

## HP General Sales Tax Act provisions creating tax as first charge over property not *ultra vires* to any law or Constitution - SC

19 May 2023



## Summary

The Supreme Court has ruled that Section 16B of the Himachal Pradesh General Sales Tax Act, 1968 (HPGST Act), is not *ultra vires* to any provision of law. The SC set aside the judgment of the Himachal Pradesh High Court (HC) wherein it had held that Section 16B of the HPGST Act was inconsistent with Section 35 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act,) and was *ultra vires* to the Constitution. The SC held that Section 16B would be attracted only after determination of the liability and upon any sum becoming due and payable under the Act, and it is only thereafter that the state's charge on the property, if any, would operate.

### Facts of the case

- M/s A.J. Infrastructures (Pvt.) Ltd. (first respondent) had purchased the property in an auction conducted by the State bank of Patiala. The said property was taken over by the bank from the M/s Eastman Rubber (the owner) because of the default committed by it in liquidating its dues. The sale deed was executed, registered and then it applied for mutation in its name, but the same was rejected as the owner of the property had liability against government dues by passing an ex-parte assessment order.
- Thereafter, the first respondent filed a writ petition before the HC against the rejection order, and later, the HC in its judgement stated that if there is proper adjudication of the amount due under the tax act, then only the state has a first charge on the property, and if it is not followed, then it cannot be said that tax is due. The HC also held that Section 35 of the SARFAESI Act would have an overriding effect over all inconsistent provisions contained in any other law. The petition was allowed by HC to mutate the property in its name and to delete the red entries.
- Aggrieved by the HC's order, the official respondents then applied to the HC for a review, but it was dismissed on the ground of delay.

**Supreme Court (SC) observations and ruling [CIVIL APPEAL NO. 8980-8981/2012 and CIVIL APPEAL NO. 9212-9213/2012, order dated 28 April 2023]:**

- **Section 16B would be attracted only after determination of the liability:** Section 16B of the HPGST Act provides that notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax and penalty,

including interest, if any, payable by a dealer or any other person under the HPGST Act, shall be a first charge on the property of the dealer or such other person. It was held by the SC that the charge would be operated only after the determination of liability. Therefore, no red entry marks could have been inserted in the revenue records and the High Court was right in holding that the state ought not to have refused mutation.

- **The decision on an infructuous writ petition is inconsequential and can never be of any effect:** The SC observed that the SLP filed by the state was rendered infructuous, partly because PNB, who was a contesting respondent before the court, had already recovered its dues and had released the property from its hypothecation during the pendency of the writ petition before the High Court. The SC also stated that a decision on the constitutional validity of a provision should be invited not in vacuum but when the justice of the case demands such a decision.
- **Non obstante clauses contained in Section 35 of the SARFAESI Act cannot be read as creating first charge in favour of banks:** The SC relied on its judgement in the case of the Central Bank of India wherein it had held that the Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the state. Furthermore, the SC stated that the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the SARFAESI Act cannot be read as creating first charge in favour of banks, etc.

- **Section 16B of the HPGST Act was inconsistent with Section 35 of the SARFAESI Act:** Section 35 of the SARFAESI Act could not have been construed as conferring any right on a secured creditor to claim priority over dues of the state in the absence of a provision in that behalf which presently can now be claimed, subject to other conditions being fulfilled, in view of Section 26E of the SARFAESI Act.
- **State cannot recover sales tax dues as arrears of land revenue by creating charge on mortgage property:** The SC further opined that the state cannot resort to the provisions of the Himachal Pradesh Land Revenue Act, 1954 (HPLR Act), for recovering sales tax dues as arrears of land revenue by creating a charge on the mortgaged property under Section 16B of the HPGST Act, when proceedings under the HPLR Act were not initiated upon notice to the defaulters and the sum owed to the department had not been finally determined.
- **Section 16B of the HPGST Act is a perfectly valid piece of legislation:** The SC held that Section 16B of the HPGST Act is a perfectly valid piece of legislation and is not *ultra vires* to the Constitution and/or the Banking Companies Act. Accordingly, the SC set aside the HC judgment to the extent that it held Section 16B to be *ultra vires* to other provisions, and the appeal was partly allowed in the state's favour.

### Our comments

Earlier, the SC, in the case of the Central Bank of India, had held that the Parliament did not intend to prioritise the dues of private creditors over the sovereign debt of the state. However, if the Parliament intended to create a first charge in favour of banks, financial institutions, or other secured creditors on the property of the borrower, then it would have incorporated a provision to give effect for the same as is provided under the Companies Act, i.e., Section 529-A of the Companies Act to that effect.

Though the judgement has been delivered in the context of General Sales tax laws, it is likely to have an impact under the Goods and Services Tax (GST) laws as well, as similar provisions exist under the GST laws. Section 82 of the Central Goods and Services Tax Act, 2017, provides that any amount payable by a taxable person or any other person on account of tax, interest or penalty that the person is liable to pay to the government shall be a first charge on the property of such taxable person or such person.

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