

JUNE 02, 2022

Forceful Recovery of GST

By- Dr. Sanjay Kalra, LL.M., Ph.D.(GST Law), Advocate, KPS Legal

98190 03313

admin@kpslegals.com



DURING the course of search or investigation, sometime taxpayers willingly deposit their partial or full GST Liability determined by the Investigating Officers. However, in some cases, taxpayers have also alleged that the said payment of tax was not made voluntarily by them, rather they were forced by the Investigating Officers in an unlawful manner. Some of the taxpayers have also approached High Courts against the manhandling committed by the inspector. Since years, the taxpayers have been complaining of the misuse of power by the Investigating Agencies whereas the Investigating Agencies have been giving the plea of safeguarding the government revenue. So, for ensuring correct application of law and to protect the interest of the taxpayers, there is a need to understand the legal position of recovery of tax.

Section 67 of the CGST Act, 2017 provides for inspection, search and seizure. Sections 73 and 74 provides for the determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized. Section 73 of the CGST Act, 2017 casts an obligation on the Officer to serve a notice on the person chargeable with the tax not paid or short paid or the refund made erroneously or the ITC wrongly availed or utilised. The said person chargeable with tax may pay the tax with interest voluntarily even before service of the notice under sub-section (1) of the Section 73 [ibid](#). Similarly, under Section 74 of the CGST Act, 2017, the Proper Officer of GST is under legal obligation to serve a notice on the person liable to discharge his tax liability arising out of any tax not paid or short paid or erroneously refunded or where ITC has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax. The said person chargeable with tax may pay the tax along with interest and penalty @15% of such tax, even before service of the notice. Thus, the taxpayers can make voluntary payment of tax for the admitted tax liability even before issuance of Show Cause Notice in terms of provisions of Section 73(5) and Section 74 (5) of the CGST Act, 2017. This helps the taxpayer in discharging their admitted liability, self-ascertained or as ascertained by the tax officer, without having to bear the burden of interest under Section 50 of CGST Act, 2017 for delayed payment of tax and may also save him from higher penalty imposable on him subsequent to issuance of show cause notice under Section 73 or Section 74, as the case may be. However, the recovery of tax becomes difficult and the situation gets worsened when the investigating officers are alleged to use of force and coercion against the taxpayer for recovery of the non-admitted tax liability. For the recovery of such non-admitted tax liability, Section 79 of the CGST Act, 2017 provides that where any amount payable by a person to the government under any of the proceedings this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the modes specified under sub-section (1) thereto. The recovery of taxes not paid or short paid, not voluntarily paid by the person charged with the tax liability, can be made under the provisions of Section 79 of CGST Act, 2017 only after following due legal process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order. No recovery can be made unless the amount becomes payable in pursuance of an order passed by the Adjudicating Authority or otherwise becomes payable under the provisions of CGST Act and rules made therein. Issuance of a show cause notice and the confirmation of demand by way of adjudication is a precondition to initiate recovery proceedings under Section 79 of the CGST Act, 2017. Though, the law does not bar the taxpayer from voluntarily making payment of any tax liability ascertained by him or the tax officer in respect of such issues, either during the course of such proceedings or subsequently, there may not arise any urgent situation where the tax officer shall recover the tax dues, arising out of any proceedings under the Act, from the taxpayer during the course of the search and investigation itself. We have come across several cases where many appellants, charged with the tax liability, have prayed for the court's intervention against the forceful recovery of the disputed tax liability by the tax officers / investigating agencies in an arbitrary and unlawful manner. The Hon'ble High Court of Jharkhand, in *Mahadeo Constructions Co. vs UOI* [[2020-TIOL-850-HC JHARKHAND-GST](#)] held that Sec. 79 of the CGST Act empowers the authorities to initiate garnishee proceedings for recovery of tax. The liability of interest, despite it being automatic, also required to be adjudicated in the event an assessee disputes the computation or very levability of interest, by initiation of adjudication proceedings under Section 73 or Section 74 of the CGST Act, 2017. In case of dispute, the amount of interest cannot be termed as an amount payable under the Act or the Rules until the adjudication process is completed. It was held that without initiation of any adjudication proceedings, no recovery proceeding under Section 79 of the Act can be initiated for recovery of the interest amount. This view was upheld by the same court in the case of *R K Transport Pvt Ltd. vs UOI* [[2022-TIOL-288-HC-JHARKHAND-GST](#)]. In case of *Century Metal Recycling Pvt. Ltd vs UOI* - [2008-TIOL-711-HC-P&H -CX](#); *Concepts Global Impex vs UOI* - [2018-TIOL-2993-HC-P&H-CUS](#) and *Abhishek Fashions Pvt. Ltd. vs UOI* - [2006-TIOL-430-HC-AHM-CX](#), it was held that unless there is assessment and demand, the amount deposited by the assessee under coercion/threat of arrest, cannot be appropriated. The tax authority cannot justify retaining the amount deposited by merely saying that the same was voluntarily deposited. The tax authority should bear in mind that they are creatures of statute and are bound by statutory law; the powers that they exercise are conferred upon them by the statute and there are no powers de hors the statute. In such circumstances, the authority is duty bound to act as provided by the provisions under which it can exercise such powers. No money can be retained by tax authority without any sanction of law.

Section 83 of the CGST Act, 2017 provides for provisional attachment of any property including bank account of the taxable person with a view to safeguard the interest of the Revenue. Section 83 provides that during the pendency of any proceedings under Section 62 or Section 64 or Section 67 or Section 73 or Section 74, the Commissioner, to protect the interest of the Government revenue and if it is necessary to do so, may by order in writing attach provisionally any property, including bank account belonging to the person in the manner prescribed, for a period of maximum one year. It is pertinent to note that even Section 83 of the Act talks about order to be passed in writing on the basis of the reasonable belief of the concerned authority. During the Pre-GST regime too, the similar provisions were there in Section 11DDA of the Central Excise Act and the Section 73C of the Finance Act, 1994. During the Pre-GST regime too, the provisional attachment in terms of Section 11DDA and Section 73C could be made only after issuance of a show cause notice. The procedure for the attachment is prescribed under Rule 159 of the

CGST Rules, 2017 stating that for attaching any property under Section 83, the Commissioner shall pass an order in Form GST DRC-22. It is seen that the Government had issued guidelines and had also laid down a procedure for provisional attachment to protect the interest of the revenue in certain cases. Hon'ble High Court of Gujarat, in case of S.S. Industries vs UOI - [2020-TIOL-2228-HC-AHM-GST](#) held that the ITC may be blocked only if the concerned authority is of the prima facie opinion, based on cogent materials that the ITC is sought to be availed based on fraudulent transactions like fake/bogus invoices etc. The subjective satisfaction should be based on some credible materials or information. The power conferred upon the authority under Rule 86A of CGST Rules, for blocking the ITC, is a very drastic and far-reaching power and the same should be used sparingly and only on subjective weighty grounds and reasons. Such power should neither be used as a tool to harass the assessee nor it should be used in a manner which may have an irreversible detrimental effect on the business of the assessee. In UFV India Global Education v. Union of India - [2020-TIOL-1541-HC-P&H-GST](#), the Punjab and Haryana High Court held that pendency of proceedings under the sections mentioned in Section 83 viz. Section 62 or 63 or 64 or 67 or 73 or 74 is the sine qua non for an order of provisional attachment to be issued under Section 83. Another case which is relevant for our purposes is the decision of the Bombay High Court in Kaish Impex Private Limited v. Union of India - [2020-TIOL-151-HC-MUM-GST](#). In this case, the taxation authorities were enquiring into fraudulent claiming of ITC on the basis of fictitious transactions by an export firm in Delhi, against whom proceedings under Section 67 of the CGST Act had been initiated. On tracing the money trail, the petitioner was summoned under Section 70 of the CGST Act and his bank accounts were provisionally attached under Section 83 of the CGST Act. On dealing with the question of whether the bank accounts of the petitioner could be attached, when there were no pending proceedings against him and proceedings were pending against another taxable entity, the High Court held that the proceedings referred to under Section 83 of the Act must be pending against the taxable entity whose property is being attached. Hon'ble Supreme Court, in the case of Radha Krishan Industries vs State of Himachal Pradesh - [2021-TIOL-179-SC-GST](#) clarified that the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions. An attachment which is contemplated in Section 83 is, in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power.

Feeling heat from the aggrieved taxpayers, the CBIC, vide its Instructions No. [01/2022-23 \[GST- Investigation\]](#) dated 25th May, 2022, has also clarified that recovery of taxes not paid or short paid, can be made under the provisions of Section 79 of CGST Act, 2017 only after following due legal process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order. No recovery can be made unless the amount becomes payable in pursuance of an order passed by the adjudicating authority or otherwise becomes payable under the provisions of CGST Act and rules made therein.

[The views expressed are strictly personal.]

(DISCLAIMER : The views expressed are strictly of the author and Taxindiaonline.com doesn't necessarily subscribe to the same. Taxindiaonline.com Pvt. Ltd. is not responsible or liable for any loss or damage caused to anyone due to any interpretation, error, omission in the articles being hosted on the site)
