

Conditions prescribed for exercise of power of provisional attachment must be strictly fulfilled – Gujarat HC

22 December 2021



Summary

The Gujarat High Court (HC) observed that the power to order a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary to do so for the purpose of protecting the interest of the Revenue. The opinion needs to be formed based on tangible material that the assessee is likely to defeat the demand, if any. In the present case, the HC noticed that the Revenue has collected the material from the business premise during the investigation and alleged wrongful availment of ITC by the petitioner. However, such allegation of wrongful availment by the petitioner and attachment order is without any credible material on record. Therefore, the HC disposed off the petition without entering merits and ordered that the investigation shall be completed within eight weeks.

Facts of the case

- The petitioner¹ is engaged in the business of copper products and is a leading manufacturer of products, such as copper wire, copper rod, etc.
- A notice was issued asking the petitioner to pay the input tax credit (ITC) claimed on purchases made from certain suppliers who had defaulted in payment of GST.
- Thereafter, a search was conducted at the premises of petitioner and various purchase files were seized. Pursuant to the said search and seizure, the Revenue issued FORM GST DRC-01A² on directing the petitioner to deposit the total tax of INR 10.43 crore³ on the ground that the ITC was not allowable and the same was required to be recovered⁴.
- Since another search was carried pending the adjudication of the show cause notice and several documents were seized, the petitioner is before the HC challenging the provisional attachment orders passed by the authorities without there being any pending proceedings⁵.

Gujarat HC observations and ruling⁶:

- **Power to levy provisional attachment is draconian:** 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. Such powers, when exercised, must be preceded by the formation of an opinion by the Commissioner that it is necessary to do it for the purpose of protecting the interest of the Government Revenue. The opinion needs to be formed 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.

- **Insistence on formation of opinion:** Considering the draconian nature of the power and the serious consequences, the legislature insists on formation of opinion before exercising the powers. A provisional attachment contemplates during the pendency of certain proceedings, which means that a final demand or liability is yet to be crystallised. The anticipatory attachment of this nature must strictly conform to the requirements of substantive and procedural embodied in the statute and the rules.
- **Pendency of proceedings required:** It is observed that pendency of proceedings under various provision of GST law is ordinarily required for the commissioner to

¹ Madhav Copper Ltd

² under Rule 142(1A) of the CGST Rules, 2017

³ under Section 74(5) of the GGST Act, 2017

⁴ under Section 74 of the CGST Act, 2017

⁵ Vide R/Special Civil Application No. 15201 of 2021

⁶ Dated 23 November 2021

form an opinion to order provisional attachment of any property including the bank account belonging to the taxable person. In absence of any kind of pendency of proceedings, it is not permissible for the respondent authority to invoke powers for the purpose of provisional attachment⁷.

- **Contention of absence of proceedings unsustainable:** The HC observed that the proceedings had been initiated on 7 July 2021, the order of attachment of bank account in FORM GST DRC 22, the attachment of immovable properties, the vehicles, movable properties and the personal properties of the Directors and directions to the debtors not to make the payments were on different dates starting from 8 July 2021 to 27 July 2021. Therefore, the contention of the petitioner that the invocation was made by the Revenue in absence of any kind of proceedings was not found to be sustainable.
- **Allegation without any credible material:** The HC observed that the allegations were made by the respondents based on the material collected from the business premise during the investigation and such allegation of wrongful availment by the petitioner and attachment order is without any credible material on record. Therefore, the HC disposed off the petition without entering merits and ordered that the investigation shall be completed within eight weeks and the petitioner shall co-operate without fail. With respect to the operating of the current account, the credit of the ITC worth INR 3 crore and unlocking of the same, the HC held that no order is presently needed to be passed and the

same shall be considered by the authority concerned at the time of adjudication.

Our comments

Earlier, the Apex Court⁸ had observed that 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. In the said case, there was a clear non-application of mind by the Joint Commissioner to the provisions and, therefore, the provisional attachment was held to be illegal.

On similar issue, the Gujarat HC⁹ had earlier held that in the absence of pendency of any proceedings under the GST law, the Revenue could not have invoked the powers ordering provisional attachment. The HC further stated even if something is noticed during any inquiry or investigation against the petitioner, the same by itself will not confer jurisdiction to the Revenue to invoke the Section 83 of the Act. In another case, the HC¹⁰ had held that the Court can determine whether the opinion is arbitrary, capricious, or whimsical. An order of provisional attachment cannot be as a matter of course and it must record and indicate that it was necessary to take a drastic action.

The present ruling by the Gujarat HC is in line with the apex court and its previous rulings. Further, the ruling shall provide required relief to the businesses and will set precedence in similar matters.

⁷ under Section 83 of the CGST Act, 2017

⁸ in the case of M/s Radha Krishan Industries Ltd.

⁹ Bhavesh Kiritbhai Kalani

¹⁰ Vinodkumar Murlidhar Chechani

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