

Insight about Property Attachment under GST Law

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Provisional attachment of property is in vogue under indirect tax system. This power has been given under the GST law to protect the interest of the revenue. However, the department has been frequently using this power to meet their revenue targets even in those cases where it is not justifiable causing the hardship to the businesses who are into the trajectory of revival due to the economic slowdown caused by the pandemic. Thus, there has been a serious raise of concern and recently Gujarat High Court also gave a remarkable judgement stating that the department should stop the mechanical use of the power entrusted upon them. The Honorable Court clearly stated that an order of provisional attachment cannot be as a matter of course. It shall be exercised only when the situation demands for the purpose of protecting the interests of revenue. It is imperative for the taxpayers to understand the recent updates on this matter so as to protect themselves from any misuse of powers by the department.

GST law clearly specifies that the said power is only entrusted upon the Commissioner. No other officer without the authority from Commissioner can initiate such proceedings. Further, GST law also specifies that such power can be exercised only where the proceedings are pending under few cases. These are Assessment of non-filers of returns - those taxpayers who did not file GST returns even after a specified period, Assessment of unregistered persons - those persons who did not register under GST law even though they are liable to do so or their registration has been cancelled by the revenue authorities, Summary assessment in certain special cases, Proceedings related to inspection, search and seizure, Demand raised in the cases other than those involving fraud or willful misrepresentation of facts, & demand raised in cases involving fraud or willful misrepresentation of facts. Except such scenarios, no provision under GST law enables the authorities' to exercise the power of attachment of property.

When the government attach the property of a taxpayer under GST, the said taxpayer will not be able to transfer or sell the attached property. If anyhow the property is transferred or sold by way of fraud or misrepresentation of facts, same shall not be treated as valid transfer under the law of land. Also like property attachment, bank account(s) of a person can be attached after which he will not be able to transfer his funds to any other account.

The Commissioner can attach the property through issuing an order in DRC-22, which will contain the details of the property so attached. Afterwards taxpayer can object against it if such property is not liable to attachment. Objection can be filed through specified form within seven days of attachment. Commissioner is bound to provide an opportunity of being heard to the taxpayer. If he is satisfied with

the response given by the taxpayer, Commissioner will detach the attached property through DRC-23. If property so attached is of perishable nature, then the taxpayer have to either settle the relevant tax dues or pay the market price for the property so attached, whichever is lower. If the taxpayer does not agree to either of them then the Commissioner may dispose of the property and protect the revenue of the government.

Recently, CBIC has released few guidelines for provisional attachment of property under GST Act which tasks the Commissioner to exercise due diligence and carefully examine all the facts of the case, including the nature of offence and quantum of revenue involved, and also record on the file the basis on which concerned officer has formed an opinion to attach property of the taxpayer. As per guidelines issued by CBIC, types of cases where provisional attachment can be considered depends upon each fact of the case. CBIC has instructed the department to exercise appropriate prudence and maximum caution in property attachment of a taxpayer. A remedy can be considered in cases involving GST evasion, fake invoicing and delay of more than three months in depositing tax collected. They have been strictly instructed not to exercise such power of provisional attachment in routine.

Cases where a taxable person has supplied any goods or services or both without issuing any invoice with an intention to evade tax or issued invoice without supply of goods or services or both or fraudulently availed input tax credit or/and where a taxpayer has collected any amount as tax but failed to pay the same to the government even after a period of three months from the date on which such payment becomes due or fraudulently applied and obtained refund or fraudulently passed on input tax credit to the recipients but not paid the commensurate tax, these cases qualify for provisional attachment of property.

Value of property attached should not be extreme and should be appropriate as per the estimated amount of pending revenue. More than one property can be attached. Provisional attachment can be made only of the property belonging to the taxable person, against whom the proceedings under GST law are pending. Movable property shall normally be attached only if the immovable property is not sufficient to protect the interests of revenue. And, the taxable person can get the moveable property released by offering the immoveable property which is sufficient to protect the interest of revenue. However, the rider has been put that the value of immoveable property shall not be less than the tax amount in dispute. It should also be ensured that attachment does not obstruct normal business activities of the taxable person.

Such guidelines are an aid and welcome step from CBIC which shall ensure that genuine tax payers are not harassed unnecessarily. These guidelines are in line with judgements pronounced by jurisdictional courts on the said matter.

In a judgement passed by the Karnataka High Court, it was held that a show-cause notice is a prerequisite condition for quantification of interest or attachment of bank account without which the proceedings would be null and void. The respondent-assessee contended that no notice as contemplated under Section 73 of the GST Act was issued to the respondent-assessee before quantifying interest amount and attaching Bank account of the respondent-assessee. After hearing the petition, the High Court of Karnataka held that issuance of a Show Cause Notice is the sine qua non to proceed with the recovery of interest payable under Section 50 of the GST Act and penalty leviable under the provisions of the GST Act and the Rules. It also held that interest payable under Section 50 of the GST Act had been determined by the respondent Authority without issuing a Show Cause Notice which is in breach of the principles of natural justice, and therefore the orders issued by GST authorities stand quashed.

Bombay High Court ordered that GST authorities must not exercise the power of attaching a taxpayer's bank account on a routine basis as this step that can have vast consequences. An attachment order can't be passed merely on the basis of a summons in the absence of any actual or pending proceedings, in addition authorities must follow all the requirements under the law before drawing any conclusion. Also GST law enables the authorities to provisionally attach property or a bank account of a taxpayer for a maximum of one year. This power can be exercised while taxpayer perform an act or omission under law. Proceedings can't be invoked against a third party.

However, the power to initiate attachment proceedings where GST payment is delayed beyond 3 months after due date would be a matter of concern for businesses who are in comeback mode with working

capital profoundly impacted due to Covid'19. In near future, more stringent laws are expected to be framed in taxation. Tax evasion activities are giving a major effect on the collection of tax to the government thereby posing a serious threat to the financial health of the country. Thereby, to deter the taxpayers from committing such misuse of law, some extreme measures have already been taken and some are expected in near future. Though, it is understood that such measures are necessary to protect the revenue interest but along with this they also provide scope for harassment of the genuine taxpayers. Thus, the measures have to be introduced along with detailed guidelines so as to safeguard the interest of both revenue and genuine taxpayers.