



Dimensions – 107th Edition

Judgment under pre-GST era

GVPR Engineers Ltd. v. Union of India¹

Issues for Consideration

- Whether a person is required to disclose the details of non-taxable services in its Service tax returns (“ST-3”) when there is no column in the return to disclose the same?
- Whether a High Court can exercise its powers under Article 226 of the Constitution of India (“Constitution”) when there exists an alternate remedy?

Discussion

- The Petitioner is engaged in the execution of works contracts relating to laying of electrical transmission lines, construction of canals for State Governments and supplies materials needed for execution of these projects by the clients. The Petitioner has its registered office in Hyderabad and is registered under the Service tax law. It was regularly paying the service tax on the applicable services.
- An audit was conducted on the Petitioner for the period 2011-12 to 2014-15 whereby a show cause notice was issued alleging that the Petitioner had not paid the service tax on certain services. The

said demand was raised on the ground that there were certain incomes which were shown in the financial statements but were not disclosed in the ST-3 returns.

- During audit and at the time of personal hearing, the Petitioner had submitted that the differences in the income shown under the financial statements and the ST-3 returns were due to the following reasons:
 - It had undertaken works contract for canal construction which was excluded from the levy of service tax under section 65(105)(zzzza) of the Finance Act, 1994.
 - It had undertaken construction of roads in the state of Jammu and Kashmir. The provisions of the Service tax law were not applicable to the said State.
 - It had engaged in the trading activity of electrical equipment which was subject to Telangana VAT, and it had discharged the VAT amount on supply of said goods.
- In lieu of the above submissions, the Petitioner had contended that the said incomes were outside the purview of service tax and accordingly, the same were not disclosed in the ST-3 return as there was no column in the ST-3 return to disclose them.

¹ 2021-VIL-161-TEL-ST



Furthermore, it had also submitted all the relevant contracts / agreements for such activities.

- However, the department confirmed the demand and issued the Order-in-Original (“impugned order”).
- Being aggrieved by the impugned order the Petitioner has filed the present Writ Petition.
- The Hon’ble High Court after considering the facts of the case observed as follows:
 - If there is no column in the ST-3 returns to disclose the ‘non-taxable turnover’ the Petitioner cannot be blamed for not indicating the same in the returns and cannot be penalized for the same by ignoring all other material evidence which has been submitted to the department on various occasions.
 - The department ought to have examined the records that were already available to them in respect of the non-taxable services to test the Petitioner’s defence.
 - The Hon’ble Supreme Court in the case of *M.P. Special Police Establishment v. State of M.P.*² held that non-consideration of material on record by an authority would vitiate the exercise of power by the said authority.
 - If there is non-consideration of material evidence by a statutory authority, judicial review by the High Court in exercise of its power under Article 226 of the Constitution is permissible, and existence of alternative remedy is not a bar for exercise of such power.
 - Existence of an alternative remedy is not a bar to entertain a Writ Petition if a statutory authority acts without jurisdiction or violates fundamental rights or acts arbitrarily. Reliance was placed upon the judgment of the Hon’ble Supreme Court in the case of *Whirlpool Corpn. v. Registrar of Trade Marks*³.

Judgment

The impugned order is not sustainable and is remitted back to the department for fresh consideration and a reasoned order shall be passed by the department.

Dhruva Comments:

There have been several judgments delivered by the Tribunals wherein it has been held that when there is no column in the return to disclose the nature of service or the nature of credit availed, then the assessee cannot be held liable for non-disclosure of information and thereby suppression cannot be alleged. The present judgment by the High Court validates the earlier decisions. The said judgment should equally be relevant under the GST regime.

Additionally, Writ Petition can be entertained when a statutory authority acts without jurisdiction or acts arbitrarily or violates fundamental rights / principle of natural justice or challenge is to the vires of an enactment.

Medineutrina Pvt. Ltd. v. District Industries Centre (D.I.C.), Udyog Bhavan, Nagpur & others⁴

Issue for Consideration

Does the secured creditor have the first charge over the asset in regard to clearing of dues of a defaulter, or does this fall to the statutory authorities?

Discussion

- M/s Wood Stock Holdings (“WSH”) constructed a factory on a plot of land (“property”) and availed a loan from Punjab National bank (“bank”). The bank attached the property of WSH due to the non-payment of a loan under the Securitisation and Reconstruction of Financial Assets and

² (2004) 8 SCC 788

³ (1998) 8 SCC 1

⁴ 2021-VIL-159-BOM



Enforcement of Security Interest Act, 2002 (“the SARFAESI Act”) and put it up for auction.

- The Petitioner was the highest bidder at the auction and its offer was accepted in March 2017. Accordingly, the bank issued a sale certificate in favour of the Petitioner and symbolic possession of the property was handed over.
- Thereafter, the Petitioner applied to the District Industries Limited (“DIC”) for issuance of a no-objection certificate (“NOC”) in order to transfer the property in its name. However, the DIC informed the Petitioner that an NOC from the Sales tax department would be required due to arrears of Sales tax under the Maharashtra Value Added Tax Act, 2002 (“MVAT Act”) of WSH.
- The Sales tax department confirmed the arrears of WSH and stated that they had asked the DIC to obtain an NOC before approving a transfer.
- Aggrieved, the Petitioner filed the present Writ Petition before the Hon’ble High Court of Bombay on the following grounds:
 - The property was transferred to the Petitioner free from any encumbrances or charge as per section 26E⁵ of the SARFAESI Act. Furthermore, the provisions of section 37⁶ of the MVAT Act are subservient to section 26E of the SARFAESI Act. Therefore, the non-issuance of an NOC by the DIC and the Sales tax department is illegal.
 - In the absence of any notice of the charge served to the Petitioner, no liability should arise as the charge is not enforceable.
 - The bank is under obligation as per the provisions of the SARFAESI Act and the rules thereunder to discover and inform about any encumbrances upon the property.
- The Petitioner is liable only for the payment of the purchase price because the property was sold on an “as-is-where-is and what-is-there-is-basis”.
- The Respondents, on the other hand, submitted as follows:
 - The property had already been attached by the department in September 2015 and the attachment order was served upon WSH.
 - The department had created the charge before the amendment in September 2016 to section 26E of the SARFAESI Act and therefore the priority mentioned in section 26E should not have a retrospective application.
 - The bank was aware about the Sales tax dues and accordingly the sale was not free from all encumbrances.
- The bank submitted that it was unaware of any claim by the Sales tax department and that it cannot be held responsible for the non-disclosure of something of which it was unaware.
- After considering the facts of the case and the submissions, the Hon’ble High Court observed as follows:
 - Placing reliance on various judgments⁷ on the issue of the priority of dues, the Court stated that it agrees with the view that the mortgage of the secured creditor has a prior charge over the government dues.
 - The non-obstante clause in section 37(1) of the MVAT Act which is “notwithstanding anything contained in the contract to the contrary” speaks of a contract and is not in respect of a law enacted by the Parliament or the State legislature. Such a non-obstante clause will not have any effect of overriding any law contained in any other statute.

⁵ Section 26E of SARFAESI Act: “Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.....”

⁶ Section 37 of MVAT Act: “(1) Notwithstanding anything contained in any contract to the contrary, but subject to any provision regarding creation of first charge in any Central Act for the time being in force, any amount of tax, penalty, interest, sum forfeited, fine or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer or, as the case may be, person.....”

⁷ *The Assistant Commissioner (CT) v. The Indian Overseas Bank and another* [2016-VIL-788-MAD], *Cosmos Co-operative Bank v. State of Maharashtra and others* [2019 SCC OnLine Bom 9527] and *State Bank of India v. The State of Maharashtra and others* [2020-VIL-636-BOM]



- On the other hand, section 26E of the SARFAESI Act overrides “any other law for the time being in force” with regard to claims of debts due to a secured creditor.
- A ‘contract’ stems from volition of the parties and is subject to laws applicable in that regard, as against a ‘law’ which has a statutory force enacted by the exercise of power vested in Union and States and which has a binding force over all those who are subject thereto and therein the question of any volition of the parties does not arise. Thus, the difference in phrases creates a categorical distinction between the operation of creation of charge and priority.
- Furthermore, given the use of the phrase “but subject to any provision regarding creation of first charge in any Central Act for the time being in force” in section 37(1) of the MVAT Act, any charge created under the said section is subservient to any first charge created by any Central Statute. As stipulated under the SARFAESI Act, the priority of the secured creditor’s claims for debts due would prevail over the first charge created under section 37(1) of the MVAT Act due to the SARFAESI Act’s being a Central Statute and due to the language used in section 26E of the SARFAESI Act.
- Although section 26E of the SARFAESI Act came into effect after September 2016, the language used in section 37(1) of the MVAT Act, in particular “but subject to any provision regarding creation of first charge in any Central Act for the time being in force” makes it clear that the charge for any dues under the MVAT Act has to give way to the claim for dues / debts by a secured creditor under the SARFAESI Act.
- The provisions of section 31B of the Recovery of Debts and Bankruptcy Act, 1993 and those under section 26E of the SARFAESI Act give priority to the rights of the secured creditor to realise the secured debts due and payable to them and which have arisen through the sale of assets in which the security interest is created over all other Government dues. This position is also recognised and accepted by the MVAT Act and therefore the priority created by section 26E of the SARFAESI Act will prevail over the first charge created by section 37(1) of the MVAT Act.
- For a ‘charge’ as defined under section 100 of the Transfer of Property Act, 1882 (“TOP Act”) to become effective, it is necessary for the transferee to have prior notice of such a ‘charge’.
- Section 55 of the TOP Act casts an obligation upon every seller to disclose to the buyer any material defect in the property or his / her title of which he / she is aware or which the buyer could not have discovered with ordinary care, as well as the obligation to pay all public charges and discharge all encumbrances on the property. Thus, even under the general law of the land, the obligation is upon the seller to disclose all the material defects and encumbrances to the buyer and to transfer the property free of encumbrances. Omission of such disclosures is declared to be fraudulent.
- The bank itself was unaware of any charge on the property and therefore the Petitioner, being an auction purchaser, could not have received any notice of charge or attachment and the charge would be unenforceable in terms of section 100 of the TOP Act against the Petitioner.
- Section 37(1) of the MVAT Act creates the ‘first charge on the property of the dealer’ for any arrears under the MVAT Act. Although the dues of the bank have a priority given the bank’s status as a secured creditor, the same would not have the effect of wiping out the dues payable under any Central / State / Local Act, where for the recovery of such dues, a first charge had been created on the property. Hence, **the statutory charge that is created on the property would go with the property and would follow the property, into whosoever’s hands the property goes.** The



notice of a statutory charge on the property is always presumed in law to one and all, and no one can claim ignorance of the same.

- Since section 37(1) of the MVAT Act creates a charge on the property, the successful auction purchaser would be liable to any statutory charges created upon it. However, due to the non-disclosure of such charges by the secured creditor, the auction purchaser may sue the secured creditor and have such redress as is permissible in law.
- The priority given in section 26E of the SARFAESI Act to the banks as secured creditors only means that it is first in the queue for the recovery of its debts by sale of property. Under section 37(1) of the MVAT Act, the dues, being statutory charges, would also be recoverable by the sale of property. This section also puts a liability upon the auction purchaser to clear the dues to obtain an encumbrance-free title.
- The purchase of property on an ‘as-is-where-is and what-is-there-is’ basis would mean that the property was being held by the auction purchaser with all its rights, obligations and liabilities including all dues, impositions and restrictions imposed upon the same and consequent upon acquiring the title to the property, and that the auction purchaser cannot be permitted to argue out of such holdings, on the grounds of ignorance. It is equally the duty of the auction purchaser to make inquiries about impositions upon the property before bidding so that he / she can have it free from encumbrances. However, after acquiring the property, the auction purchaser cannot say that he / she will have the rights associated with the property and not the liabilities. The auction purchaser takes the rights along with everything.
- The obligation to deliver the property to the auction purchaser free from encumbrances known to the secured creditor includes the responsibility to make reasonable enquiries

about the encumbrances and liabilities as spelt out in rule 9(7) and 9(8) of the Security Interest (Enforcement) Rules, 2002.

- As per section 13(6) of the SARFAESI Act, consequent to the transfer of the secured asset after taking possession thereof, either physical or symbolic, by the secured creditor, all rights in the property transferred vests with the transferee as if the transfer had been made by the owner. Hence the issue of knowledge of encumbrances assumes significance. The secured creditor is responsible for obtaining details of encumbrances insofar as statutory dues are concerned, the knowledge of which can be easily obtained. After obtaining such information, it should be disclosed to the prospective bidders in the notice of sale.
- In the absence of such information, the auction purchaser may raise a claim that the purchase by him / her occurred without any notice of any such encumbrance and that any charge found subsequent to such a confirmation of the auction shall not be enforceable, which may lead to litigation.
- An anomalous position would arise in case where a bank sells the property and appropriates the entire consideration for its debts leaving the statutory authorities with an unrealised claim for their dues. Hence, as far as possible, the debts of the bank as a secured creditor, and those of the other statutory authorities, should be realised.
- The mere mention of the phrases of “as-is-where-is” and “as-is-what-is” should not absolve the secured creditor of its obligation to make proper enquiries about dues / encumbrances upon the property and to disclose such encumbrances in the auction notice. The money in the coffers of the Bank as a secured creditor is public money, as is the money due and payable under the Central / State / Local statutes to the authorities. There is no reason why the secured creditor and other statutory authorities who have a charge upon



the property cannot act in tandem in the interest of all. Furthermore, this is eminently possible in the digital world and although the information about statutory dues may not be available with the bidder, the same can easily be accessed by the secured creditor.

- The Court also stated that the secured creditor and the authorities do not function as competitors but as facilitators and protectors of each other's interest.
- As per section 13(7) of the SARFAESI Act, the residue after the discharge of the secured creditor's debts has to be held in trust and paid to the person entitled thereto which in the present case would be the dues under the MVAT Act. The secured creditor should ensure that all encumbrances are known beforehand and that the amount received on the auction of the property covers the expenses and the discharge of the dues of the secured creditor and the encumbrances upon the property.
- The Court also categorically pointed out the following key points that must be ensured by the secured creditor under the SARFAESI Act :
 - Property offered as a security interest must be free from any encumbrance at the time when it is offered initially, to avail financial credit by the owners.
 - A title verification certificate, by a lawyer (with a penalty of cancellation of license in case the certificate is false) should be produced and it must state that the lawyer has verified the suits filing register of the Court to ascertain whether the property is subject to any litigation and also obtained an affidavit to this effect from the borrowers.
 - A valuation certificate by a person approved by the Government is a must.
 - After the creation of a security interest in its favour for payment of its dues, the bank must inform all the Central / State / Local authorities regarding the creation of such a security interest, including the sub-registrar

of documents and the relevant city survey office.

- Before the attachment and auction of a property, the secured creditor must:
 - Enquire with the Central / State / Local authorities regarding any encumbrances on the property and mention the same in the public notice;
 - In the case of symbolic possession and not physical possession by the secured creditor, the public notice must indicate the nature of such possession and also the reasons as to why the secured creditor is unable to secure actual possession; and
 - If the secured creditor is aware of the statutory dues and charge upon the property, the same could be included in the reserve price for the sale of the property or a deposit of the same could be taken from the bidder separately.
- The secured creditor, as a creation of a Statute, is created for the benefit and interest of the citizens and should act fairly and under an obligation in law to make a full disclosure of the dues and encumbrances on the property.
- The secured creditor cannot shift the responsibility onto the bidder to obtain information about the encumbrances on the property as it is already holding the documents of the borrower, which confers a right to obtain such information.
- The Petitioner would be liable to pay the dues to the State tax department in order to obtain a clear and marketable title to the property. If the Petitioner discharges the dues, then it would be entitled to a no dues certificate from the department.

Judgment

The Hon'ble High Court dismissed the Writ Petition on the above terms.



Dhruva Comments:

The judgment clarifies that in the case of a charge over an asset of a defaulting person by both the secured creditor and the statutory authorities, the secured creditor has a first charge over the assets of the defaulter. However, it is the responsibility of the secured creditor or the auction purchaser to discharge the dues of the statutory authorities and only after such a discharge of dues to statutory authorities has been made would the auction purchaser get a clear title to the property.

Furthermore, the judgment casts heavy responsibility on the bank / secured creditor to ensure that the property proposed to be sold at an auction is free from any encumbrances of statutory dues and to inform about any charge on the property, if any, to the potential buyers. The judgment clarifies that even if the auction purchaser were unaware of any charge, it would not absolve him from payment of liability of statutory dues to Government officials even if the property is purchased on an "as-is-where-is" and "what-is-there-is-basis".

First charge provisions / priority of dues to secured creditors and payment to statutory authorities is an evolving subject, with plethora of laws being enacted from time to time and assumes lot of significance even in merger / acquisitions / demerger transactions.

Dhruva Comments:

The Government has been gradually reducing the limit (originally ₹ 500 crores, then ₹ 100 crores, and now ₹ 50 crores) for the applicability of the e-invoicing provisions thereby bringing in more assesseees under the net of e-invoicing. While such steps are directed towards the creation of a digital ecosystem, they also go a long way in curbing the menace of fake invoices / fraudulent claims of input tax credit. The next batch of assesseees would soon have to kick start the digitisation exercise.

Notification under GST

Amendment in E-invoicing provisions for B2B supplies

The Government has amended notification no. 13/2020-Central Tax dated March 21, 2020 vide notification no. 05/2021-Central Tax dated March 8, 2021 to state that **w.e.f. April 1, 2021** the provisions of e-invoicing in respect of B2B supplies or for exports would apply to a person whose aggregate turnover in any preceding financial year from 2017-18 exceeds **₹ 50 crores** (previously ₹ 100 crores).





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