

Various Issues - Provisional Attachment – Section 83 - GST Laws

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The powers to provisionally attach the properties of tax payer to protect the interests of revenue comes from Section 83 of CT Act¹. The power is to be exercised by Commissioner, if he is of the opinion that it is necessary for the purposes of protecting the interest of Government. Though it was held on numerous occasions that such a power cannot be exercised without application of mind, the tax authorities continue to use in the same manner. The Honourable Supreme Court in the matter of Radha Krishna Industries vs. State of Himachal Pradesh² has held in detail the scope and guidelines to be followed for the exercise of power under Section 83. CBIC has also issued a circular detailing the modus operandi to use the provisions of Section 83. However, as stated earlier, the said guidelines either by Supreme Court or CBIC are not being followed and for all such actions by the tax authorities, the tax payers does not have any option except to invoke the writ jurisdiction and call for interreference of High Courts. In this article, we shall deal with various issues arising qua Section 83. Before proceeding to discuss the issues, we will deal with the guidelines prescribed by Supreme Court in Radha Krishna Industries (supra) and CBIC Circular.

Supreme Court on Provisional Attachment in Radha Krishna Industries:

The Supreme Court stated that the legitimate concerns of citizens over arbitrary exercises of power have to be protected while ensuring that the legislative purpose in entrusting the authority to order a provisional attachment is fulfilled. The petitioner before High Court has challenged the provisional attachment ordered by Joint Commissioner of State Tax of Himachal Pradesh in terms of Section 83 of CT Act and Rule 159 of CT Rules³, wherein the receivables of Petitioner are attached. The High Court dismissing the writ petition stating that there exists an alternative remedy available under the provisions of CT Act. The petitioner has challenged the same against the Supreme Court.

The Court after setting out the facts, referred to the judgment of Raman Tech Process Engg Co and Anr vs. Solanki Traders⁴, wherein it was held that Order 38 Rule 5 of Civil Procedure Code, which deals with attachment, is a drastic and extraordinary power and such power should not be exercised mechanically or merely for the asking. Then it referred to Gujarat High Court in Valerius Industries⁵, wherein certain principles for construction of Section 83 of CT Act are laid down and noted that a provisional attachment on the basis of a subjective satisfaction, absent any cogent or credible material, constitutes malice in law. The principles enunciated by High Court are as under:

- The power conferred upon the authority under Section 83 for provisional attachment could be termed as very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds.
- The power of provisional attachment under Section 83 should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate

¹ Central Goods and Services Tax Act, 2017

² 2021 (4) TMI 837 – Supreme Court

³ Central Goods and Services Tax Rules, 2017

⁴ 2008 (1) RCR (Civil) 195

⁵ 2019 (9) TMI 618.- Gujarat High Court

collection of the demand that is likely to be raised on completion of the assessment and it should be exercised with extreme care and caution.

- The power under Section 83 for provisional attachment should be exercised only if there is a sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his/her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.
- The power under Section 83 should not be neither used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of assessee.
- The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 should not be equated with the attachment in course of recovery proceedings.

The Supreme Court then referred to the judgment of Gujarat High Court in *Jai Ambey Filament Private Limited*⁶, wherein it was held that subjective satisfaction as to the need for provisional attachment must be based on credible information that the attachment is necessary and the opinion cannot be formed on imaginary grounds, wishful thinking, howsoever laudable that may be. Then the Supreme Court made reference to another Gujarat High Court judgment in *Patran Steel Rolling Mill*⁷, wherein the High Court cited two instances in which provisional attachment would be best fit, those being where the assessee is 'fly by night operator' and if the assessee will not be able to pay its dues after assessment. In *UFV India Global Education*⁸ and *Kaish Impex Private Limited*⁹, it was held that pendency of proceedings is sine qua non for an order under provisional attachment to be issued under Section 83 and that such pendency should be in the case of assessee for whom an attachment order was issued.

The Supreme Court after referring to the provisions of Section 83 stated that before Commissioner can levy a provisional attachment, there must be a formation of 'the opinion' and that it is necessary 'so to do' for purpose of protecting the interest of government revenue. Hence, while conditioning the exercise of power on the formation of an opinion by the Commissioner that 'for purpose of protecting the interest of government revenue, it is necessary to do so', it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner and formation of opinion must bear a proximate and live nexus to purpose of protecting the interest of the government revenue. The Court stressed on the usage of phrase 'necessary' to indicate that the section postulates a more stringent requirement than a mere expediency. The Court stated that an anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unguided discretion cannot be

⁶ 2021 (44) GSTL 41 (Gujarat)

⁷ 2019 (20) GSTL 732 (Gujarat)

⁸ 2020 (43) GSTL 472 (P&H)

⁹ (2020) 6 AIR Bom R 122

permissible because it will leave citizens and their legitimate business activities to peril of arbitrary power. The Court referred to its own judgment in *Kelvinator India Limited*¹⁰ under the Income Tax Act, 1961 in the context of Section 147 proceedings, dealing with interpretation of 'reasons to believe', wherein it was held that reasons must have live link with the formation of belief and applied the same logic here to state that the Commissioner must frame his opinion based on tangible material which indicates live link to necessity to order a provisional attachment to protect the interest of government revenue. Accordingly, the Supreme Court upheld the plea of petitioners.

CBIC has issued a circular in Circular 20/16/05/2021-GST/359 providing guidelines for provisional attachment of property under Section 83 of CT Act. After stating the procedure to be followed, CBIC provided an indicative list for proceeding with the provisional attachment, which indicates the fit cases for provisional attachment and not every case, where there is a property available for attachment. The Circular was challenged in *Originative Trading Private Limited*¹¹, wherein the Bombay High Court stated that there was enough safeguard provided in Circular 3.1.5 and none of safeguards set out in Circular would affect the rights of 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.

With this above background on the subject, we shall proceed to examine various kind of issues that have arisen and left to High Courts for interpretation, paving a way for the interpretation of Section 83.

Issue #1: Ordering of Provisional Attachment should not hamper normal business activities:

As stated by Supreme Court in *Radha Krishna Industries (supra)* and held by various high courts that the power under Section 83 is draconian and cannot be used in a routine manner. However, there are various occasions that the said power is used in a routine manner.

In *Arya Metacast Private Limited*¹², the authorities has not only provisionally attached the stock of goods lying at the factory premise, at the same time, has also provisionally attached the demat account and current account. The High Court held that these are the valuable assets of the petitioners, more particularly, raw materials and finished goods which are otherwise necessary for running of the business. The High Court stated that, time and again, it was held that proper office to ensure their action of provisional attachment should not hamper the normal business activities of taxable person. The High Court released the stock of goods, two demat accounts, current accounts, electronic items such as mobile phone, laptop and other documents seized during the search proceedings subject to certain conditions. The High Court stressed that the power of provisional attachment under Section 83 should be exercised by authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely raised on completion of assessment and therefore to be exercised with extreme care and caution. The Court held that power under Section 83 of the act should not be used as a tool to harass the assessee nor should it be used in as manner which may have irreversible detrimental effect on business of the assessee.

¹⁰ (2010) 2 SCC 723

¹¹ 2022 (3) TMI 262 – Bombay High Court

¹² 2022 (4) TMI 407 – Gujarat High Court

In Utkarsh Ispat LLP¹³, the facts were that, the petitioner is a limited liability partnership firm engaged in business of procuring various types of scarp for manufacturing TMT bars. On 19th November 21, the GST officials undertook search proceedings at registered premises of petitioner and also at the residential premises of one of partners. The search proceedings were undertaken on the allegation that petitioner is engaged in availment of input tax credit on basis of fake invoices issued by fictitious firms without any movement of goods. During the pendency of proceedings, the authorities passed an order provisionally attaching multiple properties like the factory premises, plant and machinery and bank accounts including the fixed deposits of value of Rs 45,90,22,566. Apart from the above, the authorities have also attached the properties of one of the partners (read more about this in Issue #5 in the same article). The petitioner challenged the attachment order stating inter alia that attachment hampers the normal business activities of the petitioner. The Court after making reference to Para 3.4.5 of Circular 20 (supra) stated that it is very clear that as far as possible the authority should ensure that the attachment does not hamper normal activities of the taxable person and it has been clarified that raw materials and input required for production or finished goods should not normally be attached by the department. In the instant case, the Court has not approved the provisional attachment of goods, stocks and receivables, more particularly, when the entire stock and receivables have been pledged and a floating charge has been created in favour of third party bank.

In Mono Steel (India) Limited¹⁴, the petitioner's six bank accounts were provisionally attached under Section 83 immediately after issuance of show cause notices. The Gujarat High Court held that the petitioner is not a fly by night operator and has paid hundred crores in taxes during the last year and there is no rationale for the authorities to attach the bank accounts. The Court ordered for release of bank accounts subject to certain conditions.

In Mutharamman & Co¹⁵, the petitioner challenged the provisional order under Section 83 which was based on the search and seizure launched in terms of Section 67. The Court held that the premise upon which Section 83 operates is the 'opinion' of Commissioner that for purposes of protecting the interest of Government revenue, it becomes necessary to attach assets of taxable entity pending proceedings under specified sections and the Court stated that whether the proceedings pending in petitioner's case would justify the impugned provisional attachment and post that whether the 'opinion' of Commissioner is based upon a legitimate and legal apprehension that the interests of the revenue required to be protected. The Court rejected the provisional attachment order after referring to Valerius Industries (supra).

In Patran Steel Rolling Mill¹⁶, the court while deciding the fate of provisional attachment order under Section 83, it was held that petitioner is not a fly-by-night operator or that it does not have the means to pay the dues that might to assessed at the end of assessment proceedings, which at present have not even been commenced. The Court stated that there is nothing to show that the authorities would not be in a position to recover any amount that the petitioner may ultimately be held liable to pay and in such circumstances, without recording any such satisfaction, the authorities could have not formed the opinion that it was necessary to resort to provisional attachment to protect the interest of

¹³ 2022 (2) TMI 997 – Gujarat High Court

¹⁴ 2019 (22) GSTL 184 (Guj)

¹⁵ 2021 (10) TMI 523 – Madras High Court

¹⁶ 2019 (20) GSTL 732 (Guj)

Government revenue. The Court also held that the authorities should keep in mind that bringing the business of a dealer to a halt does not in any manner serve the interest of revenue and therefore, while taking action under Section 83 or Section 67(2), the concerned authorities should take care to ensure that equities are maintained and while securing the interest of revenue, they should attempt to see that the dealer is a position to continue with the business. The Court stated that the tax authorities should consider the background and history of the dealer as well as his financial position to ascertain as to whether or not he would otherwise be in a position to pay the dues that may be assessed upon the culmination of any assessment proceedings that may be initiated and if the dealer is a fly-by-night operator or a habitual offender or does not have sufficient means to pay the dues that may arise upon assessment, such action may be justified. The Court concluded stating the such drastic powers under Section 83 should not be exercised as a matter of course, but only after due application of mind to the relevant factors. In Jay Ambey Filament (P) Limited¹⁷, the Gujarat High Court quashed the provisional attachment order stating that it was a result of mechanical exercise.

Issue #2 – Maximum Time for Provisional Attachment Order:

Section 83(2) states that every provisional attachment ordered under Section 83(1) shall cease to have effect after the expiry of one year from the date of the order. However, in many occasions, the provisional attachment order continued beyond the maximum period of one year and tax payers have approached High Courts seeking its intervention to lift the said order.

In BR Construction Company¹⁸, the Rajasthan High Court has stayed a provisional attachment order which was in effect for a period more than a year. In Futurist Innovation & Advertising¹⁹, the petitioner is a sole proprietary concern engaged in business of advertising and marketing and on 11 October 2019, the petitioner's bank account was frozen by Assistant Commissioner and continued after expiry of one year. The High Court held that it was not in accordance with the provisions of Section 83(2) and by following Radha Krishna Industries (supra), held that the provisional attachment order would not hold ground after expiry of one year. In Krishna Fashions²⁰, the Delhi High Court also removed the provisional attachment which is in operation beyond one year.

The above rationale was held in various matters namely Jackpot Exim (P) Limited²¹, KMC Constructions Limited²², Namaskar Enterprise²³ and Badal Shambhubhai Shah²⁴.

Issue #3 – Rule 86A vs Section 83:

Rule 86A deals with conditions of use of amount available in electronic credit ledger. The said rule states that the Commissioner or other delegated authority having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or ineligible in as much as under specified circumstances may for reasons in recorded in writing not allow debit of an amount

¹⁷ [2021] 123 taxmann.com 373 (Gujarat)

¹⁸ 2022 (3) TMI 308 – Rajasthan High Court

¹⁹ 2022 (1) TMI 698 – Bombay High Court

²⁰ 2022 (1) TMI 853 – Delhi High Court

²¹ [2021] 124 taxmann.com 551 (Allahabad)

²² [2021] 124 taxmann.com 276 (Telangana)

²³ [2020] 118 taxmann.com 470 (Gujarat)

²⁴ [2020] 118 taxmann.com 217 (Gujarat)

equivalent to such credit in electronic credit ledger for discharge of any liability under Section 49 or for claim of any refund of any unutilised amount.

An issue has arose in Dee Vee Projects Limited²⁵ before Bombay High Court, wherein the Court was called to analyse whether the blocking of electronic credit ledger under Rule 86A amounts to provisional attachment of property under Section 83? The Court held that power of provisional attachment of property under Section 83 can be exercised only after initiation of proceeding under Chapters XII, XIV and X and for invoking the power under Rule 86A, it is not necessary that proceeding under any of the chapters is initiated and can be exercised, when conditions prescribed are met and held that invoking power under Rule 86A is different from power under Section 83 and putting a restriction on usage of balance in credit ledger does not amount to provisional attachment.

Issue #4 – Pending Proceedings vs Section 83:

On reading of text of Section 83, it would be evident that the power to invoke Section 83 would arise only if there is a pendency of any proceedings under the Act namely under Section 63 or Section 64 or Section 67 or Section 73 or Section 74 [prior to amendment] or Chapter XII, Chapter XIV or Chapter XV [post amendment]. Hence, the pre-requisite to invoke powers under Section 83 is pendency of proceedings and without which an order under Section 83 cannot be passed. However, the tax authorities in many instances invoke powers under Section 83 despite there were no pendency of proceedings.

In Fine Exime Private Limited²⁶, the Commissioner issued a provisional attachment order of the bank account on accusation of claiming of fraudulent refund. The Petitioner approached the Bombay High Court and asked for quashing of provisional attachment order stating that there is no pendency of proceedings under any of the situations mentioned in Section 83 and accordingly the order passed by Commissioner is erroneous. The High Court held that the provisional attachment was ordered on December 1, 2020, but a notice under Section 73 was issued on January 13, 2021 and hence, as on the date of provisional attachment order, there was no pendency of the proceeding and the provisional attachment order suffered from jurisdictional error. In Fine Exime Private Limited²⁷, the Bombay High Court held that the order issued under Section 83 cannot be in operation after passing the order as a consequence of pending proceedings.

In Kaish Impex Private Limited²⁸, the Bombay High Court has analysed, whether the authority could have proceeded to provisionally attach the property owned by a person to whom just a summons under Section 70 has been issued. The Court stated that the provisions of Section 83 does not make a reference to Section 70 and since there were no other proceedings as stated in Section 83, the provisional attachment order is not in accordance with the law. Similar in the case of Kanal Enterprises²⁹, where the matter was pending in terms of Section 71, the Gujarat High Court held that there cannot be issuance of provisional attachment order under Section 83, since there was no reference to Section 71 in Section 83. In Cengres Tiles Limited³⁰, the petitioner's stock and bank

²⁵ 2022 (2) TMI 569 – Bombay High Court

²⁶ 2021 (8) TMI 519 – Bombay High Court

²⁷ 2022 (2) TMI 242 – Bombay High Court

²⁸ WP No 3145 of 2019 dated 17 Jan 2020

²⁹ [2020] 119 taxmann.com 114 (Gujarat)

³⁰ [2019] 109 taxmann.com 110 (Gujarat)

account were attached before issuance of notice under Section 46 and Section 62 and held such an attachment is erroneous.

In SS Offshore Private Limited³¹, a provisional attachment order was passed attaching the bank account of petitioner, though there are no pendency of proceedings. The Petitioner challenged the same before Bombay High Court, wherein it was held that the said attachment order was ultra vires the provisions of Section 83, when the same was initiated in absence of pendency of proceedings. The said judgment was followed by the same court in Real Trade³². In Bhavesh Kiritbhai Kalani³³, the provisional attachment order was quashed stating that there were no pending proceedings under the Act.

The above rationale that there cannot be provisional attachment order in absence of pending proceedings was held in various matters namely Anandbhavan Properties (P) Limited³⁴, Kushal Limited³⁵, Gehna Trading LLP³⁶ and Sterne India (P) Limited³⁷.

Currency of Provisional Attachment Order:

In the matter of Usha Industries (India)³⁸, the Punjab and Haryana High Court held that once an order is passed under Section 74(9), proceedings under provisional attachment cannot be continued and comes to end. In Mahavir Enterprise³⁹, the High Court of Gujarat has held that once an order is passed, there cannot be continuation of provisional attachment order under Section 83.

Issue of Second Provisional Attachment Order:

In the matter of Amazonite Steel (P) Limited⁴⁰, the High Court of Calcutta has held that there is nothing in Section 83(2) which prevents the authorities to issue a fresh provisional attachment order after expiry of one year, if requirements under Section 83(1) are met.

Issue #5 – Attachment of Whose Property?:

In continuation to the facts stated in Utkarsh Ispat LLP (supra), the authorities have attached the properties of one of partners of the LLP by taking reference to Section 90 and Section 137 of CT Act. The High Court held that on a plain reading of provisions of Section 83, it is evident that the property or properties which can be provisionally attached should belong to 'taxable person'. The High Court after tracing the definition of 'taxable person' stated that it is only property of taxable person can be provisionally attached under Section 83 and the partner of LLP not being a taxable person, the authorities cannot proceed to attach the properties of partner of LLP. The High Court stated that there

³¹ 2021 (8) TMI 344 – Bombay High Court

³² 2021 (9) TMI 564 – Bombay High Court

³³ [2021] 127 taxmann.com 199 (Gujarat)

³⁴ [2019] 112 taxmann.com 61 (Karnataka)

³⁵ [2020] 113 taxmann.com 622 (Gujarat)

³⁶ [2020] 114 taxmann.com 566 (Bombay)

³⁷ [2021] 130 taxmann.com 275 (Karnataka)

³⁸ [2021] 128 taxmann.com 269 (P&H)

³⁹ [2021] 132 taxmann.com 90 (Gujarat)

⁴⁰ [2020] 116 taxmann.com 153 (Calcutta)

is no requirement at that particular stage to take aid of Section 90 and accordingly quashed the provisional attachment order.

Similar situation has also arisen in the Kaish Impex Private Limited (supra), where the bank account of the person who is connected with the taxable person has been attached. The High Court rejected that such an action is erroneous and cannot be proceeded with. The High Court also referred to the CBIC Circular 20 (supra) and held that such an action of authorities is not in accordance with the law and lifted the attachment on the bank account of another person.

In Roshini Sana Jaiswal⁴¹, the tax authorities have passed a provisional attachment order attaching one of the directors cum share holder for proceedings against the company. The Court held that in absence of any material linking the petitioner to the company in the fake credit aspect, the bank accounts of the petitioner cannot be attached and quashed the proceedings.

Issue #6 – Can power under Section 83 be delegated?

From the bare reading of the provisions of Section 83, it is evident that an opinion is to be framed by Commissioner and in such opinion that if it is necessary to protect the interest of the Government, then he can pass a provisional order attaching the property of taxable person. The question that would often arise is, whether the power of Commissioner can be delegated to the lower authorities by Commissioner?

The above issue was analysed by Gujarat High Court in Valerius Industries (supra). In the said matter, the petitioner has challenged the provisional order of attachment passed by officer below the rank of Commissioner. The Revenue took a stand that Commissioner vide order has delegated the powers under Section 83 to Deputy Commissioner and Assistant Commissioner and accordingly they are well in power to pass an attachment order under Section 83 when read with Section 5 and Section 167 of Act.

The High Court stated that on reading of provisions of Section 168 of CT Act and Section 168 of ST Act⁴², there is a vast difference. Under the CT Act, the Commissioner specified in Section 5(3), is the Commissioner or Joint Secretary posted in Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said section with the approval of the Board. In simple words, the Commissioner of Central Tax cannot by issuance of order under Section 167 cannot delegate his powers, since the Commissioner does not have such power, the Commissioner in Board has such power. However, when it comes to ST Act, the Commissioner referred under Section 168, was normal Commissioner and not the Commissioner in Board. Hence, the High Court stated that since the instant order was passed under ST Act, there cannot be any issue in delegation of the power using Section 5(3) read with Section 167. However, the Court stated that though the order delegating authority is in accordance with the powers under Section 167, using the principle *delegatus non potest delegare*, it held that the power delegated by statute cannot be redelegated unless the intention is negated by any contrary indications in the language, scope or object of statute should be adopted. The Court also negated the contention of the Revenue that Joint Commissioner is well in his powers to pass an order under Section 83 when the pendency was due to proceedings under Section 67, by stating that

⁴¹ 2021 (5) TMI 528 – Delhi High Court

⁴² State Goods and Services Tax Act, 2017 (in this case, the Gujarat)

even for purposes of Section 67, the satisfaction should be of the proper officer not below the rank of Joint Commissioner and the authorised officer is merely executing or implementing the order that may be passed by proper officer not below the rank of Joint Commissioner. Further, the Court held that Section 83 makes it abundantly clear that it is the Commissioner's opinion which is relevant and legislature in its wisdom conferred its powers upon Commissioner and hence the same cannot be delegated.

In Praful Nanji Satra⁴³, the Joint Commissioner has issued a provisional attachment order attaching the bank account of petitioner. However, the petitioner is only a member connected with another entity on which search operation was conducted. The petitioner has approached the High Court asking to quash the attachment order on two counts. One, the Joint Commissioner is not a proper officer under Section 83 to issue a provisional attachment order and two, there are no proceedings pending on the petitioner as contemplated under Section 83 to issue a provisional attachment order. The Court stated that the power under Section 83 cannot be delegated and since there are no pending proceeding on petitioner, the attachment order was quashed.

In Enprocon Enterprises Limited⁴⁴, the Gujarat High Court was seized with a question as to whether Assistant Commissioner is empowered to pass a provisional attachment under Section 83? A search and seizure under Section 67 was conducted on the petitioner and proceedings under Section 73 has been initiated. A provisional attachment order was issued by Assistant Commissioner of State Tax in exercise of powers under Section 83. The Court after making reference to Valerius Industries (supra) held that the provisional attachment order is bad in law.

Conclusion:

From the above analysis, it would be evident that the power under Section 83 cannot be invoked as a matter of routine. The Commissioner cannot delegate such power to any other person and the same has to be exercised only if he is in the opinion that it is necessary to protect the interest of Government, a provisional attachment can be ordered. The said power can only be invoked in cases where there is a pendency of proceedings and also the material indicate that there exists a situation where the tax payer would alienate or dispose properties or he would not be in a position to pay the taxes by the end of assessment. Hence, the power cannot be used in a mechanical manner and just because there exists a property for attachment. The Courts also held that the attachment should be in such a manner it would not affect the business of the tax payers and cannot be for attaching someone else's property, that is property belonging to a person other than the taxable person. May the provisional attachment orders going forward would be passed with due accordance of the law and the above jurisprudence.

⁴³ [2021] 127 taxmann.com 141 (Bombay)

⁴⁴ [2020] 113 taxmann.com 367 (Gujarat)

