

GIB/DL/RADHA KRISHAN/20.04.2021/SC-24

Supreme Court Category : PROVISIONAL ATTACHMENT TO PROTECT REVENUE

State : Delhi

Order No.: GIB/DL/RADHA KRISHAN/20.04.2021/SC-24

Name of Entry :

M/S RADHA KRISHAN INDUSTRIES

Date : 20-04-2021

Breif Issue :

FACTS OF THE CASE:

Provisional attachment was ordered against appellant while invoking section 83 of Himachal Pradesh Goods and Service Tax Act, 2017 and rule 159 of the HPGST Rules, 2017

Appellant instituted Writ Petition under article 226 of Constitution challenging orders of provisional attachment.

High Court dismissed writ petition on ground that provisional attachment could not be challenged in a petition under article 226 on ground that an 'alternative and efficacious remedy' of an appeal under section 107 was available.

ISSUE OF THE CASE:

Whether the orders of provisional attachment issued by the third respondent against the appellant on 28 October 2020 are in consonance with the conditions stipulated in Section 83 of the HPGST Act?

Decision of Advance Ruling Authority :

DECISION:

In the present case, the narration of facts indicates that on 21 October 2020, the Commissioner had in exercise of his powers under Section 5(3) made a delegation to the Joint Commissioner of State Taxes and Excise in respect of the powers vested under Section 83(1). The Joint Commissioner, in other words, was exercising the powers which are vested in the Commissioner under Section 83(1) to order a provisional attachment in pursuance of the delegation exercised on 21 October 2020.

This being the position, clearly the order passed by the Joint Commissioner as a delegate of the Commissioner was not subject to an appeal under Section 107(1).

The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable;

High Court has erred in dismissing writ petition on ground that it was not maintainable;

Power to order a provisional attachment of property of taxable person including a bank account is draconian in nature and conditions which are prescribed by statute for a valid exercise of power must be strictly fulfilled;

Exercise of power for ordering a provisional attachment must be preceded by formation of an opinion by Commissioner that it is necessary so to do for purpose of protecting interest of government revenue. Before ordering a provisional attachment Commissioner must form an opinion on basis of tangible material that assessee is likely to defeat demand, if any, and that therefore, it is necessary so to do for purpose of protecting interest of government revenue.

Expression 'necessary so to do for protecting government revenue' implicates that interests of government revenue cannot be protected without ordering a provisional attachment;

Formation of an opinion by Commissioner under section 83(1) must be based on tangible material bearing on necessity of ordering a provisional attachment for purpose of protecting interest of government revenue;

In facts of instant case, there was a clear non-application of mind by Joint Commissioner to provisions of section 83, rendering provisional attachment illegal;

Under provisions of rule 159(5), person whose property is attached is entitled to dual procedural safeguards:

(1) An entitlement to submit objections on ground that property was or is not liable to attachment; and

(2) An opportunity of being heard;

There has been a breach of mandatory requirement of rule 159(5) and Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard;

Commissioner is duty bound to deal with objections to attachment by passing a reasoned order which must be communicated to taxable person whose property is attached;

A final order having been passed under section 74(9), proceedings under Section 74

are no longer pending as a result of which provisional attachment must come to an end; and

Appellant having filed an appeal against order under section 74(9), provisions of sub-sections 6 and 7 of section 107 will come into operation in regard to payment of tax and stay on recovery of balance as stipulated in those provisions, pending disposal of appeal.

For above reasons, appeals are allowed and impugned judgment and order of High Court dated 1-1-2021 is set aside. Writ petition filed by appellant under article 226 of Constitution shall stand allowed by setting aside orders of provisional attachment dated 28-10-2020.