



#GSTCASE-129 USE OF THE WORDS “MAY”, “NECESSARY”, “IS OF THE OPINION”, “REASON TO BELIEVE”, “IS SATISFIED”, THEORY OF ABUSE OF DISCRETION

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This write up discusses in detail decision of Gujarat High Court in the matter of **Valerius Industries v. Union of India 109 taxmann.com 218 (Guj.)**. Hon'ble Court detailed out various aspects of Legal Jurisprudence which are not only relevant for Section 83 but also otherwise. It is very common to see that the legislature uses the words "is satisfied", "is of the opinion", "considers necessary" etc.

Section 83 talks about the opinion which is necessary to be formed for the purpose of protecting the interest of the government revenue. Any opinion of the authority to be formed is not subject to objective test. Section 83 is being reproduced hereunder-

"83. Provisional attachment to protect revenue in certain cases.

1. *Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner **is of the opinion** that for the purpose of protecting the interest of the Government revenue, it is **necessary** so to do, he **may**, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.*

2. *Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1)."*

1. **Use of the words "may"**-The use of the word "may" indicates not only the discretion, but an obligation to consider that a necessity has arisen to pass an order of provisional attachment with a view to protect the interest of the government revenue.

2. **Meaning of the Term "necessary"**-The word "necessary" means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word "necessary" must be construed in the connection in which it is used. The formation of the opinion by the authority should reflect intense application of mind with reference to the material available on record that it had become necessary to order provisional attachment of the goods or the bank account or other articles which may be useful or relevant to any proceedings under the Act. .

3. **Meaning of the term "as may be necessary"**-In **J. Jayalalitha vs. U.O.I.** , the Supreme Court while construing the expression "as may be necessary" employed in Section 3 (1) of the Prevention of Corruption Act, 1988 which conferred discretion upon State Government to appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases to try the offences punishable under the Act, observed :

"The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement. Further, the discretion conferred upon the Government is not absolute. It is in "The nature of a statutory obligation or duty. It is the requirement which would necessitate exercise of power by the Government. When a necessity would arise and of what type being uncertain the legislature could not have laid down any other guideline except the guidance



of "necessity". It is really for that reason that the legislature while conferring discretion upon the Government has provided that the Government shall appoint as many Special Judges as may be necessary. The words "as may be necessary" in our opinion is the guideline according to which the Government has to exercise its discretion to achieve the object of speedy trial. The term "necessary" means what is indispensable, needful or essential."

4. Use of the Terms "is satisfied", "is of the opinion" and "has reason to believe"-In Barium Chemicals Ltd. vs. Company Law Board , the Supreme Court pointed out, on consideration of several English and Indian authorities that the expressions "is satisfied", "is of the opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. Supreme Court in the matter of **Barium Chemicals Ltd. vs. Company Law Board** , the Supreme Court construed the expression "reason to believe" employed in [Section 147](#) of the Income Tax Act, 1961 and observed: **the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.**

6. Scope of the Term "Reason to Belief"-The statutory requirement of reasonable belief is to safeguard the citizen from vexatious proceedings. "Belief" is a mental operation of accepting a fact as true, so, without any fact, no belief can be formed. It is equally true that it is not necessary for the authority under the Act to state reasons for its belief. But if it is challenged that he had no reasons to believe, in that case, he must disclose the materials upon which his belief was formed, as it has been held by the Supreme Court in **Sheonath Singh's case** , that the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court. In the case at hand, Ms. Mehta, the learned A.G.P. Appearing for the respondents very fairly submitted that not only the impugned order of provisional attachment is bereft of any reason, but there is nothing on the original file on the basis of which this Court may be in a position to ascertain the genuineness of the belief formed by the authority.

7. Meaning ascribed to "reason to believe" equally applicable to "is of opinion"-In **Bhikhubhai Vithalabhai Patel** (supra), the Supreme Court observed in paras 32 and 33 as under:

"32. We are of the view that the construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion" employed in the proviso to [Section 17](#) (1) (a) (ii) of the Act. The expression "is of opinion", that substantial modifications in the draft development plan and regulations, "are necessary", in our considered opinion, does not confer any unlimited discretion on the Government. The discretion, if any, conferred upon the State Government to make substantial modifications in the draft development plan is not unfettered. There is nothing like absolute or unfettered discretion and at any rate in the case of statutory powers.

8. Scope of the Term "is of the Opinion"-The language leaves no room for the relevance of an official examination as



to the sufficiency of the ground on which the authority may act in forming its opinion. But, at the same time, there must be material based on which alone the authority could form its opinion that it has become necessary to order provisional attachment of the goods or the bank account to protect the interest of the government revenue. The existence of relevant material is a precondition to the formation of opinion. Therefore, the opinion to be formed by the Commissioner or take a case by the delegated authority cannot be on imaginary ground, wishful thinking, howsoever laudable that may be. Such a course is impermissible in law. At the cost of repetition, the formation of the opinion, though subjective, must be based on some credible material disclosing that is necessary to provisionally attach the goods or the bank account for the purpose of protecting the interest of the government revenue.

Use of the Words “in the opinion...there are circumstances suggesting” in Section 237 of Companies Act, 1956- The Supreme Court while construing [Section 237](#) of the Companies Act, 1956 in **Barium Chemicals Ltd. vs. Company Law Board** held :

“The legislature no doubt has used the expression “circumstances suggesting”. But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression “circumstances suggesting” cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three subclauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower’s Modern Company Law nd (2 Ed.) p. 547 where the learned author, while dealing with [S. 165\(b\)](#) of the English Act observes that “the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion” and that “they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality.” There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in subclauses (I), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for anyone to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

9. Theory of “abuse of discretion” -The basic principles in this regard are clearly expressed and explained by **Prof. Sir William Wade in Administrative Law (Ninth Edn.)** in the chapter entitled 'abuse of discretion' and under the general heading the principle of reasonableness' which read as under :

“The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown’s lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real



question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."

10. Powers of the Court to examine material available, reasons recorded and whether they have connection with the formation of opinion:- The Court is entitled to examine whether there has been any material available with the State Government and the reasons recorded, if any, in the formation of opinion and whether they have any rational connection with or relevant bearing on the formation of the opinion. The Court is entitled particularly, in the event, when the formation of the opinion is challenged to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the court to examine the question whether reasons for formation of opinion have rational connection or relevant bearing to the formation of such opinion and are not extraneous to the purposes of the statute."

11. Absence of "Cogent Material" in arriving subjective satisfaction: In the absence of any cogent or credible material, if the subjective satisfaction is arrived at by the authority concerned for the purpose of passing an order of provisional attachment under section 83 of the Act, then such action amounts to malice in law. Malice in its legal sense means such malice as may be assumed from the doing of a wrongful act intentionally but also without just cause or excuse or for want of reasonable or probable cause. Any use of discretionary power exercised for an unauthorized purpose amounts to malice in law. It is immaterial whether the authority acted in good faith or bad faith. In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of **Smt. S.R. Venkatraman v. Union of India reported in (1979) 111 ITR 25(SC)** where it had been held:

"There will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non existing fact or circumstances. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience and as things go, they may well be said to run into one another. The influence of extraneous matters will be undoubtedly there where the authority making the order has admitted their influence. An administrative order which is based on reasons of fact which do not exist must be held to be infected with an abuse of power."

We may also refer to and rely upon a decision of the Supreme Court in the case of **ITO Calcutta v. Lakhmani Mewal Das reported in [(1976) 103 ITR 437 (SC)]** wherein it had been held as under:

"The reasons for the formation of the belief contemplated by section 147(a) of the Income-tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the I.T.O. And the



formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the I.T.O. On the point as to whether action should be initiated for reopening the assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.

The reason for the formation of the belief must be held in good faith and should not be a mere pretence."

12. Reason to Believe under Section 67 are not enough for being reason to believe under section 83- It would be a big mistake on the part of the respondents to understand that the reasons to believe necessary for the purpose of carrying out inspection, search and seizure under [Section 67](#) of the Act, 2017 would be sufficient enough for the purpose of formation of the opinion that it is necessary to provisionally attach the goods or other articles for the purpose of protecting the interest of the government revenue. In our opinion, [Section 83](#) of the Act stands altogether on a different footing. The considerations also are quite different for the purpose of exercising the power of provisional attachment under [Section 83](#) of the Act. Just because, some proceedings are initiated under [Section 67](#) by itself would not be sufficient to arrive at the satisfaction that it is necessary to provisionally attach the property for the purpose of protecting the interest of the government revenue. The power has been specifically conferred upon the Commissioner to form such an opinion. The legislature was quite alive to the fact that an order of provisional attachment cannot be as a matter of course. It is one of the drastic measures which the authority may be compelled to take if the situation demands for the purpose of protecting the interest of the government revenue. Under [Section 67](#) of the Act, 2017, the legislature has thought fit to use the words "proper officer not below the rank of Joint Commissioner". In [Section 83](#), even that discretion is taken away and it is only the Commissioner who has been empowered to act under [Section 83](#) of the Act. In our opinion, therefore, the subjective satisfaction, which is required for the purpose of [Section 83](#) of the Act, is not dependent on [Section 67](#) of the Act or to put it in other words, just because, a search has been undertaken resulting in seizure of goods by itself may not be sufficient to arrive at the subjective satisfaction that it is necessary to pass an order of provisional attachment to protect government revenue.

13. Use of Power of Provisional Attachment of Bank Account- "Halsbury's Laws of India (Direct Tax II, Vol 32), 2nd Edn. Halsbury's Laws of India (Direct Tax II, Vol 32) 2nd edn. 7. Miscellaneous

This provision relating to making an attachment before judgment, i.e, before assessment order is made, is legal if assessing authority is of opinion that it is necessary to protect interests of revenue and same is supported by supervening factor. It gives guidelines for making provisional attachment and is, thus, constitutionally valid. The power conferred upon the Assessing Officer under this provision is a very drastic farreaching power and that power has to be used sparingly and only on substantive weighty grounds and reasons. To ensure that this power is not misused, a number of safeguards have been provided in the provision itself. This power should be exercised by the Assessing Officer only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should therefore be exercised with extreme care and caution. Moreover. Power under this provision is to be exercised only if there is sufficient material on record to justify satisfaction that assessee is about to dispose of whole or any part of his property with a view to thwarting ultimate collection of demand and in order to achieve said objective attachment should be of properties and to extent it is required to achieve this object. It should neither be used as a tool to harass the



assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. Attachment of bank accounts and trading assets should be resorted to only as a last resort. In any event, attachment under this provision should not be equated with attachment in the course of recovery proceedings. In the event the revenue is adequately protected by attachment, there is no justification for Assessing Officer for making an order of assessment. Further, provisional attachment can be levied even in cases where proceedings under provisions of the Income-tax Act, 1961 dealing with search and Seizure are yet to be initiated. Therefore, invoking this provision and issuing notice under the provision of the Income-tax Act, 1961 dealing with assessment in case of search or requisition on same day would not effect validity of order passed under this provision.

Where on facts Assessing Officer was satisfied that it was necessary to attach properties of assessee in order to protect interest of revenue and due approval was taken from concerned Commissioner who opined that it was not a case for provisional attachment, order passed under this provision in respect of certain properties of assessee would not warrant judicial review. It is for assessing authority to decide as to which of assets could be liquidated without difficulty for realization of tax assessed. Moreover, an assessee cannot compel Assessing Officer to attach any particular property. Since this provision provides for attachment of property of assessee only and, therefore, an order directing attachment of fixed deposits of assessee would be illegal. However, this provision does not contain requirement of hearing before passing order of provisional attachment of assessee's bank account. Application of the assessee pending before Assistant Commissioner for release of assets attached must be disposed of as early as possible for the ends of justice.

An order for provisional attachment passed under this provision is valid only for a period of six months and ceases to have effect after the expiry of six months from the date of the order. However, time can be extended for a further period of six months. Appropriate order for extension of period of provisional attachment would only be passed upon satisfaction of the criteria listed out. An injunction/stay order passed during pendency of assessment proceedings does not on its own or by deeming fiction extend the period stipulated in the order. Upon the expiry of the period stipulated in the order demanding provisional attachment, assessee is entitled to encash his money minus any tax due. An extension of provisional attachment without recording any reasons, such order must be taken to be illegal and non est. When assessee has filed an appeal challenging order of assessment within time period prescribed under the provision of the Income-tax Act, 1961 dealing with appealable orders along with a stay application, Assessing Officer cannot pass an order of attachment in terms of this provision during pendency of said appeal. When property, which is subject matter of provisional attachment, is sufficient to satisfy tax liability and safeguard interest of revenue, petitioner can seek release of provisional attachment in respect of other properties and amounts due from debtors and depositors."