Goods and Services Tax Act. Its principal place of business is at Rajkot.

4 On 19th November 2021, the officials of the GST Department undertook search proceedings at the registered premises of the writ applicant and also at the residential premises of one of the partners namely Niraj Jaydev Arya under Sub-section (2) of Section 67 of the Central Goods and Services Tax Act, 2017 [for short, "the Act, 2017"]. The search proceedings were undertaken on the allegation that the writ applicant has availed Input Tax Credit on the basis of fake invoices issued by fictitious firms without any movement of goods by the said fictitious firms for the period of May 2019 till the date of the search proceedings.

5 It appears that during the pendency of the search proceedings, the respondent No.3 passed an order provisionally attaching multiple properties like the factory premises, plant and machinery and bank accounts including the fixed deposits. The respondent No.3 issued multiple Form GST DRC – 22 in relation to the attachment of the aforesaid properties. The multiple Form GST DRC – 22 came to be issued by the respondent No.3 in exercise of powers under Section 83 of the CGST Act, 2017.

6 The details of the properties which have been provisionally attached are as under:

<i>Sr. No.</i>	<i>Details of Property</i>	<i>Property Name</i>	<i>Approx. Value (Rs.)</i>	<i>Total Approx. Value (Rs.)</i>
1.	<i>Factory Building & Shed (Mortgaged with Bank authorities)</i>	<i>Building</i>	<i>4,31,944</i>	<i>6,17,90,195</i>
		<i>Factory Shed</i>	<i>6,10,56,605</i>	
		<i>Gate</i>	<i>3,01,646</i>	
2.	<i>Plant & Machinery (Mortgaged with Bank authorities)</i>	<i>Water Tank</i>	<i>54,55,406</i>	<i>20,18,99,799</i>
		<i>Workshop</i>	<i>3,94,750 30</i>	
		<i>M.T. Induction Furnace</i>	<i>4,31,46,808</i>	
		<i>Auxiliary Machine</i>	<i>2,47,51,541</i>	
		<i>CCM Continuous Casting Machine</i>	<i>3,21,86,674</i>	
		<i>Conveyor</i>	<i>17,35,648</i>	

		<i>DG Set</i>	<i>24,66,061</i>
		<i>Metal Handling Equipment</i>	<i>50,75,317</i>
		<i>Overhead Crane</i>	<i>5,16,65,763</i>
		<i>PCU</i>	<i>1,33,57,507</i>
		<i>Pilvrior Machine</i>	<i>50,000</i>
		<i>Q & A Equipment</i>	<i>23,92,073</i>
		<i>Scrap Handling</i>	<i>10,45,000</i>
		<i>Scrap Processing Equipment</i>	<i>37,11,000</i>
		<i>Slag Crusher Machine</i>	<i>45,07,229</i>
		<i>Water Circular Circuit</i>	<i>75,10,845</i>
		<i>Water Treatment Plant</i>	<i>17,33,850</i>
		<i>Weigh Bridge</i>	<i>7,14,327</i>
<i>3.</i>	<i>66KVA Substation (Mortgaged with Bank authorities)</i>	<i>66KVA Substation including Transformer & Capacition Bank</i>	<i>4,88,06,680</i>
<i>4.</i>	<i>Stock Lying At Factory Premises Plot No.718 & 719, GIDC, Bamanbore, Village : Bamanbore (Mortgaged with Bank authorities)</i>	<i>Raw Material of Waste and Scrap including Remelting Scrap, SilicoMngenize, Sponze, Store & Consumable</i>	<i>1,91,41,848</i>
<i>5.</i>	<i>Bank Current A/C</i>	<i>Bank Current A/C with SBI No.39683832171</i>	<i>1,92,617</i>
		<i>Bank Current A/C with Kalupur</i>	<i>1,18,374</i>

		<i>Commercial Bank - 5720100141</i>		
		<i>Bank Current A/C with Axis Bank No.- 91700077787324</i>		<i>58,017</i>
6.	<i>FD with Kalupur Commercial Bank (Mortgaged with Bank authorities)</i>	<i>5795100000142 (Mortgaged)</i>	<i>12,85,760</i>	<i>12,70,15,036</i>
		<i>5795100000143 (Mortgaged)</i>	<i>25,70,000</i>	
		<i>5795100000144</i>	<i>1,15,71,840</i>	
		<i>5795100000145</i>	<i>58,59,546</i>	
		<i>5795100000164 (Mortgaged)</i>	<i>58,59,546</i>	
		<i>5795100000589 (Mortgaged)</i>	<i>36,05,838</i>	
		<i>5795100000760</i>	<i>25,48,813</i>	
		<i>5795400000761</i>	<i>25,48,812</i>	
		<i>5795400000763</i>	<i>50,96,960</i>	
		<i>5795400000764</i>	<i>50,96,959</i>	
		<i>5795400000765</i>	<i>50,96,294</i>	
		<i>5795400000766</i>	<i>50,96,295</i>	
		<i>5795400000767</i>	<i>50,95,630</i>	
		<i>5795400000768</i>	<i>50,95,631</i>	
		<i>5795400000771</i>	<i>50,94,965</i>	
		<i>5795400000772</i>	<i>90,94,966</i>	

	5795400000775	50,92,970
	5795400000814 (Mortgaged)	16,71,684
	5795400000815 (Mortgaged)	25,07,527
	057CF100003665	27,25,000
	057CF100003682	28,00,000
	057CF100003692	96,75,000
	057CF100003791	10,100,000
	057CF100003796	1,58,25,000
TOTAL AMOUNT OF ATTACHMENT		45,90,22,566

7 Being aggrieved by the aforesaid action on the part of the respondent No.3, the writ applicant is here before this Court with the present writ application.

8 We have heard Mr. Avinash Poddar, the learned counsel appearing for the writ applicant, Mr. Utkarsh Sharma, the learned A.G.P. appearing for the State respondents and Ms. Mohini Bhavsar, the learned advocate for Mr. Bharat Jani, the learned advocate appearing for the respondent Bank.

9 We propose to focus on three issues : (i) Form GST DRC – 22 for attachment of the stock lying at the factory premises dated 25th November 2021, (ii) Form GST DRC – 22 for the attachment of sundry debtors (M/s. Utkarsh Bars Private Limited) dated 26th November 2021 and (iii) Form GST DRC – 22 for attachment of immovable property personally owned by Shri Niraj Jaydev Arya (one of the partners) dated

10 The first question that falls for our consideration is whether the respondent No.3 could have provisionally attached the property owned by Shri Niraj Jaydev Arya (one of the partners of the LLP) in exercise of power under Section 83 of the Act, 2017.

11 In the aforesaid context, we must look into the order passed by the Assistant Commissioner dated 20th December 2021, which reads thus:

“4.6 In respect of Property of Partner attached

Here, in the case Utkarsh Ispat LLP is partnership firm and Niraj Jaidev Arya is the main person who is looking after the operation of the firm and is in charge commercial and administration activity of the firm Being Main partner and in charge of commercial and administration activity,

Niraj Jaidev Arya, has caused hug revenue loss to the Government exchequer By causing to avail ineligible input ta credit on such fake purchase transactions, He, in order to avail input tax credit, has caused to receive fake purchase invoices in the books of accounts of the firm violation of the provisions of the Gujarat Goods and Services Tax Act, 2017 and the rules made thereunder and thereby evaded tax to defrauding the Government of tax revenue. It is also to state that Niraj Jaidev Arya is the person who is responsible to execute this huge scam of showing fake purchase transactions in the books accounts of Utkarsh Ispat LLP and thereby availing ineligible input tax credit and all retained the benefits arising out of such offence. Total liabilities of the M/s. Utkam Ispat LLP till the date of search completed is amounting to ₹ 68,91,70,54 Whereas total property attached of firm is 55,30,22,566/- which is not sufficient cover government revenue. Assessee's contention that Firm is LLP and property partner cannot be provisionally attached is not tenable as attachment made is in t with provisions of the law.

CHAPTER XVI contains provision Liability to pay in certain cases. Section and 137 of the CGST Act, 2017 are the sections that discuss liabilities of Partner case of recovery of taxes, interests and penalties for offences. It is to be noted these sections have override effects over other law related to LLP and LLP's Part Provisions of Section 90 and section 137 of GST Act is as below

90. Liability of partners of firm to pay tax.

Notwithstanding any contract to the contrary and any other law for the being in force, where any firm is liable to pay any tax, interest or penalty under Act the firm and each of the partners of the firm shall, jointly and severally, be or such payment:

Provided that where any partner retires from the firm, he or the firm, shall intimate the date of retirement of the said partner to the Commissioner by a notice in that behalf in writing and such partner shall be liable to pay tax, interest or penalty due up to the date of his retirement whether determined or not, on that date:

Provided further that if no such intimation is given within one month from the date of retirement, the liability of such partner under the first proviso shall continue until the date on which such intimation is received by the Commissioner.

Explanation to chapter XVI provides that Explanation. *For the purposes of this Chapter;-*

(i) a "Limited Liability Partnership formed and registered under the provisions of the Limited Liability Partnership Act, 2008 shall also be considered as a firm.

(ii) "court" means the District Court, High Court or Supreme Court.

137. Offences by companies.

(1) Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the

consent or connivance of, or is attributable to any negligence on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(3) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, mutatis mutandis apply such persons.

(4) Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Explanation.- *For the purposes of this section,-(i) "company" means a body corporate and includes a firm or other association of individuals; and (ii) "director", in relation to a firm, means a partner in the firm.*

Provisional attachment of Immovable Property of partner is made in tune with provision and is inevitable to secure government revenue."

12 Thus, from the aforesaid, what we have been able to understand is that the respondent No.3 took the aid of Sections 90 and 137 resply of the Act.

13 It appears that there is a reason why the respondent No.3 took the aid of Sections 90 and 137 respectively of the Act.

14 Section 90 fixes the liability of partners of a firm to pay tax. Section 90 provides that in a case where any firm is liable to pay any tax, interest or penalty under the Act, the firm and each of the partners of the firm shall jointly and severally be liable for such payment.

15 Section 137 is with respect to the offences by company. Subsection (3) of Section 137 of the Act provides that where an offence under the Act has been committed by a taxable person being a partnership firm or a limited liable partnership or a Hindu Undivided Family or a Trust, the partner or Karta or Managing Trustee would be deemed to be guilty of such offence and would be liable to be proceeded against and punished accordingly.

16 Section 83 of the Act reads thus:

"83. Provisional attachment to protect revenue in certain cases.

(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).

17 The plain reading of Section 83 referred to above makes it clear that the property or properties which can be provisionally attached should belong to a “taxable person”.

18 Who is a taxable person? The term “taxable person” is defined under Section 2(107) of the Act. The same reads thus:

“2. In this Act, unless the context otherwise requires,—

(107) “taxable person” means a person who is registered or liable to be registered under section 22 or section 24;”

19 Thus, a taxable person is a person who is registered or liable to be registered under Section 22 or Section 24 of the Act. Section 22 of the Act reads thus:

“22. Persons liable for registration - (1) *Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees: Provided that where such person makes taxable supplies of goods or services or both from any of the special category States, he shall be liable to be registered if his aggregate turnover in a financial year exceeds ten lakh rupees.*

(2) Every person who, on the day immediately preceding the appointed day, is registered or holds a licence under an existing law, shall be liable to be registered under this Act with effect from the appointed day.

(3) Where a business carried on by a taxable person registered under this Act is transferred, whether on account of succession or otherwise, to another person as a going concern, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession.

(4) Notwithstanding anything contained in sub-sections (1) and (3), in a case of transfer pursuant to sanction of a scheme or an arrangement for amalgamation or, as the case may be, demerger of two or more companies pursuant to an order of a High Court, Tribunal or otherwise, the transferee shall be liable to be registered, with effect from the date on which the Registrar of Companies issues a certificate of incorporation giving effect to such order of the High Court or Tribunal.

Explanation.—*For the purposes of this section,—*

(i) the expression “aggregate turnover” shall include all supplies made by the taxable person, whether on his own account or made on behalf of all his principals;

(ii) the supply of goods, after completion of job work, by a registered job worker shall be treated as the supply of goods by the principal referred to in section 143, and the value of such goods shall not be included in the aggregate turnover of the registered job worker;

(iii) the expression “special category States” shall mean the States as specified in sub-clause (g) of clause (4) of article 279A of the Constitution.”

20 **Section 24 of the Act reads thus:**

“24. Compulsory registration in certain cases.- Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act,—

- (i) persons making any inter-State taxable supply;
- (ii) casual taxable persons making taxable supply;
- (iii) persons who are required to pay tax under reverse charge;
- (iv) person who are required to pay tax under sub-section (5) of section 9;
- (v) non-resident taxable persons making taxable supply;
- (vi) persons who are required to deduct tax under section 51, whether or not separately registered under this Act;
- (vii) persons who make taxable supply of goods or services or both on behalf of other taxable persons whether as an agent or otherwise;
- (viii) Input Service Distributor, whether or not separately registered under this Act;
- (ix) persons who supply goods or services or both, other than supplies specified under sub-section (5) of section 9, through such electronic commerce operator who is required to collect tax at source under section 52;
- (x) every electronic commerce operator;
- (xi) every person supplying online information and database access or retrieval services from a place outside India to a person in India, other than a registered person; and (xii) such other person or class of persons as may be notified by the Government on the recommendations of the Council.”

21 The term “person” has been defined under Section 2(84) of the Act. It reads thus:

“2. In this Act, unless the context otherwise requires,—

(84) “person” includes-

- (a) an individual;
- (b) a Hindu Undivided Family;
- (c) a company;
- (d) a firm;
- (e) a Limited Liability Partnership;
- (f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- (g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act,

2013;

(h) any body corporate incorporated by or under the laws of a country outside India;

(i) a co-operative society registered under any law relating to cooperative societies;

(j) a local authority;

(k) Central Government or a State Government;

(l) society as defined under the Societies Registration Act, 1860;

(m) trust; and

(n) every artificial juridical person, not falling within any of the above;”

22 The respondent No.3, having realized that it is only the property belonging to a taxable person that can be provisionally attached under Section 83 of the Act and the partner of an LLP not being a taxable person in the case on hand, thought fit to take the aid of Section 90 and Section 137 resply of the Act for the purpose of provisionally attaching a property owned by the partner of the LLP.

23 The moot question is whether Section 90 of the Act has any application to the case on hand.

24 Section 90 of the Act is nothing, but the very same principle of law, as enunciated under Section 25 of the Partnership Act. Section 25 of the Partnership Act reads thus:

“25. Liability of a partner for acts of the firm.-Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.”

25 In the case of **Her Highness Maharcmi Mandalsa Devi vs. H. Ramnarain Private Ltd. reported in 65 B.L.R. 31**, it has been laid down by the Supreme Court that a partnership firm is to be treated as a corporate body only for the purpose of Order XXX of the Code of Civil Procedure. The legal fiction created by Order XXX cannot be carried too far. The partnership firm has no legal entity. The persons, who are individually called partners, are collectively called a firm, and the name under which their business is carried on is called the firm name. Therefore, a suit against the firm is really a suit against all the partners of the firm, and therefore, a decree passed in such a suit is in effect a decree against all the partners though it may in form be against the firm. This decision of the Supreme Court merely lays down as a principle of law that a partnership is not a legal entity distinct from its partners. A firm and its partners are, therefore, interchangeable firm. If, therefore, a partnership firm incurs any liability, it is the liability of all the partners. 26 Section 25 of the Partnership Act, 1932 referred to above provides that every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. It is, therefore, clear that the liability of a partnership is the joint and several liability of all its partners.

27 Thus, what Section 90 of the Act, 2017 conveys is the very same principle as enunciated under Section 25 of the Partnership Act. In future, as and when the liability of the LLP as a taxable person is determined and fixed, such liability would be joint and several liability of all its partners. In the case on hand, the respondent No.3 committed a serious error in invoking Section 90 of the Act for the purpose of provisionally attaching a property owned by a person of the LLP under Section 83 of the Act. There are two reasons why we say so. First, a partner of an LLP is not a taxable person. It is the LLP i.e. the

partnership firm who is a “taxable person”. The liability of the firm is yet to be determined. There has been no assessment so far as the liability of the firm is concerned. The day such liability is determined and fixed, it is open for the department to proceed not only against the firm as a taxable person, but also against individual partner of the firm.

28 Section 137 of the Act has absolutely no application. Section 137 is a provision which fixes the vicarious liability of the partners in the event any offence is committed by a firm.

29 Sub-section (84) of Section 2 of the Act, 2017 defines the term “person” to include an individual, a Hindu Undivided Family, a company, a firm, a limited liability partnership, etc. Therefore, the Act recognizes a firm as a dealer and as a person. The legislature having treated an LLP as a taxable entity, distinct from the individual partners constituting it, it was not open for the respondent No.3 to provisionally attach the immovable property owned by a partner of the firm.

30 In the aforesaid context, a reference is made of the decision of the Supreme Court in the case of **Kapurchand Shrimal vs. Tax Recovery Officer, Hyderabad and others [AIR 1969 SC 682]** wherein the Supreme Court has held as under:

“5. The scheme of the Income-tax Act, 1961, is to treat the assessee failing to pay the tax due within the period prescribed a defaulter. The Income-tax Officer may, where the assessee is found to be in default, issue a certificate for recovery and forward it to the Tax Recovery Officer specifying the amount of arrears due from the assessee. The amount due may be recovered by resort to any one or more of the four modes prescribed by Sec. 222 of the Act. If the defaulter fails to comply with a notice issued by the Tax Recovery Officer requiring the defaulter to pay the amount within fifteen days from the date of the service of the notice, proceedings for recovery may be taken against the assessee for recovery of the tax. But under the scheme of the Act and the Rules, the assessee alone may be treated in default. The Act and the Rules contemplate that the notice for payment of the tax arrears may be issued against the assessee, and proceedings for recovery of the tax may be taken against the assessee alone. Under the Income-tax Act, 1961, a Hindu Undivided Family is a distinct taxable entity, apart from the individual members who constitute that family. Section 4 of the Income-tax Act charges to tax for any assessment year the total income of the previous year of every person and 'person' is defined in Section 2 (31) as including- (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) a local authority, and (vii) every artificial juridical person, not falling within any of the preceding sub-clauses. The Legislature having treated a Hindu undivided family as a taxable entity distinct from the individual members constituting it, and proceedings for assessment and recovery tax having been taken against the Hindu undivided family, it was not open to the Tax Recovery Officer to initiate proceeding against the manager of the Hindu undivided family for his arrest and detention. It is true that if properties of the family, movable and immovable, are to be attached proceedings may be started against the Hindu undivided family and the manager represents the family in proceedings before the Tax Recovery Officer. But by the clearest implication of the statute the assessee alone may be deemed to be in default for non-payment of tax, and liability to arrest and detention on failure to pay the tax due is also incurred by the assessee alone. The manager by virtue of his status is competent to represent the Hindu undivided family, but on that account he

cannot for the purpose of Section 222 of the Act of 1961 be deemed to be the assessee when the assessment is made against the Hindu undivided family and certificate for recovery is issued against the family.”

31 Having regard to the principle enunciated in the above decision as well as in the light of the above discussion, this Court is of the view that the respondent No.3 was wholly unjustified in provisionally attaching a personal property owned by a partner of the firm under Section 83 of the Act, 2017.

32 In the aforesaid context, we may refer to and rely upon a Division Bench decision of the Bombay High Court in the case of **Kaish Impex Private Limited vs. Union and others [Writ Petition No.3145 of 2019 decided on 17th January 2020]**, wherein the question that fell for the consideration of the Bombay High Court was whether the authority could have proceeded to provisionally attach the property owned by a person to whom just a summons under Section 70 of the Act was issued. In the said case, on the date of the provisional attachment of the bank account, only a summons under the Act was issued to the petitioner i.e. Kaish Impex Pvt Ltd. The Bombay High Court took notice of the fact that Section 70 has not been mentioned in Section 83 of the Act. The Bombay High Court also took notice of the fact that no proceedings were pending against the petitioner therein under Sections 62, 63, 64, 73 and 74 respectively of the Act. In such circumstances, it was contended on behalf of the petitioner therein that the power under Section 83 could not have been invoked against the petitioner. The Bombay High Court proceeded to hold as under:

“13. Primary defence of the Respondents is that even if section 62, 63, 64, 67, 73 and 74 mentioned in section 83 of the Act are not referable to the case of the Petitioner, since a summons is issued to the Petitioner in pursuant to the inquiry initiated against M/s. Maps Global under section 67 of the Act, by the issuance of summons the proceedings get extended to the Petitioner also.

14. The analysis of section 83 of the Act will show that such interpretation is not permissible and not contemplated by the legislature. Section 83 read with Rule 159(1), and the form GST DRC-22, lay down a scheme as to how provisional attachment in certain cases is to be levied. Section 83 though uses the phrase 'pendency of any proceedings', the proceedings are referable to section 62, 63, 64, 67, 73 and 74 of the Act and none other. The bank account of the taxable person can be attached against whom the proceedings under the sections mentioned above are initiated. Section 83 does not provide for an automatic extension to any other taxable person from an inquiry specifically launched against a taxable person under these provisions. Section 83 read with section 159(2), and the form GST DRC-22 show that a proceeding has to be initiated against a specific taxable person, an opinion has to be formed that to protect the interest of Revenue an order of provisional attachment is necessary. The format of the order, i.e. the form GST DRC-22 also specifies the particulars of a registered taxable person and which proceedings have been launched against the aforesaid taxable person indicating a nexus between the proceedings to be initiated against a taxable person and provisional attachment of bank account of such taxable person.

15. Power to provisionally attach bank accounts is a drastic power. Considering the consequences that ensue from provisional attachment of bank accounts, the Courts have repeatedly emphasized that this power is not to be routinely exercised. Under Section 83, the

legislature has no doubt conferred power on the authorities to provisionally attach bank accounts to safeguard government revenue, but the same is within well-defined ambit. Only upon contingencies provided therein that the power under section 83 can be exercised. This power is to be used in only limited circumstances and it is not an omnibus power.

16. It is therefore not possible to accept the submission of the Respondents that even though specified proceedings have been launched against one taxable person, bank account of another taxable person can be provisionally attached merely based on the summons issued under section 70 to him.”

33 It appears that the respondent No.3 also overlooked the guidelines issued by the Central Board of Indirect Taxes and Customs dated 23rd February 2021 for the provisional attachment of property under Section 83 of the Act. We may remind the respondent No.3 of what has been stated in Clause 3.4.3, which reads thus:

“It may be noted that the provisional attachment can be made only of the property belonging to the taxable person, against whom the proceedings mentioned under Section 83 of the Act are pending.”

34 We now proceed to consider whether the respondent No.3 was justified in provisionally attaching the stock lying at the factory premises and the attachment of sundry debtors.

35 Before we proceed to consider the aforesaid, we must try to understand the scope and applicability of Section 83 of the Act.

36 In the aforesaid context, we must look into a very pronouncement of the Supreme Court in the case of **M/s. Radha Krishan Industries vs. State of Himachal Pradesh and others [Civil Appeal No.1155 of 2021 decided on 20th April 2021]**. Justice Dr. Dhananjaya Y. Chandrachud, speaking for the Bench, laid down the following proposition:

72 For the above reasons, we hold and conclude that

(i) The Joint Commissioner while ordering a provisional attachment under section 83 was acting as a delegate of the Commissioner in pursuance of the delegation effected under Section 5(3) and an appeal against the order of provisional attachment was not available under Section 107 (1);

(ii) The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable;

(iii) The High Court has erred in dismissing the writ petition on the ground that it was not maintainable;

(iv) 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;

(v) 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.

(vi) 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;

(vii) The formation of an opinion by the Commissioner under Section 83(1) 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;"

37 It would be apposite at this stage to also look into the guidelines issued by the Central Board of Indirect Taxes and Customs, Government of India dated 23rd February 2021 for provisional attachment of property under Section 83 of the Act, 2017. We quote the guidelines as under:

"CBEC-20/16/05-2021-GST/359

Government of India

Ministry of Finance

Department of Revenue

Central Board of Indirect Taxes and Customs

GST Policy Wing

New Delhi, dated 23rd February , 2021

To,

The Principal Chief Commissioners/

Chief Commissioners/

Principal Commissioners /

Commissioners of Central Tax (All)

The Principal Director (Generals/Director Generals (All)

Madam / Sir,

Subject: Guidelines for provisional attachment of property under section 83 of the CGST Act, 2017-Reg.

I am directed to refer to the section 83 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act"). This section provides for provisional attachment of property for the purpose of protecting the interest of revenue during the pendency of any proceeding under section 62 or section 63 or section 64 or section 67 or section 73 or section 74 of the Act.

2. Doubts have been raised by the field formations on various issues pertaining to provisional attachment of property under the provisions of section 83 of the Act read with rule 159 of Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules"). Besides, in a number of cases, Hon'ble Courts have also made observations on the modalities of implementation of provisions of section 83 of the Act by the tax officers. In view of the same, the following guidelines are hereby issued with respect to the exercise of power under section 83 of the Act.

3.1 Grounds for provisional attachment of property

3.1.1 Section 83 of the Act is reproduced hereunder.

"83. Provisional attachment to protect revenue in certain cases

(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).

3.1.2 Perusal of the above provision of the law suggests that the followings grounds must exist for resorting to provisional attachment of property under the provisions of section 83 of the Act.

(i) There must be pendency of a proceeding against a taxable person under the sections mentioned in section 83 of the Act;

(ii) The Commissioner must have formed the opinion that provisional attachment of the property belonging to the taxable person is necessary for the purpose of protecting the interest of the Government revenue.

3.1.3 For forming an opinion under section 83, it is important that Commissioner 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 and 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.

3.1.4 The basis, on which, Commissioner has formed such an opinion, should be duly recorded on file.

3.1.5 It is reiterated 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(s) is fit for exercising power under section 83. The collective evidence, based on the proceedings/ enquiry conducted in the case, must indicate that 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.

3.2 Procedure for provisional attachment of property

3.2.1 In case, the Commissioner forms an opinion to attach any property, including bank account, of the taxable person in terms of section 83, he should duly record on file the basis, on which he has formed such an opinion. He should, thereafter, pass an order in FORM GST DRC-22 with proper Document Identification Number (DIN) mentioning therein the details of property being attached.

3.2.2 A copy of the order of attachment should be sent to the concerned Revenue Authority or Transport Authority or Bank or the relevant Authority to place encumbrance on the said movable or immovable property. The property, thus attached, shall be removed only on the written instructions from the Commissioner.

3.2.3 A copy of such attachment order shall be provided to the said taxable person as early as possible so that objections, if any, to the said attachment can be made by the taxable person within the time period prescribed under rule 159 of the CGST Rules. If such objection is filed by the taxable person, Commissioner should provide an opportunity of being heard to the person filing the objection. After considering the facts presented by the person in his written objection as well as during the personal hearing, if any, the Commissioner should form a reasoned view whether the property is still required to be continued to be attached or not, and pass an order in writing to this effect. In case, the Commissioner is satisfied that the property was or is no longer liable for attachment, he may release such property by issuing an order in FORM GST DRC-23.

3.2.4 Even in cases where objection is not filed within the time prescribed under Rule 159(5) of CGST Rules, the Commissioner may take the grounds mentioned in the said objection/representation on record and pass a reasoned order. Where the Commissioner is satisfied that the property was or is no longer liable for attachment, he may release such property by issuing an order in FORM GST DRC-23,

3.2.5 Each such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order of attachment.

3.2.6 If the provisionally attached property is of perishable/hazardous nature, then such property shall be released to the taxable person by issuing order in FORM GST DRC-23, after taxable person pays an amount equivalent to the market price of such property or the amount that is or may become payable by the taxable person, whichever is lower, and submits proof of payment. In case the taxable person fails to pay the said amount, then the said property of perishable/hazardous nature may be disposed of and the amount recovered from such disposal of property shall be adjustable against the tax, interest, penalty, fee or any other amount payable by the taxable person. Further, the sale proceeds thus obtained must be deposited in the nearest Government Treasury or branch of any nationalised bank in fixed deposit and the receipt thereof must be retained for record, so that the same can be adjusted against the amount determined to be recoverable from the said taxable person.

3.3 Cases fit for provisional attachment of property

3.3.1 As mentioned above, the remedy of attachment being, by its very nature, extraordinary. needs to be resorted to with utmost circumspection and with maximum care and caution. It normally should not be invoked in cases of technical nature and should be resorted to mainly in cases where there is an evasion of tax or where wrongful input tax credit is availed or utilized or wrongfully passed on. While the specific facts of the case need to be examined in detail before forming an opinion in the matter, the following are some of type of cases, where provisional attachment can be considered to be resorted to, subject to specific facts of the case:

Where taxable person has:

- a. supplied any goods or services or both without issue of any invoice, in violation of the provisions of the Act or the rules made there under, with an intention to evade tax; or*
- b. issued any invoice or bill without supply of goods or services or both in violation of the provisions of the Act, or the rules made there under; or*
- c. availed input tax credit using the invoice or bill referred to in clause (b) or fraudulently availed input tax credit without any invoice or bill, or*
- d. collected any amount as tax but has failed to pay the same to the Government beyond a period of three months from the date on which such payment becomes due; or*
- e. fraudulently obtained refund; or*
- f. passed on input tax credit fraudulently to the recipients but has not paid the commensurate tax*

3.3.2 The above list is illustrative only and not exhaustive. The Commissioner, may examine the specific facts of the case and take a reasoned view in the matter.

3.4 Types of property that can be attached

3.4.1 It should be ensured that the value of property attached provisionally is not excessive. The provisional attachment of property shall be to the extent it is required to protect the interest of revenue, that is to say, the value of attached property should be as near as possible to the estimated amount of pending revenue against such person,

3.4.2 More than one property may be attached in case value of one property is not sufficient to cover the estimated amount of pending revenue against such person. Further, different properties of the taxpayer can be attached at different points of time subject to the conditions specified in section 83 of the Act.

3.4.3 It may be noted that the provisional attachment can be made only of the property belonging to the taxable person, against whom the proceedings mentioned under section 83 of the Act are pending.

3.4.4 Movable property should normally be attached only if the immovable property, available for attachment, is not sufficient to protect the interests of revenue.

3.4.5 As far as possible, it should also be ensured that such attachment does not hamper

normal business activities of the taxable person. This would mean that raw materials and inputs required for production or finished goods should not normally be attached by the Department.

3.4.6 In cases where the movable property, including bank account, belonging to taxable person has been attached, such movable property may be released if taxable person offers, in lieu of movable property, any other immovable property which is sufficient to protect the interests of revenue. Such immovable property should be of value not less than the tax amount in dispute. It should also be free from any subsisting charge, liens, mortgages or encumbrances, property tax fully paid up to date and not involved in any legal dispute. The taxable person must produce the original title deeds and other necessary information relating to the property, for the satisfaction of the concerned officer.

3.5 Attachment Period

3.5.1 Every provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the provisional attachment order.

*3.5.2 Besides, the provisional attachment order shall also cease to have effect if an order in **FORM GST DRC-23** for release of such property is made by the Commissioner.*

3.6 Investigation and Adjudication

As the provisional attachment of property is resorted to protect the interests of the revenue and may also affect the working capital of the taxable person, it may be endeavored that in all such cases, the investigation and adjudication are completed at the earliest, well within the period of attachment, so that the due liability of tax as well as interest, penalty etc. arising upon adjudication can be recovered from the said taxable person and the purpose of attachment is achieved.

3.7 Share in property

Where the property to be provisionally attached consists of the share or interest of the concerned taxable person in property belonging to him and another as co-owners, the provisional attachment shall be made by order to the concerned person prohibiting him from transferring the share or interest or charging it in any way.

3.8 Property exempt from attachment

All such property as is by the Code of Civil Procedure, 1908 (5 of 1908), exempted from attachment and sale for execution of a Decree of a Civil Court shall be exempt from provisional attachment

4. It may be noted that an amendment to section 83 has been proposed in Finance Bill 2021. However, such proposed amendment shall come into effect only from a date to be notified in future. The present guidelines, which are based on the existing provisions of section 83 of the Act, shall stand modified according to the amended provisions of section 83, once the said amendment comes into effect.

5. Difficulty, if any, in the implementation of the above guidelines may please be brought to the

notice of the Board.

Sd/-

(Sanjay Mangal)

Commissioner (GST)”

38 What is relevant for our purpose is clause 3.4.5 of the guidelines referred to above. It says that as far as possible, the authority should ensure that the attachment does not hamper the normal activities of the taxable person. It has been clarified that the raw materials and input required for the production or finished goods should not normally be attached by the department.

39 In the case on hand, we do not approve the provisional attachment of the goods, stock and receivables, more particularly, when the entire stock and receivables have been pledged and a floating charge has been created in favour of the Kalupur Commercial Bank Limited for the purpose of availing the cash credit facility with the provisional attachment of the goods, stock and receivables the entire business will come to a standstill.

40 In view of the aforesaid, this writ application succeeds in part. The Form GST DRC – 22 for attachment of the stock lying at the factory premises dated 25th November 2021, the Form GST DRC – 22 for attachment of the sundry debtors (M/s. Utkarsh Bars Private Limited) dated 26th November 2021 and the GST DRC – 22 for attachment of the immovable property of Shri Niraj Jaydev Arya (one of the partners of the firm) dated 27th November 2021 are hereby quashed and set aside. All other properties shall remain under provisional attachment in accordance with law.

41 With the aforesaid, this writ application is disposed of.

Citations: in 2022 (2) TMI 997 - GUJARAT HIGH COURT

1. [2021 \(4\) TMI 837 - Supreme Court](#)
2. [1968 \(8\) TMI 16 - Supreme Court](#)
3. [2020 \(1\) TMI 933 - BOMBAY HIGH COURT](#)