

Gurugram Branch of NIRC

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Chairman's Message

CA Nitin Kataria,
Chairman, Gurugram Branch

Dear Professional Colleagues,

Warm greetings for a Happy and Prosperous 2022. This year promises landmark and progressive changes for us as we welcome the new era and the developments it brings.

Gurugram Branch of ICAI has always been a firm believer of the fact that independence, integrity and excellence are best accompanied with consistency and persistent eyes on the goals. It urges one and all to not let their New Year resolutions get lost in daily routines. Rather, with unbridled willpower and undying determination induced by this new beginning, we hope you materialise all your dreams and aspirations.

2021 also marked the end of the term of the Councils i.e., the change of guard at our apex. ICAI Elections were conducted pan-India and I am pleased to state that the electoral process was well-conducted and concluded smoothly. I compliment members – both in practice and in industry – for their support to this system.

During the past month we conducted various programmes for our members. The most important programme of the past month was the organisation of **“Mobile Cancer Screening Camp, Complete Health Checkup and Blood Donation Camp in association with Canwin Foundation Gurugram and Marwari Yuva Manch, Gurugram Branch”** which was of immense value to the participants as we were joined by more than 125 plus members & their family. We also organized **Seminar on Opportunities In M&A And Alternate To Bank Funding** and also organized **Seminar on Investing In Stocks, Future And Options and Its Taxation**. These events have touched upon various aspects from updates, peer interactions to exploring professional opportunities. The gathering in these events shown us a way that members are once again ready to participate and interact with each other.

I sincerely thanks all the members of Gurugram branch & all other branches for taking active participation in our activities including the webinar participation. We assure you that we will keep on doing such activities on regular basis to always keep you a step forward.

Stay safe, stay healthy.



Potential Sources of Municipal Finance in India

Author: CA. AMITAVA BASU

Traditionally municipalities are financed through grants and budgetary allocations made by the higher levels of government. However, available funds are usually insufficient to meet the growing needs. So, various municipal bodies in India have adopted different strategies to augment their sources of finance. Number of cities has engaged private sector partners using their real estate assets for urban renewal and income generating services such as parking lots, bus terminals and municipal markets. A few cities have adopted Public Private Community Partnerships for inclusion of community for development of social projects like parks & playgrounds, and street lighting. Some large municipalities have accessed the capital market by issuing municipal bonds after completion of credit risk assessment. Also, value capture finance is another mode used. It is recovery of a share of the increment in land valuation due to the positive externalities from actions other than the land owner's investments. Raising capital through monetizing the land and other assets include sale of air rights, development charges, levy of impact fee on high rise buildings.

Appropriate means of finance, however, depends on the contextual situation of each municipal body..

Introduction

In view of rapidly increasing urbanization, there is enormous stress on urban system in India, in this context, Municipalities assume significant role and responsibility in building robust civic infrastructure, improving service delivery, and broad-basing development across the local community through easy and affordable accessibility. And, here comes the significance of having stable and robust financial status. However, the financial status of most of the municipalities in the country is considerably weak.

Municipal Finances

The revenue base of municipalities can be categorized into two types: (i) External Sources, and (ii) Internal or Own Sources.

External Sources of Income consists of grants-in-aid, plan grants and shared taxes received from the provincial government and/or the national government. Income from these sources could be one-time such as for a specific project and is called "Capital Income"; and/or recurring every year such as shared taxes and is called "Revenue



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Income". Revenue from external sources is to a large extent dependent on the policy and program of the provincial government and/or the national government, and municipalities have limited option to leverage receipt of such income.

Internal or Own Sources of Income arise from taxes and fees that are levied by municipalities, and is usually recurring in nature and called "Revenue Income". Internal or Own Sources of Income comprise:

- a. Tax Revenue, which is a contribution to a collective pool of money by the residents of the city, and it does not necessarily pertain to a service provided by a municipality, as for example, property tax, vacant land tax, tax on animals, tax on carriages and carts, and advertisement tax.
- b. Non-Tax Revenue consists of (i) fees in consideration for a specific service provided by a municipality to the person paying the fee, and usually the fee should not be more than the cost to provide the service, (ii) sale and hire charges, (iii) user charges, and (iv) lease and rental amounts.

A study of the financial position of the

municipalities shows:

1. Income of municipalities from Internal or Own Sources is significantly low to meet the recurring expenditure, which consists of establishment expenses, administrative expenses, operation & maintenance expenses and interest and finance charges.
2. Municipalities are heavily dependent on assistance from government to defray its regular expenditure.
3. Property tax constitutes the major income from Internal or Own Sources. In several municipalities, revenue from property tax is not buoyant because of absence of updated property records through periodical survey, and no revision of rate of property tax over years.

In this backdrop, it is of paramount importance for municipalities to augment its Internal or Own Sources of Income to minimize dependence on assistance from the provincial government and/or the national government, strengthen the financial position, ensure financial sustainability, and provide better civic facilities.

New Sources of Revenue

For any municipality, funds flow broadly from



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two sources – (i) internal generation through surplus of income over expenditure; and (ii) borrowings. Hence, augmenting Internal or Own Sources of Revenue assumes significance. A few potential sources of internal sources of revenue are discussed below.

Urban Infrastructure Benefit Tax

To enhance Internal or Own Source of Revenue along with development of civic infrastructure, many municipalities in India have availed of Urban Infrastructure Benefit Tax (UIBT).

UIBT are those that are compulsory levies applied to individuals or institutions who benefit from certain government/municipal services. These taxes are not directly related to the receipt of specific services but the revenues are required to be spent for particular purpose or service. An example of UIBT is development charge levied on all new development for provision of infrastructure. The distinguishing feature is that the revenue is spent on a specific service though its delivery to an individual taxpayer cannot be measured. A few of the UIBT that are imposed by some of the municipalities in the country are outlined hereunder.

- **Betterment Tax**

"Betterment tax" means a tax charged on the increase in the value of the land comprised in a development scheme, but not actually required for the execution thereof, or on the increase in the value of any land adjacent to and within a reasonable limit of the boundaries of such scheme, provided that such adjacent land is situated within the jurisdiction of the municipality. In number of cities such as Bengaluru, Hyderabad, Mumbai, etc. betterment tax has been introduced.

- **Impact Fees**

Impact Fee is a variant of betterment tax and levied by using 'rational nexus'. It implies rationally linking to an impact created by a particular development and the demonstrated need of the particular development pursuant to area improvement plan and program. The fees assessed cannot exceed the costs of improvement and from the costs, amount received as grants from the government or any funding agency is excluded. Impact fee is typically required to be made as a condition of approval at the time when building permit is issued to a developer or an individual or an institution. However, it is to be taken into account that impact fee is not charged on improvement of areas where low-income residents live



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because of socio-economic considerations. Hyderabad and Ahmedabad used the label of Impact Fee. In case of the former it is an area based charge and in the latter case it is the fee for regularizing unauthorized development.

- **Premium on Relaxation of Rules or Additional FSI**

Relaxing rules including grant of additional Floor Space Index (FSI) by charging 'Premium' has emerged as fiscal tool. The term 'premium' seemed to have been invented to avoid the terms like 'tax' or 'fee', which require legal authority and an explicit rationale rooted in 'quid pro quo' in case of a fee as adopted in Chennai.

Land Monetization

It is observed that many heritage cities like Varanasi have land assets built over a long period of time for variety of purposes. In the recent past many municipalities have begun to use some of these in Public-Private Partnership (PPP) format (simply conditional leasing of land) to build assets for public purpose and services. Typically, hospitals, markets and public parking have been developed in this manner. This, though serves the public purpose, does not become direct land-based fiscal tool. Approach could be tak-

en to use municipal lands for generating additional financial resources through PPP route on revenue sharing model.

Advertisement Tax

Cities constitute major consumer centers and, therefore, most manufacturing companies are eager to advertise their products. Municipalities can take advantage of this situation and raise substantial revenue by leasing out all important locations through, say, public auction, leaving aside areas that are declared "hoarding free". It may be cited that in case of Vijayawada Municipal Corporation, advertisement tax is levied on hoarding, slides in cinema halls, advertisements on buses, and bus shelters. This source of income has grown considerably over the years.

Tourist Fee

Cities such as Udaipur, Varanasi, and others which have large tourist inflow may consider imposing a fee on tourists visiting the city and using the civic facilities. This fee could be termed "Tourist Fee". The fee rates could be for each night stayed and structured on a fixed rate basis irrespective of place of stay for sake of simplicity in administration. However, those tourists staying with relatives or friends or on home stay arrangement or on bed and breakfast basis could be ex-



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cluded from being charged this fee for administrative and operational simplicity and ease, as well as in view of the small scale of operation of such enterprises.

Other Revenue Sources

Other avenues of income that are available for exploration by the municipalities are:

1. Multi-Level Car Parking which could be developed on PPP model; and revenue generated from parking fees, advertisement and commercial rental. The revenue so generated could be shared between the municipality and the private sector investor on an agreed basis.
2. Rental Charges from underground ducts could be charged on all cable companies and other utilities that will be using the ducts.

Accessing Capital Market

Enhancing Internal or Own Sources of Income of municipalities through hitherto largely untapped potential revenue generators enables them to attain increase in income flow to meet the expenditure and provides financial stability. Primarily based on the extent of revenue generation and financial soundness, Municipalities could obtain respectable credit rating and access the

capital market for borrowings through bond issue. There are several instances of different municipal bodies such as Ahmedabad Municipal Corporation, Kolkata Municipal Corporation, etc issuing municipal bonds in the past.

With improved revenue streams and tidy 'house-keeping' in terms of proper accounting & budgeting; financial planning & monitoring; clearly defined procedures and rules, and enforcement thereof; and application of information technology, Municipalities can access the capital market for borrowings. Instead of borrowing for routine operations, focus should be on development of revenue earning projects to ensure cash inflow and consequent provision for debt servicing.

In Sum

it may be underlined that as same medicine may not be effective for all patients, similarly appropriateness of sources of fund differs from one municipality to another. For instance, the revenue and fund sources that are available or suitable for metro cities may not necessarily be appropriate for non-metro and small cities. Hence, suitable avenues for revenue and fund have to be identified and prioritized by each municipality, and made with reference to contextual situation.



Global Minimum Taxation

Author: CA. Suraj Nangia

Global Minimum Taxation -Background

Since 2019, the OECD has been assessing plans to deal with tax issues emanating from the increasing digitalization of economies. OECD/G20 members have adopted a *two-pillared approach* to address the prime concern of taxation of digital economy. Pillar Two is a Global Minimum Tax (GMT) regime which aims to eliminate extreme tax competitions among countries. The agreement entails paying a 'top-up tax' at the level of the parent company if income earned further down the ownership chain has been taxed at a rate less than the agreed rate i.e. 15%.

Such an arrangement is bound to have a significant impact on tax incentives offered by governments across the globe. For instance, if a government in a country offers a beneficial tax regime which results in a significantly reduced rate of taxation, this will be of no benefit as the multinational will have to pay a "top-up tax" in relation to that income in the parent jurisdiction. Resultantly, it will neutralize the low tax incentive. In view of the GMT regime, governments are likely to adopt alternatives such as subsidies or grants to

incentivize multinationals and attract investments.

The newly released GloBe rules

The OECD has released model GloBe rules under Pillar 2 with a view to provide guidance to the participating jurisdictions in effectuating the Global Minimum Taxation regime into their domestic legislations. The rules provide that all constituent entities of an MNE group with annual revenue of EUR 750 million or more in at least two of the four fiscal years immediately preceding the tested fiscal year shall be subjected to the 15% tax rate. Certain categories of entities viz. government entities, international organizations and non-profit organizations, as well as entities that meet the definition of a pension, investment or real estate fund are excluded from the scope of the GloBe rules. The OECD's release has also provided that the rules shall apply to joint ventures (JVs), multi-parented MNE groups and also in cases of mergers where involved entities are brought under common control.

The main rule i.e. the income inclusion rule (IIR) applies on a top-down basis and requires the ultimate parent company to pay any tax



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due to the tax authority in its country. The tax due is the "top up" amount required to bring the overall tax on the profits in each country where the group operates up to the minimum effective tax rate of 15%. The secondary rule i.e. under-taxed payment rule (UTPR) operates as a backstop to the IIR. Under the UTPR, constituent entities of an MNE Group resident in a jurisdiction that has adopted the UTPR regime into law, will either be denied a deduction or be required to make an equivalent adjustment under domestic law in an amount, resulting in an additional cash tax expense equal to the UTPR top-up tax amount.

Further, the rules have addressed the most imperative consideration i.e the standard base or the taxable income which shall be subject to taxes under the finalised regime. The GloBE income or loss of each constituent entity in a jurisdiction is the "Financial Accounting Net Income or Loss" determined for the constituent entity for the Fiscal Year, adjusted for specific items of income or expense, such as dividends and capital gains relating to non-portfolio shareholdings, any asymmetric foreign currency gain, international shipping income, prior period errors and changes in accounting principles. The intent of the

adjustment is to align the financial accounts with tax purposes.

In addition, the Net GloBE Income for a jurisdiction will be reduced by a substance-based income exclusion comprising a "payroll-exclusion" amounting to 5% of eligible payroll costs of eligible employees and a "tangible asset exclusion" amounting to 5% of the carrying value of eligible tangible assets located in the jurisdiction. Thereafter, the top-up rate i.e. the difference between the 15% minimum rate and the Effective Tax Rate (ETR) in a jurisdiction will be applied on an MNE's income.

The revolution of the international tax system will have far-reaching implications and will also cast significant compliance requirements on MNEs. A "GloBE Information Return" in a standard template will have to be filed with the tax administration of the concerned jurisdiction within 15 months of last day of the Reporting Fiscal Year. However, as a transitional relief, the return will be allowed to be filed no later than 18 months after the last day of the transitional fiscal year.

The ultimate parent company (or an appointed group member) will file the return with its local tax authority, who will then



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exchange the agreement with other tax authorities where a qualifying competent authority agreement is in place. However, constituent group entities located in a country which does not have an exchange agreement in place will be required to file a copy of the return with their local tax authority.

The next steps for India

The model rules released by the OECD are intended to assist governments in incorporating the global minimum tax into their domestic tax legislation. However, there are complexities revolving around several key considerations including the calculation of ETR and the top-up tax. To accord clearer understanding of the GloBe rules, the OECD is further set to provide more guidance by way of a Commentary and a Pillar 2 implementation framework during the course of 2022.

The Indian government effusively supports the OECD's project and expects to raise a considerable amount of additional corporate income taxes on the basis of the Pillar 2 rules. India has given in to OECD's requirement of immediate with-

drawal of unilateral digital services tax and a commitment not to introduce such measures in the future.

Anticipations are rife that the GMT regime will be implemented from January 2023. It is not yet clear how the rules will be included in the extant provision of the Indian tax code. However, with Pillar 2 only a year away, India will have to integrate GloBe rules into the domestic legislation in an expeditious manner. The Budget 2022 is impending and it is probable that the government will unfold its proposals to operationalise the "Global Minimum Taxation" regime.



The Rising Fintech Space

Author: Asvini Krishnan

India has witnessed a massive change in the financial services sector over the last 7 years. This change is attributable to the emergence of Fintech companies. A Fintech company may be defined as a tech company operating in the Financial services space, to quote a few areas – Insurance, Payments, Lending and loan management, Wealth management etc. This fast-paced growth can be credited to a lot of factors as below

- Government policies,
- Access to capital
- Indian Demographics- burgeoning tech savvy population, underbanked Indian population.

These Fintech companies have created a huge impact on this country as well as financial services space

1. Ease of transactions- With the Payments ecosystem, UPI/ QR etc, transferring payments has become like swooshing of magic wand. Most transactions are happening through Mobile phones.
2. These digital modes of payment are

gradually leading to shift from cash mode to cashless mode of transaction.

3. The reach of these technology companies is massive, they are able to facilitate lending/banking facilities to the underbanked strata of the population creating financial inclusion.
4. New age lending tools are being used by these companies to manage risks, which is a very important pillar of lending.
5. New / Flexible products suitable for all kinds of prospective borrowers
6. Borrower / Loan management
7. Wealth management through low cost brokerage firms, investment in mutual funds.
8. Insurance, which again was associated with big bank and state run companies is also undergoing transformation
9. Creating of job opportunities

There is hardly any space of our day to day lives, which these companies have not touched and this is expected to grow. A combination of these in-vogue companies along with Banks and NBFC can surely push India and its citizens towards growth.



BNPL (Buy Now, Pay Later): Part 1

Author: CA. Nipun Grover

From the Author:

This is going to be a series of explanations and discussions on the most hyped fintech product today which is BNPL (Buy Now, Pay Later). You must be hearing this word from all the E-commerce players or many Fintech companies launching their BNPL product every day. Nobody wants to stay behind in this race. There is FOMO (fear of missing out) with all the companies today to get into this space as early as possible.

This is the first part where we start our interaction with the basics of BNPL and get an idea about what is BNPL and types of micro lending products in the market.

For keeping yourself updated in this space, you can follow me on LinkedIn at <https://www.linkedin.com/in/nipun-grover-04299ba0/>

Will be more than happy to connect if you like my content and take our discussion to the next step.

Now, let's get into the Basics

What is BNPL?

I am sure, you would have heard this word somewhere or the other or even read on

some of the apps you use on a daily basis on your smartphones. Starting with the very basics, what is BNPL? BNPL is nothing but digital lending to people with the use of digital technologies, seamlessly to a significant extent. People get the money today and they get a credit period during which they have to return the money along with the interest or any other fees which the lender and borrower agree amongst them. The terms and conditions including the fee structure are generally same for everyone when a company launch their BNPL Product

Lending processes involves credit assessment and loan approval, loan disbursement, loan repayment, and customer service. With Aadhaar being linked today with most of the online platforms, it has become easier to do a KYC (Know your customer) formality of the borrower and give them a credit within seconds.

Types of Lending

In India, digital lending ecosystem is still evolving and presents a patchy picture. While banks have been increasingly adopting innovative approaches in digital processes, NBFCs have been at the forefront



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of partnered digital lending.

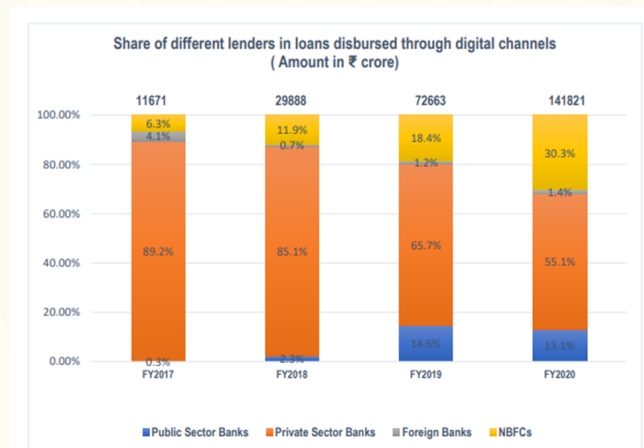
From the digital lending perspectives, such lending takes two forms

- Balance sheet lending (BSL)
- Market place lending (MPL), aka platform lending.

The difference between BSL and MPL lies where the lending capital comes from and where the credit risks of such loans reside. Balance Sheet Lenders are in the business of lending who carry the credit risk in their balance sheet and provide capital for such assets and associated credit risk, generated organically or non-organically. Market Place Lenders (MPLs) or Market Place Aggregators (MPAs) are those who essentially perform the role of matching the needs of a lender and borrower without any intention to carry the loans in their balance sheet. While P2P lending in India is a clear example of MPL, many other players who are in the business of originating digital loans, (e.g., MPAs, FinTech platforms or the so called 'neo banks' or BNPL players) with the intention of transferring such digital loans to BSLs, can also be bracketed with MPLs/ MPAs. These categories of market players form part of the broader class of Lending Service Providers (LSPs).

How much is the Hype?

Overall volume of disbursement through digital mode for the sampled entities has exhibited a growth of more than twelvefold between 2017 and 2020 (from ₹11,671 crore to ₹1,41,821 crore). Now you know the reason of FOMO amongst the companies to get into this space.



Private sector banks and NBFCs with 55 per cent and 30 per cent share respectively are the dominant entities in digital lending ecosystem. Also, share of NBFCs has increased from 6.3 per cent in 2017 to 30.3 per cent in 2020 indicating their increasing adoption of technological innovations. During the same period, public sector banks have also increased their share significantly from 0.3 per cent to 13.1 per cent. The prominent role of NBFCs in fostering digital mode of lending is



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reflective of the flexible regulatory regime (vis-à-vis banks) meant for NBFCs.

Idea behind Buy Now Pay Later Products

The idea behind buy now, pay later is that consumers can get the things they need immediately—while also getting a little extra time to pay for them.

Buy now, pay later financing may seem appealing if you can't or don't want to foot the bill for something all at once.

These loans extend your credit—without imposing steep interest charges—but with a repayment schedule, so you don't get into a mountain-of-ongoing debt situation. But consider whether the payments are affordable and what penalties you may face if you're unable to pay. Read the fine print carefully on buy now, pay later financing, so you fully understand the conditions to which you're agreeing.

About the Author

CA Nipun Grover

He is a Chartered Accountant by Profession and his heart beats both for Finance and Technology. He is exploring Metaverse these days. He is reachable at canipungrover@gmail.com.



Provisional Attachment - GST

Author: CA. Anmol Gupta

Provisional Attachment – A measure introduced to protect interest of the revenue by provisionally attaching any property of a taxable person, including bank account. We begin this article with the comments given by the division bench of **Justice Dhananjaya Y Chandrachud and Justice MR Shah** as:

“The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.”

The power of provisional attachment is given to the GST Authorities, more specifically to the Commissioner of GST and there are numerous of cases rolling up these days involving the matter of provisional attachment in lieu of the powers conferred under Section 83 of the CGST Act, 2017. It has always been a litigative & debatable matter whether the action of the Competent Authority of provisionally attaching the bank account or any other property belonging to the taxpayer is as

per the powers conferred and is justified in the circumstances.

Brief Introduction of Provisional Attachment

Before talking about the pertinent judicial pronouncements on this issue, here's a brief of what powers are conferred under Section 83 of the CGST Act, 2017 and subject to what conditions. Section 83 of the CGST Act, 2017, as introduced w.e.f. 01 July 2017, reads as –

“(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).”

However, the sub-section (1) is proposed to



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Author: CA. Anmol Gupta

be amended by the Finance Act, 2021 w.e.f. a date yet to be notified and after substitution, it shall read as –

“(1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, 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 or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed.”

Vide the aforementioned amendment, scope of provisional attachment which is currently applicable on pendency of proceedings under Section 62, 63, 64, 67, 73 or 74 is proposed to be enlarged by giving power to invoke provisional attachment after initiation of proceedings under Chapter XII (covering Sections 59 to 64), XIV (covering Sections 67 to 72) and XV (covering Sections 73 to 84).

Now coming to the provision under Section 83 that currently exists, it provides for –

- Proceedings under Section 62, 63, 64, 67, 73 or 74 must be pending in order to invoke provisional attachment of any property of the taxpayer;
- Such power must be invoked after forming an opinion that the same is done with an objective to protect interest of the revenue;
- The competent authority to invoke such power has been defined under Section 83 to be Commissioner of GST;
- Any property, including bank account, belonging to the taxpayer can be provisionally attached by the Commissioner by passing an Order in writing; and,
- The provisional attachment cannot have an effect for more than 1 year from the date of order.

Whereas Rule 159 of CGST Rules, 2019 contains procedure and *inter-alia* provides for mechanism for release of property in cases –

- where the property so attached is perishable or hazardous in nature (sub-rule 4); and,



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Author: CA. Anmol Gupta

- where person whose property is provisionally attached is of the opinion that such property is not liable for attachment, filing of objections thereof (sub-rule 5 & 6).

Cases wherein power of provisional attachment can generally be invoked

CBIC, recently issued **Instructions/Guidelines bearing no. CBEC-20/16/05/2021 – GST/359 dated 23 February 2021** for provisional attachment of property under Section 83 wherein certain cases (illustrative) were listed by the CBIC itself where, if the situations so warrant, provisional attachment can be resorted to, like –

- Where a person supplies any good or services without issuance of an invoice, with an intent to evade tax or *vice – vera*;
- Where a person has availed ITC using invoice issued without supply of goods or services;
- Where a person has collected any amount as tax but failed to pay to the Government beyond 3 months;

- Where a person has fraudulently obtained refund; and,
- Passed on ITC to recipient but not paid due taxes.

What properties can be provisionally attached?

Bank account can be attached as mentioned in the Section 83 itself. Further, CBIC vide aforementioned **Instructions/Guidelines dated 23 February 2021** contains certain guidelines with respect to the type of properties which can be provisionally attached –

- More than 1 property can be provisionally attached in case 1 property is not sufficient to cover due taxes estimated to be collected from the taxpayer;
- Movable property should only be attached in case immovable property, available for attachment, is not sufficient to cover estimated dues, i.e. preference must be given to immovable property available for attachment, like, warehouse, godown, etc.;



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- In case movable property (including bank account) is attached by the officers and taxpayer offers his immovable property (enough to cover estimated liability) for attachment, such movable property may be released; and,
- Raw material & Inputs required by the taxpayer for production or finished goods should not be attached by the officers. This is to ensure that provisional attachment does not hamper normal business activities of the taxpayer.

Some pertinent judicial pronouncements/resources on Provisional Attachment

This section discusses some of the important judgements pronounced under GST law on this topic setting precedents as to when this power can be invoked and when it must not be invoked and in what manner should this power be invoked by the concerned authority.

1. Power for ordering of provisional attachment must be supported by substantial grounds (depicting formation of a valid opinion, as required) by the Commissioner as the said power is draco-

nian in nature and to be exercised sparingly

- In the matter of **Radha Krishan Industries v. State of Himachal Pradesh**, cited at **MANU/SC/0293/2021**, the Hon'ble Supreme Court while setting aside the judgment of the Hon'ble High Court and the order of the provisional attachment has held that –
- The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled;
- The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the Assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting



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the interest of the government revenue.

- The expression "necessary so to do for protecting the government revenue" implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment.
- A judgment was pronounced by the Hon'ble High Court of Gujarat in the matter of **Valerius Industries v. Union of India**, cited at **MANU/GJ/1743/2019** where it was held that the power of provisional attachment under Section 83 of the CGST Act 2017 could be termed as very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons. The said power to be exercised with extreme care and caution. The power under Section 83 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.
- It was further held that the subjective

satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the belief.

- Also, the Hon'ble Court laid down the points to be considered by the authority before exercising power under Section 83 and provisionally attaching any property as –
- Whether it is revenue neutral situation; and,
- the statement of "output liability or input credit". Having regard to the amount paid by reversing the input tax credit if the interest of the revenue is sufficiently secured, then the authority may not be justified in invoking its power under Section 83 of the Act for the purpose of provisional attachment.
- Due to increased instances of provisional attachment by departmental officers and upper courts quashing such orders of provisional attachment passed by



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officers, CBIC in line with directions laid down by upper courts and to ensure uniformity of actions, recently issued **Instructions/Guidelines bearing no. CBEC-20/16/05/2021 – GST/359 dated 23 February 2021** for provisional attachment of property under Section 83 which, *inter-alia* contains –

- That for forming an opinion, it is important that Commissioner must exercise due diligence and duly consider as well as carefully examine all the facts of the case, including the nature of offence, amount of revenue involved, established nature of business and extent of investment in capital assets and reasons to believe that the taxable person, against whom the proceedings referred in Section 83 are pending, may dispose of or remove the property, if not attached provisionally;
- Further, it was directed by CBIC that the basis on which Commissioner has formed an opinion shall be duly recorded on file; and,
- The remedy of attachment, available

to Government officers, by its very nature, extraordinary, needs to be resorted to with utmost circumspection and with maximum care and caution. It should normally not be invoked in cases of technical nature.

2. Property of any joint owner or third party (who is not the part of proceedings) cannot be provisionally attached

- **M/s Abhi Engg. Corporation Pvt. Ltd. v. Union of India (High Court of Bombay),** cited at **MANU/MH/0334/2021 –**

Facts of the Case: In the present case, the Petitioner and M/s Creative Business Associates ("Respondent 1") opened a joint escrow account; Respondent No. 1, being the first party and the Petitioner, being the second party to the account. It was agreed that out of the deposits made in the escrow account, 3% shall be transferred to Respondent No. 1 and 97% shall be transferred to Petitioner.

In the present matter, the proceedings were initiated against the Respondent 1 under Section 74 to determine the tax and other amount due from the said person. Further the escrow account as held jointly by the Peti-



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tioner and Respondent 1 was, in entirety, provisionally attached by the Competent Authority exercising the power conferred by Section 83 to protect the interest of the revenue.

Order: The Hon'ble High Court of Bombay has held that Petitioner is not the taxable person in the present case and after considering the fact that no proceedings have been initiated against the Petitioner and no inquiry has been contemplated against the Petitioner, it was directed to the Competent Authority to lift the provisional attachment in so far as Petitioner's share in the escrow account is concerned, i.e. 97% and department is empowered to provisionally attach such bank account to the extent of only 3%, i.e. Respondent No. 1's share.

- **Roshni Sana Jaiswal v. Commissioner of Central Taxes GST Delhi (East)**, reported at **[2021] 128 taxmann.com 357** – In this matter, Petitioner was acting as a director on the Board of Directors of a company, namely, M/s Milkfood Ltd between 2006 and 2008 and since then, was working as a mentor/advisor to the Company for which receiving a remuneration from the company and

also had 14.33% equity stake in M/s Milkfood Ltd. Department on the basis of an information received that Milkfood Ltd. was availing ITC against fake/ineligible invoices, commenced investigation, under Section 67 against Milkfood Ltd. In the process, provisional attachment order was passed attaching bank account of the Petitioner, i.e. bank account of the mentor/advisor of the Company on whom proceedings were pending.

- Hon'ble Delhi High Court, in this matter, while setting aside the provisional attachment order, held that exercise of power u/s 83 to provisionally attach bank account of the Petitioner was without jurisdiction, as the petitioner is not a 'taxable person' as defined in GST law, instead M/s Milkfood Ltd. is the taxable person against whom proceedings u/s 67 were pending.
- Similarly, in the matter of **Dharmesh Gandhi v. Assistant Commissioner (Anti-Evasion), CGST & Central Excise, Belapur**, reported at **[2021] 128 taxmann.com 50 (Bombay)**, bank accounts of not only Petitioner but also his family members (mother, wife & son) were provisionally attached by the department. Hon'ble Bombay High Court after



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relying upon an identical matter in **Siddhart Mandavia v. Union of India**, reported at **[2020] 121 taxmann.com 68 (Bom.)** ordered to release the bank accounts of the family members.

- Furthermore, CBIC, vide **Instructions/Guidelines dated 23 February 2021** categorically states that provisional attachment can be made only of the property belonging to the taxable person, against whom proceedings are pending and not against any third person.

3. Provisional attachment not required when substantial amount of disputed tax has already been paid/reversed

- In the matter of **H.M. Industrial P. Ltd. v. Commissioner of Central GST and Central Excise** cited at **MANU/GJ/0457/2019**, proceedings u/s 67, 73 or 74 were pending against the Petitioner when Order of provisional attachment of the bank account u/s 83 was passed by the competent authority. As on the date of passing of Order of provisional attachment, liability was estimated to Rs. 14.62

crores which on the date of this decision was enhanced to Rs. 16.24 crores. It was held by the Hon'ble Gujarat High Court that provisional attachment of the property to safeguard the interest of the revenue is not required as in the present matter, the Petitioner has already reversed the substantial amount of the ITC (Rs. 13.52 crores) out of total estimated demand (Rs. 14.62 crores). Thus, it was concluded that there is no requirement to provisionally attach the bank account as the interest of the Revenue is sufficiently secured.

- In pursuance to the above judgment, similar view can be drawn from the matter of **Pranit Hem Desai v. Additional Director General** cited at **MANU/GJ/1009/2019** where in the present case the Petitioner has paid GST more than the ITC availed (availment of which was under dispute). Moreover, it could not be said that the interest of the revenue was at stake and held that there is requirement to provisionally attach the bank account.
- The same judgement can be relied upon in the of **Patran Steel Rolling Mill v.**



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Assistant Commissioner of State Tax cited at **MANU/GJ/1398/2018** where the Hon'ble High Court of Gujarat observed that the Petitioner has on his own deposited a sum of Rs. 17,00,000/- during search covering more than tax liability that might be assessed, i.e. Rs. 13,84,000/-, then the impugned order of provisional attachment does not hold good and thus, set aside and quashed.

- Furthermore, CBIC, *vide* **Instructions/Guidelines dated 23 February 2021** categorically stated that Departmental officers should ensure that value of property attached is not excessive. The provisional attachment of property shall be to the extent it is required to protect the interest of revenue i.e., to cover the estimated pending dues from such taxpayer, whose property is proposed to be provisionally attached.

4. Authority cannot attach the bank account "again" when the order for releasing the same has been passed

earlier

- In the matter of **Patran Steel Rolling Mill v. Assistant Commissioner of State Tax** cited at **MANU/GJ/1173/2019**, the Competent Authority has once exercised the power under sec 83 of the CGST Act by attaching the Bank account of the assessee against which the assessee had filed the Writ Petition and the Hon'ble High Court in the said matter had set aside the impugned order of the Competent Authority and directed to release the attached property of the assessee.
 - After that, once again the Competent Authority has attached the same bank account of the assessee by passing an identical order again which *vide* this interim order of Hon'ble Gujarat High Court was directed to be released.
- 5. Provisional attachment ceases to be effective after the expiry of one year from the date of order or from the date of attachment if order does not specify any date.**

- In the matter of **Namaskar Enterprise v. Commissioner of Goods and Service Tax**



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cited at **MANU/GJ/1313/2020**, Petitioner filed the writ application with the subject matter of releasing the bank account attached vide Section 83 of the CGST Act 2017. The contention of the Petitioner was that the provisional attachment of the bank account will only to have effect for one year from the date of the order. However, in the present case the date no specific date was mentioned so the date of freezing the bank account of the Petitioner is to be taken into the consideration and the one year from the date of attaching the bank account has lapsed.

- The Hon'ble High Court of Gujarat has held that the provisional attachment would cease to have effect after the expiry of a period of one year from the date of attachment and thereby directed the bank to permit the Petitioner to operate his bank account forthwith.
- The similar judgement has been passed by the Hon'ble High Court of Gujarat in the matter of **Badal**

Shambhubhai Shah v. The Directorate General of Goods & Service Tax Intelligence cited at **MANU/GJ/0885/2020** where the Competent Authority was directed to lift the provisional attachment order as the period of one year was over and thus the impugned order had lapsed on completion of one year.

6. Provisional attachment order would come to an end once final order is passed concluding the pending proceedings

- In the matter of **Usha Industries (India) v. Deputy Commissioner** cited at **[2021] 128 taxmann.com 269**, Hon'ble Punjab & Haryana High Court while relying upon the Apex Court's decision in *Radha Krishan Industries (supra)* held that since a final Adjudicating order under Section 74(9) of the Act has been passed, the proceedings under the provisional attachment order passed comes to an end.

7. Even after attachment of bank account, assesseees are allowed to operate the bank account subject to certain conditions so that business of such assessee is not paralyzed



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- In the matter of **Skj Finvest Advisory Pvt. Ltd. v. Union of India** cited at **[2021] 128 taxmann.com 53 (Gujarat)**, Hon'ble Gujarat High Court allowed the Petitioner to operate his bank account (provisionally attached by the revenue) subject to the condition that as on the date of provisional attachment, balance in such bank account showed a balance of Rs. 22 lakhs which the Petitioner was directed to maintain at all times.
- In another matter of **SPNN Business Services (P.) Ltd. v. Commissioner of Central Tax (GST), Delhi** reported at **[2021] 129 taxmann.com 207 (Delhi)**, the concern raised by the Petitioner was that in absence of bank account became inoperable due to provisional attachment, Petitioner is unable to distribute salaries of its employees. Taking cognizance of the situation, Hon'ble Delhi High Court permitted the Petitioner to collect Rs. 2 crores from the attached bank accounts to be used only to pay the salaries of the employees.

Conclusion:

From the case laws described *supra* & Instructions/Guidelines issued by the CBIC, it will not be correct to deny the fact that the power of provisional attachment is very extreme in nature and must be exercised with full caution as if these powers are used in a harsh manner, it may eventually lead to the closure of the business of the taxable person which is never the purpose of GST law. No doubt this power is necessary to protect the interest of revenue but it should be used in a rational manner and to be exercised only if utmost necessary as it will hamper the working of the business even if the taxable person has no *mala-fide* intention.

Further, with the changes proposed to be made in Section 83 of the CGST Act 2017 brought by the Finance Act 2021, the scope of the powers will be expanded and now it is more imperative to be exercised carefully and with caution.



Committing Startup Fraud Theranos Style

Author: CA. Shantanu Jain

The Theranos fraud is an interesting case study that highlights the differences between a promising start-up and bare-faced fraud.

if you've been watching Shark Tank you will know that as a startup founder the first thing you need to be is a good salesman.

Your pitch is everything. It's how you get money to convert your ideas into reality. And for this, you don't just need talent and data. You need storytelling, passion, charisma and conviction.

You know who else needs to have such character traits? Fraudsters.

And today we're going to tell you the tale of one such startup founder cum fraudster: Theranos' Elizabeth Holmes.

Holmes was recently found guilty on multiple counts of investor fraud. She and her company stole over \$140 million from investors. But money is nothing if you weigh in the actual implication of her action. People could actually lose their lives because of her.

Wondering how?

The Theranos Story

The story begins in 2003 when Holmes was 19. She dropped out from Stanford to create her own startup venture, something that would revolutionise the world.

This story was pretty common in Silicon Valley, look at Steve Jobs and Bill Gates.

Plus Holmes' cause was so noble that it was surely destined for success. She wanted to disrupt the \$75 billion/year blood testing industry. She proposed a world where you could know what diseases or disorders you had without painful needles, without hospital lines, and without waiting for days on end. But how could she manage all this?

By creating a portable blood-testing machine that could diagnose everything that was wrong with you by taking just one drop of your blood.

Sounds amazing, right?

Theranos' investors thought the same. And these investors were not just common folks like you and me. The jaw-dropping list included:

- Billionaire media magnate Rupert Murdoch (who owns the Fox Group). He



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invested around \$125 million in the company. In 2017, he sold his stake for \$1.

- Oracle founder Larry Ellison
- Alice Walton, the daughter of Walmart founder Sam Walton.
- Henry Kissinger, the former US Secretary of State.
- Betsy DeVos, former Secretary of Education.

They all put millions at stake to be a part of the health tech revolution. And that's not all. Theranos' list of board members was equally impressive. It included multiple former politicians and even a doctor!

Looking from the outside, the company looked perfect. But on the inside, there was utter chaos.

You see the machine on which the company's entire business model was built didn't work. Theranos was actually using regular machines and needles to provide data. Its machines weren't FDA approved and when other regulators asked for data about how they worked, Holmes just had two words for them: "Trade secret."

But people didn't know that yet and so

Holmes was celebrated and labelled the "next Steve Jobs" (P.S. WeWork CEO Adam Neuman was also called the next Steve Jobs and look how that turned out.) In 2010, her company became a unicorn and in 2015, Holmes made the cover of Forbes and was even on Time Magazine's list of 100 Most Influential People of 2015.

She was basking in this glory, providing fake data to regulators and fake numbers to investors promising them untold riches until in 2015 a 22-year-old dared to reveal the truth.

The Bubble Bursts

Whistleblower Tyler Schultz, the grandson of a board member at Theranos, told the truth about the company to a journalist from The Wall Street Journal and down came the house of cards that Holmes had built.

Six years later she has finally been convicted (though not of all charges).

Looking back it's easy to call Holmes a fraudster. But the reality wasn't so black and white. You see, a "fake-it-till-you-make-it" mentality is very common in the world of startups. Theranos was no different.

What made Theranos different was Holmes' refusal to accept reality. Her mission was



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more for herself than for the world. So when it failed, she could not accept it. She kept going with the game of lies, forgetting that her obsession could lead to the loss of lives.

This whole episode can serve as a lesson for both startups and investors. Founders should know when to call the time of death on their original idea and either adapt or exit.

Meanwhile, investors should also not be taken by anyone and everyone who has a great idea. What they need to look for is execution, data, and a working business model.

And this, reader, should serve as a lesson to you as well. The current unicorn and IPO boom may inspire you to invest in up and coming startups and companies. But you need to be extremely careful with these investments because even unicorns can fail miserably.

Now, the million-dollar question is, will this case actually make a difference in how major investors treat startups? Or will the

FOMO continue?

Only time will tell...

P.S. If you want to know more about the whole saga, you can read *Bad Blood: Secrets and Lies in a Silicon Valley Startup* by John Carreyrou.

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