



## **RIGHT OF BUSINESS**

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The tax authorities under their respective statutes have been empowered to safeguard the interest of the revenue by attaching the property of the accused person which includes the bank account. However, such attachment severely damage the operation and conduct of the business and may cause difficulty in complying with the statutory obligations like paying of taxes under various statutes, payment of provident fund, salaries of the employees, company's compliance etc. and failure would cause initiation of uncalled litigation.

### **Under the Constitution of India**

The Constitution of India under Article 19(1)(g) protects the right to business and profession as a fundamental right. Similarly under Article 300A of the Constitution protects the right of a person to hold the property except by authority of law.

In a recent judgment passed by the learned Single Judge of the Hon'ble Madras High Court in ***Sri Marg Human Resources Pvt Ltd v. the Principal, Addl. Director General***<sup>1</sup> has permitted the de-freezing of the bank account of the petitioner company as such restriction is violative of the fundamental right to business and profession.

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<sup>1</sup> W.P. NO. 11284/2021



### **Reasonability of Restriction**

Under Article 19(6), the State<sup>2</sup> may impose reasonable restrictions on the fundamental right of business and profession. Thereby, the right bestowed upon the businesses and profession is not an absolute but a qualified right, however, the test on reasonability of the restriction is quintessential.

The Hon'ble Supreme Court in ***OPTO Circuit India Ltd. v. Axis Bank & Ors.***<sup>3</sup> has also allowed the de-freezing of the bank account for payment of statutory dues. Herein, the Hon'ble Court opined that the petitioner company has been unable to pay the statutory dues on account of freezing by the authorities, which would lead to litigation against the petitioner, causing uncalled difficulty to the petitioner. Therefore, the Hon'ble Court in rationalising the facts permitted the requisite withdrawal from the freezed bank account to pay the statutory dues.

### **Restriction an outcome of tangible information**

In another judgment, the Hon'ble Supreme Court prescribed the framework for provisional attachment of the property affecting the business, the Hon'ble Court held that the attachment should be preferred where the interest of the revenue cannot be protected without order a provisional attachment, formulated on an opinion

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<sup>2</sup> Includes union, state and local government, defined under Article 12 of the Constitution of India.

<sup>3</sup> Criminal Appeal No. 102/2021.



based on tangible material that the assessee is likely to defeat the demand<sup>4</sup>.

### **Attachment beyond the reasonable time period**

The Hon'ble Court of various jurisdictions have held in catena of judgments that the continuation of provisional attachment of the property of a person cannot be exceed the prescribed statutory time limit (generally one year under GST and PMLA) and in an event of continuation of attachment beyond the reasonable time period, then such actions of the authorities are violative of Article 19(1)(g) and Article 300A of the Constitution.

### **Violation of Principles of Natural Justice**

The violation of principles of natural justice which comprises of *audi alteram partem* (opportunity of being heard) may also entitle the aggrieved person to prefer the grievance before the Hon'ble Court and such violation may vitiate the proceedings.

### **Maintainability of Writ before the Hon'ble High Court**

The aggrieved person may approach the Hon'ble High Court of the respective jurisdiction for infringement of rights provided under Article 19(1)(g) and 300A of the Constitution.

The Hon'ble Supreme Court in ***Radha Krishan Industries v State of Himachal Pradesh & Ors.***<sup>5</sup>, placing reliance on ***Whirlpool***

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<sup>4</sup> *Radha Krishan Industries v State of Himachal Pradesh & Ors.*, 2021 SCC OnLine 334.

<sup>5</sup> 2021 SCC OnLine 334.



***Corporation v. Registrar of Trademarks, Mumbai***<sup>6</sup> has analysed the jurisdiction of the Hon'ble High Courts and prescribed exceptions to the rule of alternate remedy.

### **Prosecution safeguards**

The statutes has provided various safeguard to the accused, as in the pre-prosecution sanction, wherein the authorities before initiation of the proceedings are required to take approval from the senior officials and such senior official, after evaluation of the evidences may provide his consent for initiation of prosecution against the accused.

Similarly, the persons responsible for the conduct of the business may be arrested based on the nature of offence, but such person may escape from the liability if such person may show that the offence was committed without his knowledge or he exercised due diligence to prevent commission of such offence.<sup>7</sup>

The Hon'ble Courts instead of blatantly following such draconian legislation<sup>8</sup> have opted to balance the interest of the revenue and the public by extending the scope of fundamental rights to protect the rights of such accused.

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<sup>6</sup> (1998) 8 SCC 1.

<sup>7</sup> Section 137 of Central Goods and Services Tax, 2017.

<sup>8</sup> 2021 SCC OnLine 334.



■ *TEAM MAJESTY LEGAL*<sup>9</sup>

CHAMBER : 204, E-Block, Rajasthan High Court, Jaipur.

OFFICE : C-89, 201, Jagraj Marg, Mangalam Apartment, Babu Nagar, Jaipur

MOB : 8890077779  
9785461395

E-MAIL : [majestylegal9@gmail.com](mailto:majestylegal9@gmail.com)

WEBSITE : [www.majestylegal.in](http://www.majestylegal.in)

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<sup>9</sup> Majesty legal is law firm and aim of the present article is to provide insights regarding right to business under Constitution and various tax legislations. The opinions presented in the article are personal in nature and not to be deemed as legal advice.