IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 16TH DAY OF DECEMBER 2022

BEFORE

THE HON'BLE MR.JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION No.16692 OF 2022(T-IT)

BETWEEN:

XIAOMI TECHNOLOGY INDIA PRIVATE LIMITED
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 2013
HAVING ITS REGISTERED OFFICE AT
ORCHID (BLOCK E) GROUND FLOOR TO 4th FLOOR,
EMBASSY TECH VILLAGE,
MARATHALL, SARJAPURA
OUTER RING ROAD,
BENGALURU 560 103

REP. BY ITS AUTHORISED SIGNATORY,
MR. SAMEER B.S.RAO
CHIEF FINANCIAL OFFICER.

…PETITIONER

(BY SRI.UDAYA HOLLA, SENIOR ADVOCATE FOR SRI.DEEPAK CHOPRA, SRI.ADITYA VIKRAM BHAT, SRI. HARPREET SINGH AJMANI, SRI.SHRAVANTH ARYA, MS.V.RADHIKA AND SRI. MITHEL REDDY, ADVOCATES)

AND:

1 . DEPUTY COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE 2(1)
CENTRAL REVENUE BUILDING,
QUEENS ROAD,
BENGLAURU 560 001.

2 . ADDITIONAL COMMISSIONER OF INCOME TAX,
CENTRAL RANGE -2,
CENTRAL REVENUE BUILDING,
QUEENS ROAD, BENGALURU 560 001.

3 . PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL)
CENTRAL REVENUE BUILDING,
QUEENS ROAD, BENGALURU 560 001

…RESPONDENTS

(BY SRI.M.B.NARAGUND, ASG ALONG WITH SRI.K.V.ARAVIND AND SRI.M.DILIP, ADVOCATES)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER OF PROVISIONAL ATTACHMENT DTD.11.8.2022 PASSED UNDER SECTION 281B OF THE INCOME TAX ACT 1961 BY THE R-1 WITH THE APPROVAL OF THE R-3 WHILST PROVISIONALLY ATTACHING THE FIXED DEPOSIT TOTALING TO INR 3,700 CRORES (INDIAN RUPEES THREE THOUSAND SEVEN HUNDRED CRORES) VIZ INR 2,600 CRORES WITH HSBC BANK (ACCOUNT NO.073-161671-001) AND INR 1,100 CRORES WITH CITI BANK (ACCOUNT NO.521656018) ALONG WITH INTEREST THEREUPON, WHEREBY AN ATTACHING HAS BEEN MADE FOR A PERIOD OF SIX MONTHS (NEARING ANNEXURE-A BEARING NO.ITBA.COM/F/A/2022-23/1044616877(1).

THIS W.P. IS BEING HEARD AND RESERVED ON 17.10.2022, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

In this petition, petitioner seeks quashing of the impugned order at Annexure-A dated 11.08.2022 passed by the 1st respondent – Deputy Commissioner of Income Tax under Section 281E of the Income Tax Act, 1961 (for short 'the I.T.Act') whereby, pursuant to the approval dated 11.08.2022 of the 3rd respondent – Principal Commissioner of Income Tax, the 1st respondent provisionally attached the subject fixed deposits of the petitioner in a sum INR 3,700 crores viz., i.e. INR 2,600 crores with HSBC Bank and INR 1,100 crores with City Bank.

2. The brief facts rising to the present petition are as under: -

The petitioner is a private limited company engaged in the business of procurement, supply and distribution of Xiaomi products in India bearing various brand names including mobile phones, accessories, computers etc., as part of its business, petitioner has to pay royalty to Qualcomm and Beijing Xiaomi mobile software company Ltd., During the period from 2019 to March 2022, there

were proceedings between the respondents and Income Tax Department and the proceedings in relation to alleged payment of income tax by the petitioner. Meanwhile, the Enforcement Directorate passed a seizure order dated 29.04.2022 seizing the bank accounts of the petitioner to an extent of INR 5,551 crores under the Foreign Exchange Management Act (for short 'FEMA'). The said order having been challenged by the petitioner in W.P.No.9182/2022, this Court passed an interim order dated 05.05.2022 staying the operation of the seizure order, subject to the condition that the petitioner was not entitled to make payments to foreign entities in the form of royalty or any other form. Subsequently, this Court issued a further clarification on 12.05.2022 that the petitioner was at liberty to take overdrafts and make payments from such overdrafts to foreign entities excluding payment of royalty.

2.1 Subsequently, by final order dated 05.07.2022, this Court disposed of W.P.No.9182/2022 by relegating the petitioner to the competent authority i.e., Commissioner of Customs (Appeals) and further directed that the aforesaid

earlier interim orders dated 05.05.2022 and 12.05.2022 to continue till disposal of the proceedings.

2.2 Subsequently, in the proceedings before the petitioner before the Transfer Pricing Officer (TPO) in respect of the Assessment Year 2018-19, the petitioner contested the proceedings and filed the detailed submissions with regard to payment of royalty to the foreign entities referred to supra and the said proceedings were pending consideration and on 30.07.2022, the TPO passed an order under Section 92CA (3) of the I.T.Act for the Assessment Year 2018-19 whilst making transfer pricing adjustment. Pursuant to the said order, the Assessing Officer issued a Notice under Section 142(1) of the I.T.Act for the Assessment Year 2018-19 *inter alia* calling upon the petitioner to show cause, as to why payment of royalty to the foreign entity i.e., Qualcomm and Beijing Xiaomi Mobile should not be disallowed. On 10.08.2022, petitioner submitted a detailed response along with documents and contested the said Notice and proceedings.

2.3 On 11.08.2022, upon obtaining approval from the 3rd respondent, the 1st respondent passed the impugned order under Section 281B of the I.T.Act provisionally attaching the subject fixed deposits of the petitioner in a sum of INR 3,700 crores for a period of six months. Aggrieved by the impugned order, petitioner is before this Court by way of the present petition, which was preferred on 18.08.2022.

2.4 During the pendency of the present petition, the FEMA authorities passed an order dated 19.09.2022 against the petitioner in relation to the aforesaid INR 5,500 crores, which is the subject matter of challenge in W.P.No.19973/2022 pending before this Court, in which, the petitioner has sought for various reliefs including challenging the vires under Section 37A of the FEMA, 1999. In this context, it is relevant to note that there is no interim order passed in favour of the petitioner in the said petition, which is pending adjudication.

3. Heard Sri.Udaya Holla, learned Senior counsel appearing for the petitioner and Sri.M.B.Naragund, learned ASG for the respondents – revenue.

4. In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned Senior counsel for the petitioner made the following submissions: -

(i) That the impugned order passed by the 1st respondent is manifestly arbitrary and reflects pre-meditated conclusion whilst provisionally attaching the property of the petitioner without recording any opinion as to the necessity for attaching the property.

(ii) The approval granted by the 3rd respondent is also silent and does not make out necessary reasons on the aspect of necessity of attaching the property and does not satisfy the jurisdictional precondition for passing a provisional attachment order.

(iii) The impugned order also does not take into account the doctrine of proportionality comprising of both purpose and necessity to pass an order of provisional attachment. In this context, it is contended that proportionality mandates the existence of a proximate or live link between the need for attachment and the purpose

it is intended to secure which is not found / contained in the impugned order.

(iv) The impugned order is also contrary to the judgments of the Apex Court in the case of ***Radha Krishan Industries vs. State of Himachal Pradesh & Others – (2021) 6 SCC 771,*** which has been followed by this Court in the case of ***Indian Minerals and Granite Company vs. DCIT – (2022) 440 ITR 292 (KAR HC)*** and other judgments of the Apex Court. this Court and other High Courts.

(v) The approval granted by the 3rd respondent does not specify the Document Identification Number (DIN) and is accordingly *non est* in terms of the CBDT Circular No.19/2019 dated 14.08.2019 which is binding upon the respondents as held by the Apex Court in the case of ***UCO Bank vs. CIT – (1999) 237 ITR 889 (SC).***

(vi) The impugned order has been passed mechanically and based on borrowed satisfaction which do not meet the depth of formation of an opinion of the Assessing Officer as held by various Courts including in the

Bombay High Court in the case of ***PCIT vs. Shodiman Investments (P) Ltd., - (2020) 422 ITR 337(Bombay).***

(vii) The approval granted by the 3rd respondent does not reflect application of mind and the said approval which precedes the impugned order is not a mere formality and is vitiated on this ground. In this regard, reliance is placed upon the judgment of the Apex Court in the case of ***Chhugamal Rajpal vs. S.P. Chaliha & Others – (1971) 1 SCC 453*** and Delhi High Court in the case of ***United Electrical Company Pvt. Ltd., vs. CIT – (2002) 258 ITR 317.***

(viii) Alternatively, it is submitted that the approval of the 3rd respondent is restricted only to royalty payments which constitute 20% of the attached deposits and accordingly, it is necessary to set aside the attachment order in relation to the remaining 80% of the subject fixed deposits.

(ix) Since the provisional attachment order does not contain valid or sufficient reasons as required in law, fresh / new reasons cannot be added or supplemented by the respondents to justify the provisional attachment order. In

this regard, reliance is placed on the judgment of the Apex Court in the case of ***Mohindar Singh Gill vs. Chief Election Commissioner – (1978) 1 SCC 405.***

5. Per contra, learned ASG for the respondents – revenue in addition to reiterating the various contentions urged in the statement of objections and referring to the material on record, would support the impugned order and submit that the same does not warrant interference in the present petition which is liable to be rejected and submitted as under:-

(i) The approval granted by the 3rd respondent is only an administrative action which does not require to be communicated to the petitioner and as such, non-quoting of the DIN number in the approval is not required and the same does not invalidate the approval which is otherwise in accordance with law;

(ii) The approval not only refers to attachment of the entire fixed deposits of the petitioner and the same is not restricted to the royalty and accordingly, it cannot be said

that the approval by the 3rd respondent is illegal or contrary to law;

(iii) The impugned order contains sufficient and valid reasons and fulfils the parameters laid down by the Apex Court in ***Radha Krishan Industries' case (supra)*** and the petitioner who is guilty of defrauding the respondents and not paying taxes by shifting money outside India is not entitled to any relief in the present petition.

(iv) Apart from the sufficient reasons contained in the impugned order, the other material on record including email correspondence, Investigation reports, findings of the TPO etc., clearly indicate that the petitioner is attempting to reduce the taxable income for the purpose of evading payment of tax and the impugned order does not call for interference on this ground also.

(v) The draft assessment order dated 28.09.2022 for the Assessment Year 2018-19 fully justifies the stance of the respondents as well as the impugned order.

(vi) The various judgments relied upon by the petitioner are not applicable to the facts of the instant case and the details of the tax liability of the petitioner have been

correctly recorded in the impugned order which makes out sufficient reasons as to why it was necessary to provisionally attach the fixed deposits for the purpose of protecting the interest of the revenue.

(vii) Learned ASG would reiterate the various contentions urged in the written submissions and contend that in the light of the specific contention of the respondents that the TPO and Investigation Wing have found that the royalty paid by the petitioner was only a mode adopted by it to divert profits outside India, setting aside the impugned order would have the effect of permitting the petitioner to divert profits under the guise of royalty to foreign entities outside India which is detrimental not only to the revenue but also to the country and as such, the impugned order does not warrant interference in the present petition. Reliance is placed on the following judgments: -

(i) Smt.Gangamma& Others vs. K.Hanumantha Reddy & Others – RFA 100058/2017 Dated 23.03.2022;

(ii) C.S.Puttaraju vs. State of Karnataka & Others – Crl.P.No.5305/2021 dated 31.01.2022;

8. I have given my anxious consideration to the rival submissions and perused the material on record.

9. Before adverting to the rival contentions and legal position in this regard, it is necessary to state that in the impugned order dated 11.08.2022, after stating the details and particulars as to how a demand was likely to be raised against the petitioner for the reasons mentioned therein, the 1st respondent came to the following conclusions: -

> *"5. As per the above search findings by the investigation wing and the findings of the TPO the likely addition to be made and corresponding tax effect excluding interest is as under:*
>
> *The estimated additional income is Rs. 33980,08,42,186/- and approximate tax ability of Rs. 10434,69,21,058 (excluding interest) in respect of the assessment years for which the assessment is pending.*
>
> *6. Apart from the likely demand to be raised mentioned above the assesses will also be liable for interest U/s 234B and Penalty, as per provisions of the Income Tax act which will increase the likely tax dues of the assesses over and above the amount estimated above.*
>
> *7. As per information received from the investigation wing, the assesses is maintaining fixed*

deposits of Rs. 3700 crores. The details of the same is as under:

Sl.No.	*BANK Name*	*Account Number*	*Principal (in Rs.)*
1.	*HSBC Bank Tech*	*073-16167-001*	*2600,00,00,000*
2.	*CITI Bank-Tech*	*5216560l8*	*1100,00,00,000*
Total			*3700,00,00,000*

8. In view of the above stated reasons, I am of the opinion that for purpose of protecting the interest of revenue it is necessary to provisionally attach the fixed deposits tot he extent of Rs. 3,700 crores held by the assessee as mentioned in the table above along with the interst earned on the said fixed deposits.

9. I therefore attach the fixed deposits of Rs.3,700 crores held by the assesses as mentioned in the table above along with the interest earned on the said fixed deposits under Section 281B of the Income Tax Act, 1961.

10. The Provisional attachment order Under Section 281B of the Income tax act is passed after obtaining approval from the Principal Commissioner of Income Tax (Central), Bangalore vide Approval in ***F.No. 281B/XIOMl India/ Pr.CIT(C)/2022-23 dated: 11.08.2022****. This order of provisional attachment is valid for a period of six months from the date of the order.*

10. A perusal of the impugned order will indicate that except for stating that there is likely addition of the amount mentioned in the order, no reasons, much less valid or cogent reasons are assigned by the 1ct respondent as to how and why he has formed an opinion that it was necessary to provisionally attach the fixed deposits of the petitioner for the purpose of protecting the interest of the revenue. The requirements and parameters preceding passing of a provisional attachment order came up for consideration before the Apex Court in the case of ***Radha Krishan Industries' case (supra),*** wherein it was held as under:-

> *48. On the other hand, when the proper officer is of the opinion that the amount which has been paid under sub-section (5) falls short of the amount which is actually payable, a notice under sub-section (1) is to issue for the amount which falls short of what is actually payable. Sub-section (8) contains a stipulation that where a person who is chargeable with tax under sub-section (1) pays the tax together with interest and a penalty of twenty-five per cent of the tax within thirty days of the issuance of the notice, all proceedings in respect of the notice shall be deemed to be*

concluded. Under sub-section (9), the proper officer after considering the representation of the person chargeable to tax is authorised to determine the amount of tax, interest and penalty due and to issue an order. A period of five years is stipulated by sub-section (10) for the issuance of an order in sub-section (9). Sub-section (11) stipulates that upon service of an order under sub-section (9), all proceedings in respect of the notice shall be deemed to be concluded upon the person paying the tax with interest under Section 50 and a penalty equivalent to 50 per cent of the tax within thirty days of the communication of an order. These provisions indicate how sub-sections (5), (8) and (11) operate at different stages of the process.

49. Now in this backdrop, it becomes necessary to emphasise 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 noticed earlier. An attachment which is

contemplated in Section 83 is, in other words, at a stage which is anterior to the finalisation 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 preconditions 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.

50. By utilising the expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorised 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 in other words 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 crystallised. 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 authorise 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.

51. These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine of proportionality. Proportionality mandates the existence of a proximate or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. Moreover, the words embodied in sub-section (1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement. While dealing with a similar provision contained in Section 45 [Section 45 (1) provides

as follows:"45. Provisional attachment.—(1) Where during the tendency of any proceedings of assessment or reassessment of turnover escaping assessment, 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 belonging to the dealer in such manner as may be prescribed."] of the Gujarat Value Added Tax Act, 2003, one of us (Hon'ble M.R. Shah, J.) speaking for a Division Bench of the Gujarat High Court in Vishwanath Realtor v. State of Gujarat [Vishwanath Realtor v. State of Gujarat, 2015 SCC OnLine Guj 6564] observed : (Vishwanath Realtor case [Vishwanath Realtor v. State of Gujarat, 2015 SCC OnLine Guj 6564] , SCC OnLine Guj para 26)

"26. Section 45 of the VAT Act confers powers upon the Commissioner to pass the order of provisional attachment of any property belonging to the dealer during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment. However, the order of provisional attachment can be passed by the Commissioner when the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary so to do. Therefore, before passing the order of provisional attachment, there must be an opinion formed by the Commissioner that for the purpose of protecting the interest of the Government Revenue during the pendency of any proceedings of assessment or reassessment, it is necessary to attach provisionally any property belonging to the dealer. However, such satisfaction must be on some tangible material on objective facts with the Commissioner. In a given case, on the basis of the past conduct of the dealer and on the basis of some reliable information that the dealer is likely to defeat the claim of the Revenue in case any

order is passed against the dealer under the VAT Act and/or the dealer is likely to sale his properties and/or sale and/or dispose of the properties and in case after the conclusion of the assessment/reassessment proceedings, if there is any tax liability, the Revenue may not be in a position to recover the amount thereafter, in such a case only, however, on formation of subjective satisfaction/opinion, the Commissioner may exercise the powers under Section 45 of the VAT Act."

(emphasis supplied)

72. It is evident from the facts noted above that the order of provisional attachment was passed before the proceedings against the appellant were initiated under Section 74 of the Hpgst Act. Section 83 of the Act requires that there must be pendency of proceedings under the relevant provisions mentioned above against the taxable person whose property is sought to be attached. We are unable to accept the contention of the respondent that merely because proceedings were pending/concluded against another taxable entity, that is, GM Powertech, the powers of Section 83 could also be attracted against the appellant. This interpretation would be an expansion of a draconian power such as that contained in Section 83, which must necessarily be interpreted restrictively. Given that there were no pending proceedings against the appellant, the mere fact that proceedings under Section 74 had concluded against GM Powertech, would not satisfy the requirements of Section 83. Thus, the

order of provisional attachment was ultra vires Section 83 of the Act.

73. On 1-3-2021, the appellant has filed an appeal under Section 107 together with a deposit of Rs 32,15,488 representing ten per cent of the tax due. Section 107(6) contains the following stipulation:

"107. (6) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed."

Sub-section (7) stipulates that:

"107. (7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed."

74. Clause (a) of sub-section (6) provides that no appeal shall be filed without the payment in full, of such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order as is admitted. In addition, under clause (b), ten per cent of the remaining amount of tax in dispute arising from the order has to be paid in relation to which the appeal has been filed. Upon the payment of the amount under sub-section (6) the recovery proceedings for the balance are deemed to be stayed. Thus, in any event, the order of

provisional attachment must cease to subsist. The appellant, having filed an appeal under Section 107, is required to comply with the provisions of sub-section (6) of Section 107 while the recovery of the balance is deemed to be stayed under the provisions of sub-section (7). As observed hereinabove and under Section 83, the order of provisional attachment may be passed during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74. Therefore, once the final order of assessment is passed under Section 74 the order of provisional attachment must cease to subsist. Therefore, after the final order under Section 74 of the Hpgst Act was passed on 18-2-2021, the order of provisional attachment must come to an end.

11. The said judgment which was passed while dealing with identical provisions under the CGST Act, 2017 and Rules made there under was followed by this Court in the context of Section 281B of the I.T.Act by this Court in ***Indian Minerals Case (supra),*** wherein it was held as under:-

" 8. As held by the Apex Court in the aforesaid decision, mere apprehension on the part of the respondents that huge tax demands are likely to be raised on completion of assessment is not sufficient

for the purpose of passing a provisional order of attachment. It has also been held that apart from the fact that a writ petition under Article 226 of the Constitution of India challenging the provisional attachment order was maintainable, having regard to the fact that the provisional attachment order of a property of a taxable person including the bank account of such person is draconian in nature and the conditions which are prescribed by the statute for the valid exercise of power must be strictly fulfilled, the exercise of power for order of provisional attachment must necessarily be preceded by formation of an opinion by the authorities that it is necessary to do so for the purpose of protecting the interest of Government revenue. Before the order of provisional attachment, the Commissioner must form an opinion on the basis of the tangible material available for attachment that the assessee is not likely to fulfil the demand payment of tax and it is therefore necessary to do so for the purpose of protecting the interest of the Government revenue. In addition to the aforesaid mandatory requirements, before passing the provisional attachment order, it is also incumbent upon the authorities to come to a conclusion based on the tangible material that without attaching the provisional attachment, it is not possible in the facts of the given case to protect the revenue and that the provisional attachment order is completely warranted for the purpose of protecting the Government revenue.

9. Applying the principles laid down in Radha Krishan's case (supra) to the facts of the instant case, a perusal of the impugned provisional attachment order will clearly indicate that except for merely stating that since there is a likelihood of huge tax payments to be raised on completion of assessment and that for the purpose of protecting the revenue, it is necessary to provisionaliy attach the fixed deposit of the petitioners, the other mandatory requirements and pre-condition as laid down by the Apex Court have neither been complied with nor fulfilled or followed prior to passing the impugned order. It is apparent that the impugned provisional attachment orders at Annexures-D, D1, D2 and D3 do not satisfy the legal requirements as laid down in Radha Krishan's case (supra) and consequently, in view of the fact that the impugned provisional orders are cryptic, unreasoned, non-speaking and laconic, the same deserve to be quashed.

10. Insofar as the apprehension of the respondents that in the event huge tax payments are to be raised as against the petitioners – assessee, the assessee may not make payment of the same causing loss to the revenue is concerned, in the light of the undisputed fact that the proceedings under Section 153A of the said Act of 1961 have already been initiated coupled with the fact that Section 281 of the said Act of 1961, contemplates that any alienation of any property belonging to the petitioners would be null and void, in addition to the specific assertion

made by the petitioner that they own and possess immovable property to the tune of more than Rs.300 crores, the said apprehension of the respondents is clearly unfounded and without any basis and consequently, the said apprehension of the respondents cannot be accepted".

12. In the instant case, a perusal of the impugned order will clearly indicate that the same is arbitrary and reflects premeditated conclusion without recording either an opinion or necessary to attach the property; the doctrine of proportionality which is implicated in the purpose and necessity of provisional attachment mandates the existence of a proximate or a live link between the need for the attachment and the purpose which it is intended to secure.

13. Further, mere apprehension that huge tax demands are likely to be raised on completion of assessment is not sufficient for the purpose of passing a provisional attachment order and the exercise of the same must necessarily be preceded by the formation of an opinion that it was necessary to do so for the purpose of protecting the interest of Government revenue, that too on

the basis of tangible material that the petitioner was not likely to fulfil the demand and on the other hand, was likely to defeat the demand, which is conspicuously missing and absent in the impugned order.

14. The impugned order also discloses that the same has been passed mechanically and is based on borrowed satisfaction and does not meet the test of formation of an opinion of the Assessing Officer who seems to have been influenced by the findings of the Investigation Wing and TPO and have not independently formed an opinion on the likely additions to be made during assessment proceedings.

15. As stated supra, in the light of existence of a legal mandatory pre-requirement and precondition of recording of formation of opinion which is in *pari materia* with "reasons to believe" in Section 281B of the I.T.Act, it was incumbent upon the 1st respondent to arrive at his own satisfaction and not borrowed satisfaction by proper application of mind and consequently, the impugned order which is bald, vague, cryptic, laconic, unreasoned and non-

speaking order deserves to be set aside, particularly having regard the undisputed fact that except for stating that he was of the opinion that it was necessary to attach the fixed deposits for the purpose of protecting the interest of the revenue, no other reasons have been assigned by the 1st respondent in the impugned order.

16. A perusal of the impugned order will also indicate that there is no finding recorded as to why a provisional order of attachment had to be passed against the petitioner; it is significant to note that there is no finding recorded by the 1st respondent that the petitioner was a 'fly by night operator' from whom it was not possible to recover the likely demand. The impugned order also does not state that the petitioner was either a habitual defaulter nor that he was not doing any business at all or that the petitioner did not have sufficient funds to satisfy the demand. In other words, in the absence of any reasons as to why and how the demand would be defeated by the petitioner, mere apprehension that huge tax demands are likely to be raised on completion of assessment was not sufficient to constitute formation of opinion and existence of proximate

and live link for the purpose and necessity of provisional attachment which implicate the doctrine of proportionality. Under these circumstances also, I am of the considered opinion that the impugned order deserves to be quashed.

17. A perusal of the approval dated 11.08.2022 also indicates that the same is silent on the aspect of necessity and does not satisfy the jurisdictional precondition / requirement for passing a provisional attachment order. It is trite law that grant of approval should not be a mechanical act and should reflect independent application of mind and this important safeguard of taking prior approval of the Commissioner under Section 281B of I.T.Act is not a mere empty formality and cannot be taken lightly. As stated supra, the approval granted by the 3rd respondent also reflects complete non-application of mind and is a non-speaking and unreasoned approval which is contrary to law and consequently, the impugned order based on the said approval deserves to be quashed.

18. The contention of the respondents that in addition to the reasons contained in the impugned order,

the other material on record comprising of email correspondence, investigation reports, statements recorded during the course of investigation, etc., are sufficient to satisfy the requirements contemplated in law cannot be accepted in view of the well settled legal position as held by the Apex Court in ***Mohinder Singh Gills' case (supra),*** wherein the Constitution Bench held that when the respondent passed the impugned order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in a shape of an Affidavit or otherwise. At paragraph-8 of its judgment, the Apex Court held as under: -

> *" 8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji$_2$ [Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16] :*
>
> *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of*

explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older.

Under these circumstances, the said contention of the respondents cannot be accepted.

19. Insofar as the various other contentions urged by the respondents with regard to the petitioner allegedly evading tax etc., are concerned, the said contentions are neither germane nor relevant for the purpose of adjudicating upon the legality, validity or correctness of the impugned order of provisional attachment and consequently, all rival contentions in this regard are not gone into and the same are kept open. The judgments relied upon by the respondents – revenue are not applicable to the facts of the instant case and as such, no reliance can be placed upon the same by the respondents in support of their defence.

20. Insofar as the contention of the petitioner with regard to the 3rd respondent's approval dated 11.08.2022 not containing a DIN number as required in the CBDT Circular bearing No.19/2019 dated 14.08.2019 is concerned, in view of my findings above that the impugned order deserves to be quashed, the said contention of the petitioner need not be gone into for the purpose of disposal of the present petition.

21. In view of the foregoing reasons, I am of the view that the impugned order passed by the 1st respondent is illegal, arbitrary and contrary to law and the same deserves to be quashed.

22. As stated supra, the impugned order deserves to be quashed. However, in the facts and circumstances of the instant case, the specific contention of the respondents that right from the inception that the petitioner is indulging in diverting profits outside India and making payment to foreign entities under the guise of royalty cannot be lost sight of or glossed over by this Court. In fact, it is specifically contended that the TPO and the Investigation

Wing have found that the royalty made by the petitioner to entities outside India was only a mode adopted by it to divert profits outside India.

23. A similar allegation was made by FEMA authorities against the petitioner in the proceedings which culminated in the order dated 05.07.2022 passed by this Court in W.P.No.9182/2022 wherein the earlier interim orders passed by this Court permitting the petitioner to operate the accounts and by restricting / limiting the same by directing the petitioner not to make payment in the form of royalty or in any other form to entities outside India was confirmed by this Court. Having said so, this Court also showed indulgence in favour of the petitioner by permitting petitioner to obtain / take overdrafts and make payments to such foreign entities excluding payment of royalty.

24. It is also relevant to note that the proceedings which were pending before the FEMA authorities on the date of disposal of W.P.No.9182/2022 were subsequently concluded and a confirmation order dated 19.09.2022 were passed against the petitioner which is the subject matter of

challenge in W.P.No19973/2022, in which, the petitioner has sought for various reliefs including challenging earlier orders passed by the FEMA authorities as well as the vires under Section 37A of the FEMA, 1999.

25. Further, in the said W.P.No.19973/2022, which is pending before this Court, no interim orders have been passed in favour of the petitioner and it is the specific contention of the respondents -- revenue that the petitioner has violated the order dated 05.07.2022 passed in W.P.No.9182/2022 and is diverting funds outside India. It is also an undisputed fact that the subject matter of the FEMA proceedings against the petitioner is a sum of INR 5,500 crores comprising of fixed deposits savings account etc., which have also been seized by the FEMA authorities.

26. As stated supra, this Court has not permitted the petitioner to make payment by way of royalty in any form to entities outside India in the FEMA proceedings also. Under these peculiar / special facts and circumstances obtaining in the instant case and in the light of the specific contention of the respondents that the petitioner has been diverting

profits outside India under the guise of payment of royalty coupled with the undisputed fact that this Court have not permitted the petitioner to make payment of royalty to foreign entities in any of the proceedings till today, I am of the considered opinion that in the interest of justice, it would be just and appropriate to direct the petitioner not to make payment in the form of royalty or any other form to any entities outside India till conclusion of assessment proceedings by the respondents. However, interest of justice would also be met if the petitioner is reserved liberty to take / obtain overdrafts on the subject fixed deposits and make payments from such overdrafts from the respective banks to foreign entities in accordance with law.

27. During the pendency of the present petition, the 1st respondent passed a draft assessment order dated 28.09.2022 under Section 144C(1) of the I.T.Act after concluding the proceedings. It is needless to state that the petitioner would be entitled to contest the said draft assessment order and proceedings pursuant thereto before the respondents. However, having regard to the undisputed fact that the subject matter of the impugned attachment

order included the Assessment Year 2018-19 in relation to which draft assessment order was passed on 28.09.2022 during the pendency of the present petition, in the peculiar / special facts and circumstances of the instant case and in the light of the categorical statement made by the respondents in its written submissions that it would complete the draft assessment proceedings for the Assessment Years 2019-20, 2020-21 and 2021-22 within 8 months, I deem it just and appropriate to direct the concerned respondents to complete the draft assessment proceedings for the aforesaid three Assessment Years 2019-20, 2020-21 and 2021-22 as expeditiously as possible and at any rate on or before **31.03.2023.**

28. In the result, I pass the following:

ORDER

(i) Petition is partly allowed;

(ii) The impugned provisional attachment order at Annexure-A dated 11.08.2022 passed by the 1st respondent in respect of the subject fixed deposits

accounts of the petitioner is hereby set aside, subject to the following conditions:-

(a) that the petitioner shall not be entitled to make payments from the subject fixed deposits accounts in the form of royalty or in any other form to any companies / entities located outside India;

(b) that the petitioner is however at liberty to take overdrafts from the subject fixed deposits accounts and make payments from such overdrafts to such companies / entities located outside India;

(c) that the respondents are directed to complete the draft assessment proceedings of the petitioner for the Assessment Years 2019-20, 2020-21 and 2021-22 on or before **31.03.2023**.

Sd/-
JUDGE

Srl