



Dimensions – 103rd Edition

Judgment under Pre-GST era

The Commissioner of Service Tax Service Tax Commissionerate TTMC/BMTC, Bangalore v. M/s Silverline Estates¹

Issue for Consideration

Can a demand for Service tax be raised under section 73A(3) of the Finance Act, 1994 before the determination of the tax due?

Discussion

- The Respondent is engaged in the business of the development and construction of residential apartments. The Respondent did not charge any Service tax during the period from 2006 to 2009 for developing and constructing residential apartments for which the completion certificate was obtained on or before August 21, 2009.
- However, due to a lack of clarity on the applicability of Service tax, the Respondent collected certain amounts from the apartment buyers and deposited them in an escrow account.
- Thereafter, a proceeding was initiated against the Respondent on the ground that collection and deposit in escrow account amounts to collection of

Service tax in terms of section 73A of the Finance Act, 1994.

- Accordingly, the authority passed an order directing the payment of Service tax on the amount deposited in the escrow account along with interest and penalty. The Hon'ble Tribunal, pursuant to an appeal filed by the Respondent, held that the Commissioner should have determined the Service tax dues and thereafter raised a demand under section 73A(3) of the Finance Act, 1994.
- Aggrieved by the order of Appellate Tribunal, the Petitioner filed the present appeal before the Hon'ble High Court of Karnataka. After perusing the facts, the Hon'ble High Court observed as follows:
 - On perusal of section 73A(5) of the Finance Act, 1994, it is evident that the amount paid to the credit of the Central Government under sections 73(1), (2) or (4) shall be adjusted against the Service tax payable upon the finalization of the assessment or any other proceedings for the determination of Service tax dues relating to the taxable service.
 - The Court stated that an assessment must be conducted before a demand for Service tax is raised. Reliance was placed on the judgment of the Hon'ble High Court of Karnataka in the case

¹ 2021 (2) TMI 84



of *Union of India v. Prashanth*² wherein it was held that the power to create a demand under Section 87 of the Act can be exercised only after adjudication i.e. upon assessment of the amount due.

Judgment

The Hon'ble High Court dismissed the appeal filed by the Petitioner.

Dhruva Comments:

The Hon'ble High Court has clarified that assessment / determination of tax is necessary before the raising of a demand of Service tax. This is in line with the decisions pronounced in the case of *Union of India v. Prashanthi (supra)*. The judgment would be relevant even under GST as the statute contains similar provisions.

Judgment under GST era

Piyush Shamjibhai Vasoya v. Union of India through the Secretary & 2 other³

Issue for Consideration

Can a bank account be provisionally attached under section 83 of the CGST Act, 2017 merely on the basis that the Petitioner was involved in a business transaction with certain persons against whom some action has been taken by the authority?

Discussion

- The Petitioner being a proprietor of a firm, acts as a commission agent at the Agricultural Produce Market Committee, Gondal, Gujarat.
- The department had passed an order of provisional attachment of the bank account of the Petitioner under section 83 of the CGST Act, 2017. The said action prima-facie appears to have been taken because of other action for recovery taken by the department against a few other individuals who may

be involved in some manner in the business with the Petitioner.

- Thereafter, the Petitioner filed the present Writ Petition before the Hon'ble High Court of Gujarat challenging the order of provisional attachment.
- The Hon'ble High Court observed as follows:
 - The provision under section 83 of the CGST Act, 2017 can be invoked **only if** any proceedings under section 62, 63, 64, 67, 73 or 74 of the CGST Act, 2017 have been initiated or are pending against the Petitioner. In the present case, no such proceedings have been initiated nor are pending. Accordingly, the department could not have invoked section 83 of the CGST Act, 2017.
 - Even if it is assumed that during any inquiry or investigation, something had surfaced against the Petitioner as regards some business transaction with other individuals, the same by itself cannot confer jurisdiction to the department to invoke section 83 of the CGST Act, 2017 in the absence of any proceedings pending as on date against the Petitioner.
 - The language of section 83 of the CGST Act, 2017 is plain and simple. In the absence of any proceeding pending, an order of provisional attachment could not be passed.
 - The proceedings initiated under section 79 of the CGST Act, 2017 and which are pending against the Petitioner may continue in accordance with law. However, in future, if any proceedings are initiated against the Petitioner as referred under section 83, then, if authority deems fit, proceedings under section 83 can be invoked.

Judgment

The Hon'ble High Court allowed the Writ Petition and set aside the order of provisional attachment of the bank account of the Petitioner.

² (2016) 43 STR 350 (KAR)

³ 2021-VIL-68-GUJ



Dhruva Comments:

The Finance Bill, 2021 has amended section 83 whereby the powers of provisional attachment of any property including bank accounts have been significantly expanded and now can be invoked if any proceeding is initiated under Chapter XII⁴, Chapter XIV⁵ and Chapter XV⁶ (*this now includes all situations of assessments, inspection, search, seizure, arrest, summons, demands and recovery proceedings*). The proposed amendment shall come into effect from a date to be notified by the Government post enactment of Finance Bill, 2021.

Instruction under GST

Procedures to be followed during search⁷

- CBIC has re-iterated the instructions contained in the Central Excise Intelligence and Investigation Manual (2004) for conducting search proceedings under section 67 of CGST Act, 2017. It is observed that in certain instances proper procedures are not being followed during the search proceedings / panchnamas / recording of statements, which could weaken the case during judicial scrutiny at a later stage. The guidelines are summarised as under:
 - Department officer issuing authorization for the search should have a valid and justifiable reason for authorizing a search duly recorded in the file. Instructions related to generation of Document Identification Number (“DIN”) should be scrupulously followed.
 - The premises of a person cannot be searched if the search warrant is issued for the premises of some other person.
 - Lady officer shall be part of search team in case of search of a residence.
 - Search shall be made in the presence of two or more independent witnesses during sensitive search operations to maintain transparency and credibility.
- The officers authorised to search (“search officers”) shall identify themselves by showing their identity cards to the person in charge of the premises. Also, the said officers and the witnesses shall offer their personal search before the start and after conclusion of search.
- The search authorisation shall be executed before the start of the search and shown to the person in charge of the premises to be searched and signature of such person and the witnesses shall be obtained on the body of search authorisation.
- A panchnama should contain truthful account of the proceedings, list of documents / goods recovered, date and time of start and conclusion of the search. Also, the fact of offering personal search of the search officers and witnesses should be recorded in the panchnama.
- Videography of sensitive premises may be considered and recorded in panchnama.
- Search officers shall be sensitive to social and religious sentiments of the person to be searched and special care should be given to elderly, women and children.
- The person in charge of documents to be seized may be allowed to make copies or take extracts unless it would prejudicially affect the investigation.
- The search officers must sign each page of panchnama and annexures. Furthermore, a copy must be given to the person-in-charge of premises being searched.
- If a statement is recorded during search, each page of the statement must be signed by the person giving the statement and by the search officer recording the statement as ‘before me’.
- After the end of search, the duly executed search authorisation shall be returned to the officer who had authorised the search along with a report of the outcome of search. Furthermore, the names of the search officers

⁴ Chapter XII - Assessment [section 59 to 64 of CGST Act, 2017]

⁵ Chapter XIV – Inspection, Search and Seizure [section 67 to 72 of the CGST Act, 2017]

⁶ Chapter XV - Demands and Recovery [section 73 to 84 of the CGST Act, 2017]

⁷ Instructions no. 01/2020-21 [GST-Investigations] dated February 2, 2021



who had participated in the search should be written on the reverse side of the search authorisation.

- The search officers should leave the premises immediately upon the completion of panchnama proceedings.
- Precautionary measures should be taken considering the COVID-19 pandemic.





ADDRESSES

Mumbai

11th Floor, One World Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad 380 015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122 002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

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