

Voluntary Payments during investigation

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By Vijay Kumar

YET another case of an eager taxpayer voluntarily paying tax, inspired by the **massage** of the investigating officers, but later realising that the payment was not really voluntary, was reported by us recently. - [2021-TIOL-828-HC-MAD-GST](#)

The petitioner is registered as a Small-Scale Industry under the MSME Act and is an assessee under the provisions of the Goods and Services Tax Act. An investigation was conducted in the premises of the petitioner on 22.10.2019 and various documents and registers seized. In the course of that investigation, a statement was recorded from one S.A.Kumar, to the effect that the petitioner has not discharged its GST liability correctly. In the statement, he accepts the mistakes and assured the Department that the liability would be discharged at the earliest with applicable interest.

This undertaking has been signed by the Managing Director on 22.10.2019. In line with the undertaking, the petitioner has, on the same day remitted a sum of Rs.1 crore. The second installment of the tax was paid on 30.10.2019.

However, on 05.11.2019 the Managing Director of the petitioner has retracted his statement and submitted to the DGGI that:

we would like to retract the version/statement mentioned in the MAHAZAR dated 22-10-2019. We would further like to inform you that your Ld. Authority had failed to mention the actual facts in the Mahazar which were informed to your Ld. Authority during the search proceedings along with relevant supporting documents in support of our claim.

despite we are supplying Nil/exempted goods, we have been forcibly made to make the payment of GST liability for the tax period July 2017 to March 2018 of Rs.1,00,00,000/- immediately on the same day i.e.22-10-2019 under the influence of coercion, threat and in a state of panic without providing any workings of determination of tax liability;

It has been 15 days from the date of search and yet your office has not provided us with the workings of actual determination of tax liability despite receiving frequent follow up calls from your office on enquiry of discharge of tax liability for which we are not bound to make any payment as per the provisions of CGST Act, 2017;

Shri.S.A.Kumar signed the MAHAZAR and paid the amount under the influence of coercion, threat and in a state of panic without giving an opportunity to read the content of the Mahazar and without providing the workings of the actual determination of tax liability;

Thus, the petitioner has stated that it has no liability to tax, that the MD and officials were forced to accept the liability and the admission was, by no means, voluntary. The petitioner has also made serious allegations about the high handedness of the authorities during the search and the scant regard expressed for the sentiments of the family of the Managing Director and employees of the petitioner. They state that the visit was on the eve of Deepavali and investigation was carried out in an intrusive and acrimonious fashion. The petitioner, leave alone celebrating the festival, could not even disburse bonus and gifts to its employees. In all, not just high handedness, but also **mala fides** is attributed in the conduct of the proceedings.

The High Court observed,

The ratio of the decisions relied by the petitioner and several more besides, are to the effect that no collection can be insisted upon prior to a final determination of liability being made. These decisions, in my view, still hold the field. What Section 74(5)

provides is the first opportunity to an assessee to pay tax, interest and penalty liability even prior to the issuance of a show cause notice and such acceptance will have to be in the form of either self-ascertainment or an ascertainment by the proper officer.

The Court also referred to the Gujarat High Court's proposed guidelines that No recovery in any mode by cheque, cash, epayment or adjustment of input tax credit should be made at the time of search/inspection proceedings under Section 67 of the [Central](#) /Gujarat Goods and Services Tax [Act, 2017](#) under any circumstances.

And ordered refund of the amount of Rs.2.00 crores collected.

What happens to a businessman if two crores are collected from him, when he claims that he need not pay any tax and that amount is unfairly retained by the department under the pretext of 'voluntary payment'? Are our taxmen out to destroy business? Their job is to collect the correct tax, not a penny more, not a penny less - and that too legally. The amount was collected in October 2019 and even after more than a year and a half, the department has not arrived at the tax liability, while happily retaining the **voluntarily** paid amount. Most probably, the department will end up paying interest for this voluntary payment - of course not before they explore all legal chances right up to the Supreme Court. Why can't these premier investigative agencies be trained to follow the laws?

And that reminds of a case that happened more than a decade ago. There was an export duty on steel products. The DRI gathered **intelligence**

that some steel units were not paying this export duty on steel cleared to SEZ as clearances to SEZ were deemed to be exports. After summons and **voluntary** statements, they **persuaded**

the steel units to pay the export duty. The persuasion was so strong that the units continued to pay the duty even after it was stayed by High Courts. While this was going on, the Central Excise side realised that these units were illegally taking cenvat credit in relation to the clearances to SEZs. The notice by Central Excise wing could be used as the reply to the notice by DRI.

Provisional Attachment only when it is necessary, not just because it is expedient

Yesterday, the Supreme Court delivered a significant judgement in relation to provisional attachments under GST - **2021-TIOL-179-SC-GST** . The judgement is amazing for the depth of knowledge of the Court in GST laws and procedures.

Some quotes from the judgement:

- it becomes necessary to emphasize that before 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 at a stage which is anterior to the finalization of an assessment or the raising of a demand.

- Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power.

- 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. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre-conditions by the Commissioner.

- While conditioning the exercise of the power on the formation of an opinion by the Commissioner that **"for the purpose of protecting the interest of the government revenue, it is necessary so to do"**, it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.

- By utilizing the expression **"it is necessary so to do"** the legislature has evinced an intent that an attachment is authorized not merely because it is expedient to do so (or profitable or practicable for the revenue to do so) but because it is **necessary to do so** in order to protect interest of the government revenue.

- Necessity postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated.

- 'Necessity' postulates a more stringent requirement than a mere expediency.

- A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallized.

- An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules.

- The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power.

- Each of these ingredients must be strictly applied before a provisional attachment on the property of an assessee can be levied.

- The Commissioner must be alive to the fact that such provisions are not intended to authorize Commissioners to make pre-emptive strikes on the property of the assessee, merely because property is available for being attached.

- There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue.

Let's hope the overactive officers would follow the Supreme Court.

Draconian

What does the term "**draconian**" mean?

The word "**draconian**" comes from "**Draco**"

. Draco was a legislator of Athens in Ancient Greece, and was responsible for implementing a written legal code. Before Draco, the system was one of oral law and blood feud.

Draco's laws were known to be very harsh - the death penalty as punishment for even minor offences like stealing cabbage. It is said that Draco himself, when asked why he had fixed the punishment of death for most offences, answered that he considered these lesser crimes to deserve it, and he had no greater punishment for more important ones.

So, the word "**draconian**" has come to mean something that is unusually harsh.

If the Supreme Court of the Country says that a law is draconian, it deserves all attention of the legislature which passes these laws and the bureaucrats who draft them.

Until next week