Can the department resort to the recovery action without assessment of the liability?

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As discussed in this column earlier, the department cannot recover any amount of tax or interest or penalty or any other amount without first issuing a show cause notice to the person concerned as mandated in law. The applicability of this established principle of law is not confined only to Excise, Service Tax or Customs but also extends to the GST laws as well. However, unfortunately, the department is known to resort to arbitrary recovery action, often than not, in total disregard of this established principle. What is, indeed serious is the fact that the statutory provisions which are basically aimed at protecting the Government's revenue from the nefarious activities of the tax evaders, are being only used by the department against the honest and compliant taxpayers in an unreasonable and unchecked manner.

The provisions relating to the various modes available to the department for the recovery of any amount payable by a person to the Government are contained in Section 79 of the CGST Act, 2017. When any amount is due and payable by a person to the Government, the proper officer may, for the recovery thereof, apply any of the modes prescribed under Section 79 and initiate action against the said person. These statutory provisions of Section 79 relating to the 'Recovery of tax' also include the 'Garnishee proceedings' vide clause (c) of sub-section (1) thereof.

By initiating the Garnishee proceedings, the proper officer can issue a notice to a third party like the Bank or a debtor of a person concerned for the purpose of the recovery of tax or any other amount payable by such person to the Government and direct the third party to pay the specified amount to the Government which otherwise it owes or is required to pay to the said person. For instance, if any amount belonging to the person concerned is lying or being credited in the account of that person which he holds with the bank or a buyer (debtor) is required to make a payment to such person against the supply obtained from him then in that case, the proper officer can issue a notice in terms of Section 79 to the Bank or the buyer (debtor) and direct them to not pay the specified amount to the person concerned but pay the amount to the Government treasury.

While the statute provides for such Garnishee action by the department for the purpose of recovery of tax, etc., many issues arise with regard to such action being taken by the department. The issues as to "Can the department initiate such recovery proceedings without completing the assessment of the amount of tax, etc. payable by a person? Can the department resort to Garnishee proceedings without first issuing a show cause notice under Section 73 or Section 74 of the CGST Act, 2017 and its adjudication by the competent authority? Is the department obliged in law to follow the principles of natural justice before initiating any such action against any person? At which stage can the department initiate such action?" are but a few of the issues that require serious consideration. The provisions of Section 79 of the CGST Act, 2017 are *pari materia* with the provisions of erstwhile Section 11 of the Central Excise

Act, 1944 and the erstwhile Section 87 of the Finance Act, 1994. It will, therefore, be advantageous to have a brief look at a few judgements rendered by the Courts in the context of these provisions relating to Excise or Service Tax and the principles of law established thereunder.

In the case of **ICICI Bank Ltd. vs. UOI – 2015-TIOL-1164-HC-MUM-ST,** the Hon'ble Bombay High Court has observed and held that an amount which is payable by a person can be said to be payable only after there is a determination under Section 72 or Section 73 of the Finance Act, 1994 and without there being any adjudication, coercive steps cannot be taken for recovery of service tax or penalty or interest.

In yet another judgement rendered by the same Court in the case of **M/s. Quality Fabricators & Erectors vs. the Deputy Director, DGCEI – 2015-TIOL-2710-HC-MUM-ST,** it has been held by the Hon'ble Court that unless and until there is a crystallisation of a demand by proper adjudication order and on hearing of the Petitioner therein, there was no question of any recovery. With these observations, the Hon'ble Court quashed and set aside the Notices issued by the department and addressed to the Bank to freeze the Current Accounts of the Petitioner before it.

Reaffirming the aforesaid principle of law as established in the above and other catena of judicial pronouncements, yet another judgement has recently been delivered by the Hon'ble Bombay High Court in the case of **M/s. New India Civil Erectors Pvt. Ltd. vs. UOI – 2020-TIOL-1644-HC-MUM-ST,** wherein it is held that before proceeding to recover the amount by issuing garnishee notice under Section 87(b) (i) of the Finance Act, 1994, the amount has to be first determined and quantified and thereafter not paid by the person required to make the payment as per law. The Hon'ble Court further held that the garnishee notice has to be preceded by determination of the amount due and not paid and that the amount payable has to first crystallise. As regards the reliance placed by the Revenue on the statements of the Officials of the Petitioner, the Hon'ble Court observed as under:

"23. Reverting back to the facts of the present case, we notice that Respondents are relying on two statements made by officials of the Petitioner; one on 19.12.2019 and the other on 13.02.2020. Mere making of such statements by themselves cannot lead to any conclusion that certain amount has been determined as due from the Petitioner. Finance Act, 1994 provides for various provisions for making assessment for determining the amount of service tax required to be paid by the service provider, including best judgment assessment under Section 72 which provision can be invoked when there is failure to furnish the return or failure to assess the tax. Without there being an assessment, no conclusion can be reached that any amount has become due to be paid. In the absence of such determination of the tax due, recourse to Section 87 of the Finance Act, 1994 would certainly be premature and cannot be justified."

With the above observations, the Hon'ble Court directed the Respondent to forthwith withdraw the restraint on the Petitioner's bank account so that the same can be made functional for the Petitioner.

In the case of **Tata Teleservices (Maharashtra) Ltd. vs. the Ministry of Finance – 2014-TIOL-147-HC-MUM-ST**, the Hon'ble High Court deprecated the recovery proceedings initiated by the department even before the expiry of time limit provided in law for filing an appeal against the Order vide which a demand was confirmed against an Assessee. The Hon'ble High Court observed that the communication issued by the department insisting on the payment by the Petitioner of the amount adjudicated upon by the adjudication order without waiting for the statutory period of three months provided in law to enable the filing of an appeal and stay application to the Tribunal is over, is not only contrary to the provisions of the Finance Act, 1994, but also to the Circular dated January 01, 2013 issued by the CBEC. Castigating such communication as **'high-handed'** the Hon'ble Court reminded the Revenue Officers that they would do well to realise that their job is much more than merely collecting the tax and that as the Officers of the State administering the Finance Act, 1994, fairness in approach to the taxpayer and acting in accordance with the Rule of Law is a *sine-qua-non* in discharge of all its functions. The Hon'ble Court, accordingly, disposed of the Petition by quashing and setting aside the impugned communications of the department and restraining the Revenue authorities from adopting any coercive proceedings for the recovery of tax dues in terms of the adjudication order till the disposal of stay application by the Tribunal, in the event, the Petitioner files an appeal and a stay application within the statutory period as prescribed.

Various High Courts have, time and again, reiterated the aforesaid settled principles of law vide their judgements pronounced in various cases involving similar issues. Even in the context of such recovery via garnishee action in terms of Section 79 of the CGST Act, 2017, various High Courts have affirmed the same principles of law. The judgements of the Hon'ble Madras High Court in the case of **M/s. V.M. Mehta and Company vs. Assistant Commissioner – 2019-TIOL-2594-HC-MAD-GST**; by the Hon'ble Jharkhand High Court in the case of **Mahadeo Construction Company vs. UOI – 2020-TIOL-850-HC-JHARKHAND-GST** and by the Hon'ble Andhra Pradesh High Court in the case of **Spy Agro Industries Ltd. vs. Asst. Commissioner of Central Tax – 2020-TIOL-2002-HC-AP-GST** deserve special mention here.

It may be noted here that in terms of Section 78 of the CGST Act, 2017, the recovery proceedings can be initiated only if any amount payable by a taxable person in pursuance of an order passed under the Act is not paid by such person within a period of three months from the date of service of such order on him. The period of 'three months' is provided for the purpose of filing of an appeal by the person aggrieved by an order confirming the demand against him, before the Appellate Commissioner or the GST Appellate Tribunal (not yet established) in terms of Section 107 or Section 112, as the case may be, of the CGST Act, 2017. The provisions of Section 107 and 112 also, inter alia, require the pre-deposit of the disputed amount as specified therein by the Appellant while filing the appeal thereunder. Once the taxpayer has filed such appeal and also made the pre-deposit of the specified amount, the department cannot take any recovery action against such taxpayer as is the settled law. The ratio of the principle laid down by the Hon'ble Bombay High Court in Tata Teleservices' case (supra) squarely applies here even in the context of the GST laws.

There is nothing surprising about the arbitrary recovery action being undertaken by the Revenue officers in total disregard of the statutory provisions and the established principles of law when they continuously strive to achieve the unrealistic revenue targets! However, unfortunately, it is only the taxpayers who suffer due to such illegal action of the department even while there is no real gain for the Revenue due to such exercise! In the end, the (monetary) benefit of this state of affairs accrues only to the professionals like Advocates, Chartered Accountants, etc.!

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