

NO SERVICE TAX ON RESTAURANTS FOR TAKE-AWAY SERVICE

The Hon'ble Madras High Court in a matter titled as *Anjappar Chettinad A/C Restaurant v. Jt. Commissioner, Office of Commissioner of GST & C. EX., Chennai South Commissionerate*¹ has granted relief to the assesseees who were operating restaurants under the 'take away/parcel services' model.

The Department issued orders to the assesseees for not discharging service tax liability in relation to 'take away/parcel services' till June 2017. The assessee aggrieved from the impugned order of the Department preferred the writ petition before the Hon'ble Court.

The Hon'ble Court on assessing the facts and law pertaining to the issued held that not all the activities at the restaurants are chargeable under the Service Tax including the 'take away/parcel services'. The Hon'ble Court reasoned on the rationale that the services commencing from the point where food and drinks are collected for service at the table, till the raising of the bill are chargeable under the Finance Act, 1994. Further, the Hon'ble Court applying the aforesaid rationale, in the present factual matrix where the Department is recovering the service tax on 'take away/ parcel services' held further that such tax levy is beyond the scope of service tax, as there are separate counters, may be out of the main restaurant and the parcels are picked up by the agents of food delivery services or by the customer himself and not consuming food and drink at the premises of the restaurant.

Based on the aforesaid reasoning the Hon'ble Court quashed the impugned order of the Department and granted relief to the assesseees from charging unlawful and arbitrary service tax on the restaurant businesses, who are severely struggling due to the present unforeseen times.

¹ 2021 (51) G.S.T.L. 125 (Mad.)

NON-COMPLIANCE OF PROCEDURE WILL BENEFIT THE ASSESSEE

IN DE-FREEZING OF BANK ACCOUNT

The Hon'ble Courts in catena of judgment has raised issues pertaining to the arbitrary exercise of power of attachment of bank accounts of Assesseees. The Hon'ble Supreme Court has considered an attachment of the bank account as draconian in nature.

The Hon'ble Delhi High Court in *Proex Fashion Pvt. Ltd. v. Government of India*² has opined that the attachment of bank account entails serious consequences to the assessee, particularly in running a business. Therefore, strict compliance of the procedure as prescribed under the legislation are quintessential.

In the present case, the petitioner/assessee's bank account was frozen under Section 83 of the Central Goods and Services Tax Act, 2017 in pursuance of Section 71 of the Act, 2017. The Hon'ble Court held that the mandatory procedural requirements prescribed under the statute were not complied with by the Department, and placing reliance on the judgment of the other Hon'ble High Courts, it was held that due to failure of compliance of the statutory procedural requirements, the attachment of bank account is illegal, unsustainable and ultra vires the statutory power and the attachment order was quashed.

The safeguard to the assesseees against the unlawful and arbitrary exercise of attachment power are prescribed under the statute and failure to comply with the statutory requirement, the assessee may prefer writ before the jurisdictional court. Multiple judgments in this regard has been passed as in *Kaish Impex Private Limited v Union of India*³; *Bindal Smelting Pvt. Ltd. v. Additional Director General*⁴; *Valerius Industries v. Union of India*⁵.

² 2021 (51) G.S.T.L. 133 (Del.)

³ 2020 (34) G.S.T.L. 3 (Bom.)

⁴ 2020 (34) G.S.T.L. 592 (P & H)

⁵ 2019 (30) G.S.T.L. 15 (Guj.)

ANTICIPATORY BAIL UNDER GST

The Criminal Procedure Code, 1973, under Section 438, provides provisions relating to anticipatory bail of the accused for non-bailable offence before the jurisdictional High Court or the Sessions Court. This provision may be used by an accused assessee under the Goods and Services Tax regime who is apprehending arrest from the department for custodial interrogation.

The Hon'ble High Court in *Pawan Goel v. Directorate General of GST Intelligence, Gurugram*⁶, has granted anticipatory bail to the accused assessee who apprehends arrest from the department for custodial interrogation for alleged evasion of tax by availing of wrongful input tax credit. The Hon'ble Court places reliance on *Akhil Krishan Maggu v. Deputy Director, Directorate General of GST Intelligence*⁷ and *Nitin Verma v. State of U.P.*⁸, and reasoned for granting anticipatory bail as that the assessee has no tax evasion or criminal antecedents, no threat to the witnesses or tampering of evidences and the assessee is co-operating with the investigation. Further, the investigation is pertaining to the transactions of 2018, for which the investigation agencies have already attached the bank account and for alleged tax evasion amounting to Rs. 22.42 crores, the assessee has already deposited Rs. 2.5 crore.

The grant of anticipatory bail to a *bonafide* assessee under Section 438 of the Code of Criminal Procedure is a protection to the accused assessee who is apprehending arrest from the department for custodial interrogation, inspite of co-operation with the investigation. Such actions of the Department are arbitrary unless backed with reasonable believe based on tangible information.

⁶ 2021 (51) G.S.T.L. 139 (Del.)

⁷ 2020 (32) G.S.T.L. 516 (P&H)

⁸ 2021 (49) G.S.T.L. 357

DELAY IS A GROUND FOR QUASHING REASSESSMENT ORDER

The Hon'ble High Court of Gujarat in *Oceanic Foods Ltd. v. State of Gujarat*⁹, has quashed the reassessment proceeding initiated by the Department under the Gujarat Value Added Tax Act, 2003 against the assessee.

In this case, the Respondent Department passed the final audit assessment order under Section 34 of the VAT Act and accordingly refund was assessed for the Assessment Year 2011-12. However, the Department vide notice called for the book of accounts of the assessee for the AY 2011-12 and thereafter show cause notices were issued under Section 34(8A) of the Act, on the ground of reason to believe. On assessment, the Department passed a demand notice was issued.

The Hon'ble Court placing reliance on the *Dhanani Imp. Exp. Pvt. Ltd. v. State of Gujarat*¹⁰, and failure to comply with the pre-condition prescribed under Section 34(8A) wherein the pendency of proceeding is must under Section 35 or 75, quashed the reassessment order by the Department. Additionally, the Hon'ble Court stated that the initiation of the reassessment proceedings after 7 years, on the basis of objections of audit not sustainable. Therefore, the actions of the Department is *ultra vires* of the jurisdiction.

The delay or laches in proceeding without a reasonable ground of such delay and failure of compliance of the statutory requirement may be grounds for quashing of the reassessment. Further, such actions of the Department are arbitrary and unlawful.

⁹ 2021 (51) G.S.T.L. 182 (Guj.)

¹⁰ SCA Nos. 9519-9520 of 2016

TAX AUTHORITIES BOUND BY THE RESOLUTION PLAN PASSED

UNDER INSOLVENCY AND BANKRUPTCY CODE

The Insolvency and Bankruptcy Code, 2016 defines the classes of creditor into two categories i.e. financial creditor and operational creditor, any of these creditor may file an application for initiation for corporate insolvency proceedings. For revival of the company, the committee of creditors pass a resolution plan, approved by the Tribunal i.e. National Company Law Tribunal (NCLT).

In the present case of *GGs Infrastructure Pvt. Ltd. v. Commissioner of CGST & Central Excise*¹¹ the Hon'ble High Court of Judicature at Bombay, has held that the Government Authorities against whom the tax liability exist shall be an operational creditor for the provisions of the Code, 2016 and such the statutory dues shall be payable to the Department in accordance to the resolution passed by the committee of creditors and approved by the Tribunal. In this regard, in the present case, the due service tax shall be payable in accordance to the resolution plan i.e. at 5% of the principal adjudicated demand and waiver of interest, penal interest and penalties.

In conclusion, the resolution plan approved by the Tribunal in terms of the Insolvency and Bankruptcy Code 2016, aims at the revival of the company, therefore, the plan is binding on all the stakeholders including the Governmental Tax Authorities.

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¹¹ 2021 (51) G.S.T.L. 187 (Bom.)

¹² Majesty legal is law firm and aim of the present article is to provide insights on the recent legal development. The opinions presented in the article are personal in nature and not to be deemed as legal advice.