COMPENDIUM ON PROSECUTION IN GOODS & SERVICES TAX

CENTRE OF EXCELLENCE
NACIN


NACIN BENGALURU
Comprehensive Workshop on
" Prosecution in Tax matters "


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Patron – In – Chief:

Ms. Neeta Lall Butalia
(Pr. Director General)

Mentor:

Shri Ramesh Chander
(Additional Director General)

Guide:
Shri Prakash Veer Singh Meena
(Additional Director)

Ms. Anchita Pandoh
(Joint Director)

Shri Aditya Singh Yadav
(Deputy Director)

Shri Bhagwat Dayal
(Assistant Director)

Shri Bhoopanand Sharma
(Assistant Director)

Prepared by:

Shri Arvind Singh, Additional Assistant Director
Shri Nitish Garg, Inspector, **Shri Manjeet Singh,** Inspector

Centre of Excellence
(National Academy of Customs, Indirect Taxes & Narcotics)
New Delhi.

Message

I am pleased to know that Centre of Excellence, NACIN, New Delhi is releasing a training material cum compendium on the intricate subject of 'Prosecution in Tax Matters'. The legal framework, evidentiary concerns, trial procedures, the function of the defence counsel, and punishment of offenders are just a few of the many themes relevant to tax prosecutions that are covered in this compilation of guidance and training materials. On the basis of actual events, it also looks at some of the difficulties and conflicts that occur in tax cases.

I congratulate the Centre of Excellence team, NACIN, New Delhi on this deserving success. You've reached this thrilling milestone in the creative, perseverant, and dedicated path that is writing a book. A book's journey doesn't come to an end with its publication. It's only the start of a brand-new chapter. Accept the thrill and eagerness of presenting your work to the readers. Accept the criticism and comments, both good and bad, since they will help you develop as a writer.

I think that tax officials in particular will find this training material to be a great tool, as it offers a thorough and insightful analysis of the legal and practical issues involved in tax prosecutions as well as helpful advice and practical recommendations.

Once again, congrats, and best wishes for continued success in your writing aspirations.

(Neeta Lall Butalia)
Pr. Director General, NACIN

FOREWORD

There has been longstanding demand, from the various stakeholders including field officers of CBIC and practicing community, to develop a credible guidance and training material on the complex subject of 'prosecution' which would also benefit the academia, practicing and legal fraternity. I am pleased to present this new training material, a compendium on subject 'Prosecution in Tax Matters', which provides an in-depth analysis of the legal and practical aspects of tax prosecutions in its various dimensions with up-to-date information and material.

2. Tax prosecution have become increasingly important in recent years, as government has stepped up efforts to combat and enforce compliance with tax laws in letter and spirit. Therefore, owing to the importance of the prosecution, it was felt that there was a need to organize a workshop on subject matter to educate the GST officers to understand the various legal and procedural aspects relating to launching of prosecution against the offenders. It is essential that the officers are well-versed on the legal requirements, to ensure that the case of prosecution does not fall victim to procedural and technical defects, which may creep in during the stages of investigation and launching of prosecution. Accordingly, a workshop was organized on 24th and 25th November,2022 in collaboration with ZTI, NACIN, Bengaluru, NLSIU, Bengaluru and DoR Chair, Bengaluru to deliberate various aspects involved in launching of prosecution and precautions/safe guards to be observed in this regard. At the conclusion of the workshop, it was felt that a comprehensive study material on the subject, should be prepared, which can be used as a training material for use by the participants and tax officers.

3. This guidance & training material compendium covers a wide range of topics related to tax prosecutions, including the legal framework, evidentiary issues, trial procedures, role of the defense counsel and sentencing. It also examines some of the challenges and controversies that arise in tax prosecutions based on real situations on the ground.

4. I believe that this training material will be a valuable resource, especially for tax officers. It provides a comprehensive and insightful overview of the legal and practical issues involved in tax prosecutions, and offers practical guidance and advice also but it is not legally binding and does not have legal locus.

5. I also express my gratitude to the Chairman, CBIC, Shri Vivek Johri and Pr. D.G., NACIN, Ms Neeta Lall Butalia, and Professor of Practice, DoR Chair Sh M. Vinod Kumar for their directions and guidance in preparation of the study material. I also acknowledge and appreciate the zealous contribution of the officers of Centre of Excellence and ZTI, New Delhi NACIN, in compilation of this compendium. I hope that readers find this book informative and useful in effective performance in their work place.

(Ramesh Chander)
Additional Director General
CoE, NACIN, New Delhi.

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Disclaimer: This material has been prepared only for training, guidance and academic purposes. The information provided herein needs to be cross-checked with the extant legal provisions and circular/instructions issued from time to time. This material is not a legal document/ opinion of the CBIC and therefore may not be quoted as an authority in any legal proceedings before any Court /Tribunal etc. This content was prepared as on 31.05.2023.

1. Background:

In 2017, a major transformational change was introduced in the indirect tax regime in India with the introduction of Goods and Services Tax (GST). The GST subsumed multiple taxes such as Central Excise, Service Tax and Value Added Tax (VAT). The Central Goods and Services Tax Act (CGST), the Integrated Goods and Services Act (IGST), State Goods and Services Tax Acts (SGST) and the Union Territory Goods and Services Tax (UTGST), which were enacted to bring in GST, all contain provisions for prosecution in relation to certain specified offences.

The provisions governing prosecution under the CGST Act, 2017, which are discussed in detail below, have been made applicable to offences under the IGST Act, 2017 vide Section 20 of the IGST Act which specifies that the provisions of the CGST Act shall, *mutatis mutandis*, apply, so far as it may be, as they apply in relation to Central Tax. These include Offences and Penalties. Parallel and identical provisions are contained in the SGST and UTGST Acts.

The term "prosecution" means the institution or commencement of legal proceedings against an offender. It is the process of creating formal charges before the institution of any proceedings. In simple language, it is the process of charging a person with the commission of a crime in a court of law. It is also defined as the act or process of holding a trial against a person who is accused of a crime to see if that person is guilty.

Generally, every fiscal statute contains provisions relating to prosecution, although the errant taxpayer can be prosecuted under general laws such as Indian Penal Code and Code of Criminal Procedure. The reason behind having special provisions regarding prosecution in fiscal statutes is to describe the offences specifically considering the objects and scheme of the respective fiscal statute.

Prosecution is intended to act as a deterrence against deliberate tax evasion. In general, considering the seriousness and gravity of such proceedings, the policy of the Government is to restrict prosecution only to offences of a major nature.

It is in this context that the Government has recently increased the threshold for launching of prosecution and even decriminalized certain offences under GST laws. Launching of prosecution needs a detailed and judicious approach and should be restricted to cases of a serious nature which merit such action. Once launched, it is also desirable that prosecution in suitable/fit cases do not fail on account of procedural and technical defects or on account of faulty investigation. Faulty investigation means failure to obtain and present sustainable evidences against the offenders which are essential to sustain the case in a Court of Law. It is therefore felt that field formations should be aware of the procedures related to prosecution in GST.

The foundation of a strong case lies in detailed and meticulous investigation, application of the appropriate provisions of law and the issue of well-drafted show cause notices. A defective show cause notice weakens both adjudication of the case as well as reduces the possibility of success of the prosecution launched in a court of law.

In so far as procedural aspects are concerned, commencing from issue of summons, recording of statements, execution of search and seizure, drawing of Panchnama, effecting arrest, etc. procedures need to be carried out in terms of the law and the judicial pronouncements of superior courts. Failure to follow the same often leads to failure of prosecution on technical grounds or procedural defects.

This compendium-cum-study material for training, *inter alia*, covers not only the legal provisions pertaining to prosecution but the various procedural aspects as well, and the guidelines and instructions issued by the CBIC in this regard.

This compendium-cum-study material is only illustrative and not exhaustive as there could be numerous factors which would have to be considered during investigation and prosecution proceedings depending upon the nature of the offence and the circumstances surrounding the same.

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2. An Introduction to Provisions of Prosecution in the CGST Act, 2017.

The scheme of punishment for certain specified offences is laid down in Section 132 of the CGST Act, 2017(**as amended by Finance Act,2023**) which is reproduced below: -

SECTION 132(1). Punishment for certain offences. —

(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely: —

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

[(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;]

(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(e) evades tax, or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(g)*[1] obstructs or prevents any officer in the discharge of his duties under this Act;

(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals

[1] (**Omitted vide Finance Act,2023**)

with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(j)* (**Omitted vide Finance Act,2023**) tampers with or destroys any material evidence or documents;

(k)* (**Omitted vide Finance Act,2023**) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (f) and clauses (h) and (i)of this section, shall be punishable —

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of an offence specified in clause (b), where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Explanation. — For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.

The quantum of tax evasion and the term of imprisonment prescribed are tabulated below for ease of reference:

Sr. No.	Quantum of tax evasion	Term of imprisonment
1.	Exceeding ₹ 100 lakhs up to ₹ 200 lakhs	Up to 1 year and fine
2.	Exceeding ₹ 200 lakhs up to ₹ 500 lakhs	Up to 3 years and fine
3.	Exceeding ₹ 500 lakhs	Up to 5 years and fine
4.	Abetting offence under clause (f).	Up to six months and fine

2.2. Section 132(2): Every subsequent offence punishable

As per sub-section (2) of Section 132, if any person convicted of an offence under this section is again convicted of an offence under this section, then he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years. Here it is appropriate to note that the monetary limit with respect to evasion of tax does not apply in case of repeated offence.

2.3. Section 132(3): Minimum Punishment

By section 132(3), it is provided that the minimum punishment will be six months unless for adequate written reasons in judgment, it is waived by concerned Court.

2.4. Section 132(4)/(5): Offences are non-cognizable and bailable

Sub-section (4) of Section 132 prescribes that all the offences under GST Act, except those referred in sub-section (5), are non-cognizable and bailable even if they are cognizable or non-bailable under Code of Criminal Procedure, 1973. Sub-section (5) lays down that the offences involving evasion of tax as per clause (a), (b), (c) or (d) mentioned above and which

GST Act are non-cognizable and bailable if the amount of evasion of tax is below ₹ 500 lakhs.

As two separate categories have been prescribed in the GST law i.e. non-cognizable and bailable offences and cognizable and non-bailable offences, it is necessary to have a clear understanding of these legal terms i.e. the meaning of Bailable and Cognizable Offences**.**

A bailable offence is defined in Section 2(a) of the Code of Criminal Procedure, 1973, according to which it is an offence which is made bailable by any other law for the time being in force. Bailable offences means bail is available under the law as a matter of right. It does not mean that a person arrested for non-bailable offence cannot get bail. He can also be freed on bail by approaching a Court of Sessions or the High Court.

The word "Cognizable Offence" is defined in Section 2(c) of the Code of Criminal Procedure. It means an offence in which case a police Officer may arrest without warrant. In case of "non-cognisable offence" a police officer has no authority to arrest without warrant. Under Section 190 of the Code of Criminal Procedure, 1973 (Criminal Procedure Code) any Magistrate empowered may take cognizance of any offence specified in the said section.

Section 155 of Criminal Procedure Code is also relevant here. According to the said section, a police officer shall not investigate a non-cognisable case without the order of a magistrate having power to try such case or commit the case for trial. However, a police officer can investigate cognizable case without the order of the magistrate as per Criminal Procedure Code.

2.5. Section 132(6): - Sanction for Prosecution

A crucial and significant provision with regard to sanction for prosecution is contained in sub-section (6) of section 132 of the Act *ibid*.
For prosecuting any person under Section 132, there must be a previous sanction of the Commissioner. Further, Section 134 mandates that the Court should not take cognizance of any complaint in the absence of previous sanction of the Commissioner and further that offences under this Act cannot be tried by any Court inferior to a Magistrate of First Class.

The term 'Commissioner' is defined in Section 2(24) of CGST Act as under:
"(24) "Commissioner" means the Commissioner of Central Tax and includes the Principal Commissioner of Central Tax appointed under Section 3 and the Commissioner of Integrated Tax appointed under the Integrated Goods and Services Tax Act."

Thus, the officers covered by above definition will be eligible to sanction prosecution. Further, the term 'tax' is separately defined for the prosecution provision of Section 132. The Explanation is added to Section 132 which reads as under:

"Explanation — For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act."

In broad terms, any wrong benefit in relation to tax payment is considered to be 'tax' for launching prosecution. It is settled position that to prove a criminal offence of evasion under Fiscal Laws, the action should be with a conscious mind to defraud revenue. The affected party/person will be required to prove its bona fide to escape the prosecution provision.

2.6. Section 133: - Prosecution of Officers

Section 133 prescribes prosecution of officers of department if they willfully disclose an information or contents of any return furnished under GST and shall be liable for prosecution, except where such disclosure is in term of requirement of law in different situation.

The punishment for such offence will be imprisonment up to six months and fine up to ₹ 25,000/-. However, the prosecution of such officer should be with the prior section of Government, if he is a Government servant, and by the Commissioner, for others.

2.7. SECTION 134. Cognizance of offences. —

No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of a Magistrate of the First Class, shall try any such offence.

Section 134 mandates that the Court should not take cognizance of any complaint in the absence of a previous sanction of the Commissioner and further, that offences under this Act cannot be tried by any Court inferior to Magistrate of first class.

2.8. Section 135 : Presumption of Culpable Mental State :-

In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.— For the purposes of this section —

(i) the expression "culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;

(ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

The section has wide implications and almost all burden is placed on accused person to defend. Normally, for prosecution under Indian Penal Code etc. the burden is on prosecutor/complainant to prove the charge. However, due to specific provision under section 135 of GST Act, the burden is shifted on accused person. The section is reproduced below to comprehend the scope of said section.

2.9. SECTION 136. Relevancy of statements under certain circumstances. —

A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Normally, the parties are entitled to retract the statement based on facts. If the party finds any such eventuality it should do needful at the earliest, else the above provision may affect adversely.

Normally, if any statement is relied upon in prosecution the person making such statement is required to be made available for cross examination.

2.10. SECTION 137. Offences by companies. —

(1) Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(3) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or *karta* or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, *mutatis mutandis*, apply to such persons.

(4) Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Explanation. — For the purposes of this section, —

(i) "company" means a body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm.

Thus, Section 137 enumerates the persons who would be guilty and be prosecuted for the offences, if the offences are committed by a firm, company, LLP, HUF or Trust.

As per Section 137(1) in case of a company, every person who was in charge/responsible when the offence committed, can be prosecuted and the company can also be prosecuted.

As per Section 137(2), in case of the company, director, manager secretary or other officer will also be liable for prosecution, if their connivance or negligence is proved in relation to offence.

As per Section 137(3), in case of Partnership Firm or Limited Liability Partnership Firm or Hindu Undivided Family or Trust, the partner or karta or managing trustee will be deemed to be guilty of offence and shall be liable to be proceeded against and be liable for punishment, similar to a director in the case of a company.

As per Section 137(4), the persons, as stated above, would not be held liable for punishment if it is proved that the offence was committed without their knowledge or all due diligence to prevent commission of offence was exercised.

2.11. SECTION 138. Compounding of offences. —

(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:

Provided that nothing contained in this section shall apply to —

(a) A person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f), (h) ,(i) and (l) of sub-section (1) of section 132;

(b) **(This clause omitted vide Finance Act,2023),** a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;

(c) a person who has been accused of committing an offence under this Act which is also an offence under clause (b) of sub section (l) of section 132;

(d) a person who has been convicted for an offence under this Act by a court;

(e) **(This clause omitted vide Finance Act,2023)** a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of section 132; and

(f) any other class of persons or offences as may be prescribed :

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

(2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than twenty five percent of the tax involved and the maximum amount not being more than one hundred percent of the tax involved;

(3) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

Thus, it can be seen that the Section 138 allows for compounding of offences by the competent authority either before or after institution of prosecution on payment of compounding fees as may be prescribed. Rules are prescribed vide Rule 162. Amount for compounding of offence shall be prescribed under the GST Rules. The said compounding fees:

– shall not be less than twenty five percent of the tax involved and the maximum amount not being more than one hundred percent of the tax involved.

Compounding shall not be allowed without payment of tax, interest and penalty.

On payment of compounding amount, no further proceeding shall be initiated under GST Act and if any criminal proceeding is initiated, the same shall stand abated. However, the compounding can be withdrawn if it was obtained by concealment, etc. and if withdrawn, the trial will continue.

a. **Limitation period for taking cognizance or institution of prosecution.**
There is no specific provision in respect of period of limitation for prosecution under GST Act ,2017. However, Section 468 of the Criminal Procedure Code, 1973 (CrPC) provides for periods of limitation. As per the said provision, limitation periods are

dependent on nature of punishment and term of imprisonment. The limitation periods under CrPC are shown in the Table below:

Sr. No.	Nature of Punishment / term of imprisonment	Limitation period
1.	Only fine	Six months
2.	Imprisonment for one year	One year
3.	Imprisonment for a term exceeding one year and up to three years	Three years

Section 469 of CrPC, 1973 defines the commencement of the period of limitation. The following eventualities are discussed in sub-section (1) of Section 469 of CrPC for the commencement of period of limitation.

- Clause (a) : period of limitation will start on the day of offence.
- Clause (b) : if the commission of offence is not known to the person aggrieved or police officer, then first day on which offence comes to the knowledge of aggrieved person or police officer.
- Clause (c) : when the identity of the offender is not known, in that case the first day on which identity of the offender is known to the person aggrieved or police officer.

In the absence of specific provisions in respect of period of limitation for prosecution under GST Act, the above provisions of Sections 468 and 469 of CPC can be made applicable. For commencement of period of limitation, clause (b) appears to be relevant in cases of offences under GST Act. However, it is required to be tried in the competent court.

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3. Guidelines for Prosecution under CGST Act, 2017:

3.1 CBIC, vide Instruction No. 04/2022-23 [GST-Investigation], dated 1-9-2022[2] has issued guidelines for launching of Prosecution under the Central Goods & Services Tax Act, 2017(**Appendix-1**). The salient features of the said guidelines are discussed herein below: -

3.1.1 As per the guidelines issued by GST-Investigation Wing vide Instruction no. 04/2022-23 dated 1st September 2022, the general points to be taken care of prior to sanction of prosecution are –

- The nature of the evidence collected at the time of investigation should be assessed carefully.
- The decision of prosecution needs to be taken on a case-to-case basis considering factors like –
- Nature as well as the gravity of the offence,
- Amount of tax evaded/ wrongly availed input tax credit/ refund wrongly taken, and
- The nature and quantity of evidence collected.
- The prosecution should **not** be –
- Filed merely because the demand is confirmed in the adjudication proceedings;
- Launched in cases of technical nature;
- Launched in cases, wherein, an additional claim of tax is because of difference of opinion regarding the interpretation of the law.
- Launched indiscriminately against all the directors of the company.

3.1.2 Monetary limit for launching prosecution –

Prosecution can be launched only when the amount of any of the following is more than INR 5 Crores –

- Tax evasion;
- Mis-use of the input tax credit;

[2] Appendix-1

- Fraudulently obtaining refund relating to offences specified u/s 132(1) of the Central Goods and Services Tax Act.

However, the above monetary limit of INR 5 Crores will not be applicable in the following cases –

- Cases, wherein, arrest under section 69 is made during the course of an investigation; or

- In the case of habitual evader i.e. when the taxpayer has been involved in two or more cases in the past two years, wherein, the demand exceeding INR 5 Crores is confirmed either at the first adjudication level or above on account of tax evasion or fraudulent refund or mis-use of input tax credit involving fraud or suppression of facts, etc.

3.1.3 Authority to sanction prosecution: –

The prosecution complaint for prosecuting a person can be filed after obtaining mandatory sanctions as follows –

Particulars	**Authority from whom the sanction is to be obtained**
Cases investigated by the Directorate General of GST Intelligence (DGGI)	Pr. Additional Director General or Additional Director General, the DGGI of the concerned zonal unit or Hqrs.
Any other case	Pr. Commissioner or Commissioner of CGST [section 132(6) of the Central Goods and Services Tax Act, 2017]

3.1.4 The time period within which prosecution complaint should be filed –

Particulars	**Time period within which prosecution complaint should be filed**
Cases, wherein, the arrest has been made, however, bail is not granted	Within 60 days of the arrest
In all other arrest cases	Within a definite time frame

3.1.5. Procedure for sanction of prosecution:

(i) In cases of arrest(s) made under Section 69 of the CGST Act, 2017 :

Where during the course of investigation, arrest(s) have been made and no bail has been granted, all efforts should be made to file prosecution complaint in the Court within sixty (60) days of arrest. In all other cases of arrest, prosecution complaint should also be filed within a definite time frame. The proposal of filing complaint in the format of investigation report prescribed in Annexure-I, should be forwarded to the Pr. Commissioner/ Commissioner, within fifty (50) days of arrest. The Pr. Commissioner/ Commissioner shall examine the proposal and take decision as per Section 132 of CGST Act, 2017. If prosecution sanction is accorded, he shall issue a sanction order along with an order authorizing the investigating officer (at the level of Superintendent) of the case to file the prosecution complaint in the competent court.

(ii) In cases investigated by DGGI wherever an arrest has been made, procedure as detailed in para (i) should be followed by officers of equivalent rank of DGGI.

(iii) The Additional/Joint Commissioner or Additional/Joint Director in the case of DGGI, must ensure that all the documents/evidence and list of witnesses are kept ready before forwarding the proposal of filing complaint to Pr. Commissioner/Commissioner or Pr. ADG/ADG of DGGI.

3.1.6 Filing of Prosecution

Cases which are deemed fit for prosecution even before adjudication – In such cases, the Additional/ Joint Commissioner or Additional/ Joint Director, DGGI shall forward the prosecution proposal to the sanctioning authority after recording the reason for the same.

In any other cases – The adjudicating authority should, at the time of passing the order, mention that according to him the case is fit for prosecution. However, if the adjudicating authority has not taken any view, then, in such a case, the file should be re-submitted, within a period of 15 days from the date of issue of adjudication order, to the adjudicating authority for taking a view on the prosecution.

It is important to note here that in the case of companies, both the natural person and the legal person are liable for prosecution. Further, after obtaining sanction for prosecution, an authorized officer is required to file prosecution in the court within 60 days.

3.1.7 Guidelines to be followed for withdrawal of prosecution –

Withdrawal of prosecution is possible when the prosecution is sanctioned, however, the complaint is not filed and some new facts/ evidence has come to light. Accordingly, withdrawal of prosecution can be sanctioned in the following manner –

Particulars	Sanction of withdrawal of prosecution
In DGGI case	Principal Director General should sanction the withdrawal of prosecution
In any other case	Principal Chief Commissioner/ Chief Commissioner should sanction withdrawal of prosecution

3.1.7.1 In case the complaint is already filed, withdrawal of prosecution should be done in the following manner –

- It should be found on merits that there is no contravention of the provisions in the adjudication proceedings and the order should have attained finality.
- Prior approval of Pr. Chief Commissioner/ Chief Commissioner or Pr. Director General/ Director General is needed for filing an application for withdrawal of prosecution.
- Post approval, Pr. Commissioner/ Commissioner or Pr. Additional Director General/ Additional Director General should ensure the filing of an application in the court via a public prosecutor to allow withdrawal of prosecution.
- Such withdrawal of prosecution can be affected only with the approval of the court.

3.1.8 General guidelines to be followed –

Some of the general guidelines to be followed are –

- In case of inadequate punishment/ acquittal –

When Pr. Commissioner/ Commissioner is of the view that lighter punishment is given to the accused person. Then, in such a case, an appeal should be filed, within the stipulated time, against the order.

- Filing of prosecution should not be kept in abeyance based on the ground that the taxpayer has gone in appeal or revision.
- Section 159 of the Central Goods and Services Tax Act, 2017 empowers the Pr. Commissioner/ Commissioner or any other authorized officer to publish the name and other particulars of the convicted person under the Act.
- Once the prosecution is launched, the same should be followed vigorously.
- The provisions regarding compounding of offence a available in Section 138 of the CGST Act, 2017 should be brought to the notice of person being prosecuted and such person be given an offer of compounding by Pr. Commissioner/Commissioner or Pr. Additional Director General/Additional Director General of DGGI, as the case may be.

3.1.9. Transitional Provisions:

All cases where sanction for prosecution is accorded after the issue of these instructions shall be dealt in accordance with the provisions of these instructions irrespective of the date of the offence. Cases where prosecution has been sanctioned but no complaint has been filed before the magistrate shall also be reviewed by the prosecution sanctioning authority considering the provisions of these instructions.

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4. Safeguards to be observed to make prosecution successful in Courts of Law:

Prosecution has a negative effect on an individual's mind; therefore, the standard of proof required in the prosecution shall be beyond a reasonable doubt. The evidence collected by the officer in charge shall be adequate to prove an individual's crime. The standard of proof required in a criminal prosecution is higher as the case has to be established beyond reasonable doubt whereas the adjudication proceedings are decided on the basis of preponderance of probability. Therefore, in order to sustain the charges and for successful prosecution of a person, availability of adequate evidence is must. Evidences are collected during the course of investigation. While conducting an investigation, focus should not only on collection of evidences which sustain and results into the confirmation of demands in the process of departmental adjudication, but to collect and put such evidences in the Show Cause Notices which prove that the person, company or individual had guilty knowledge of the offence, or had fraudulent intention to commit the offence, or in any manner possessed mens rea (guilty mind) which would indicate his guilt.

Prosecution should not be launched in cases of technical nature, or where the additional claim of duty/tax is based totally on a difference of opinion regarding interpretation of law. In the case of public limited companies, prosecution should not be launched indiscriminately against all the Directors of the company but it should be restricted to only against persons who were in charge of day-to-day operations of the factory and have taken active part in committing the duty/tax evasion or had connived at it.

To make the prosecution a success, it should not be filed merely because a demand has been confirmed in the adjudication proceedings particularly in cases of technical nature or where interpretation of law is involved. One of the important considerations for deciding whether prosecution should be launched is the availability of adequate evidence. As already said, the standard of proof required in a criminal prosecution is higher as the case has to be established beyond reasonable doubt whereas the adjudication proceedings are decided on the basis of preponderance of probability. Therefore, even cases where demand is confirmed in adjudication proceedings, evidence collected should be weighed so as to likely meet the test of being beyond reasonable doubt for recommending prosecution. Decision should be taken on case-to-case basis considering various factors, such as, nature and gravity of offence, quantum

of duty/tax evaded or Input Tax credit wrongly availed and the nature as well as quality of evidence collected.

Decision on prosecution should be normally taken immediately on completion of the adjudication proceedings. However, the Hon'ble Supreme Court of India in the case of *Radheshyam Kejriwal*[3] has *inter alia*, observed the following: -

(i) adjudication proceedings and criminal proceedings can be launched simultaneously;

(ii) decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) adjudication proceedings and criminal proceedings are independent in nature to each other and

(iv) the findings against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution. Therefore, prosecution may even be launched before the adjudication of the case, especially where offence involved is grave, qualitative evidences are available and it is also apprehended that party may delay completion of adjudication proceedings.

Therefore, the decision of prosecution under GST shall be taken giving due regard to the circumstances of the cases and such other factors prescribed below:

1. Nature and Gravity of Offence
2. Amount of tax evaded
3. Amount of the Input Tax Credit Wrongly Claimed
4. Amount of tax refund Wrongly Claimed
5. Nature of Evidence collected

Quality of Evidence collected

For successful prosecution, the various aspects, which need to be taken care of can broadly be divided into the two categories. First category is related to procedural aspects and second one

[3] [2011 (266) E.L.T. 294 (S.C.)]

is related to collection of quality evidences to sustain the charges against the accused, which in any case have to be beyond a reasonable doubt.

4.1. Procedural Aspects:

It is pertinent to note that non observance of the procedural aspects also leads to failure of the prosecution in the court of law. The procedures required to be followed during investigation starts from issue of summon, recording of statement, making of Panchama, documentation for search, seizure and arrest etc. Due care should be given while preparing these documents so that offender is not go scot-free on account of procedural lapses on the part of the investigation. In the coming para, discussions is being made in respect of preparation of various documents during the process of investigation.

Procedure for filing the prosecution is detailed in the Instruction No. 04/2022-23 [GST-Investigation] dated 1-9-2022[4], which has to be followed scrupulously so that violation of procedure does not come in the way of success of prosecution.

Other procedural aspects, which are prior to launching prosecution are related to the procedures prescribed for investigation of the case during which evidences are collected. Whether or not a case is suitable for prosecution and adequate evidence is forthcoming for securing conviction also depends on the quality of investigation. It is, therefore, necessary to monitor the investigation so that all possible evidence is brought on record and can be used in securing conviction.

Various precautions are required in each step of the investigation. This starts from issue of summons, recording of statement, execution of search including preparation of Panchnama, execution of arrest including making of Arrest Memo and collection of documentary evidences during the investigation. All these procedural aspects and safeguards required while preparing/issuing the documents during the investigation are given below:

[4] Appendix-1

4.2. Procedure of issue of summons:

As per Section 70(1) of the CGST Act, 2017, summons can be issued by the proper officer to any person whose attendance is considered necessary either for giving evidence or producing a document or any other thing in an inquiry in the same manner, as provided in the case of a civil court under the provisions of Code of Civil Procedure, 1908 (5 of 1908). As per sub-section (2) of Section 70, securing such documentary and oral evidence under the said legal provision shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860). That means if anyone intentionally gives false evidence in response to summon issued under section 70, or fabricates false evidence for the purpose of being used in any stage of such enquiry, may be punished with imprisonment which may extend to seven years, and shall also be liable to fine.

Issue of summons in any inquiry, to a witness to give evidence should be reasonable and not arbitrary. The authority issuing the summons, must issue summons to a witness only when the authority considers it necessary. This necessarily implies application of mind and is guided by the principles of reasonableness in the matter of summoning of witness. Guiding force for issuing summon should be 'necessity of witness for the purposes of inquiry'. Hon'ble Jharkhand High Court in the case of Sudhir Deora Vs. CCE[5] had observed that it is quite possible that the senior most officers like Managing Director or General Manager, who are at the helm of the affairs of the company might not be having knowledge of minute operational things. The hon'ble Court held that the Enquiry Officer should keep in mind that he being an Officer authorized by law to summon anybody does not make him an Officer having no control of reasonableness and though he has right to summon any person either the Managing Director or the General Manager of the company or even a clerk of the company but he should not summon unless it is required for the purpose of an inquiry.

Therefore, summons is one of the instruments with the Department to get/obtain information or documents or statement from any person to find out the evasion of the tax. Format of summons has been prescribed under Board's Circular No. 128/47/2019-GST, dated 23rd December, 2019[6] (**Appendix-II**).

[5] (284 ELT 326)
[6] Appendix-II

CBIC has issued a detailed Instruction bearing No. 3/2022-23 (GST-Investigation) dated 17.08.2022[7] **(Appendix -III)** setting the guidelines on issue of summons under section 70 of the CGST Act,2017. The salient features of the said instructions are as under:

(i) Summons by Superintendents should be issued after obtaining prior written permission from an officer not below the rank of Deputy/Assistant Commissioner with the reasons for issuance of summons to be recorded in writing. Where for operational reasons it is not possible to obtain such prior written permission, oral/telephonic permission from such officer must be obtained and the same should be reduced to writing and intimated to the officer according such permission at the earliest opportunity.

(ii) In all cases, where summons are issued, the officer issuing summons should record in file about appearance/non-appearance of the summoned person and place a copy of statement recorded in file.

(iii) Summons should normally indicate the name of the offender(s) against whom the case is being investigated unless revelation of the name of the offender is detrimental to the cause of investigation, so that the recipient of summons has *prima facie* understanding as whether he has been summoned as an accused, co-accused or as witness.

(iv) Issuance of summons may be avoided to call upon statutory documents which are digitally/online available in the GST portal.

(v) Senior management officials such as CMD/MD/CEO/CFO/similar officers of any company or a PSU should not generally be issued summons in the first instance. They should be summoned when there are clear indications in the investigation of their involvement in the decision-making process which led to loss of revenue.

(vi) Generation and quoting of Document Identification Number (DIN) is mandatory on summon.

[7] Appendix-III

(vii) The summoning officer must be present at the time and date for which summons is issued. In case of any exigency, the summoned person must be informed in advance in writing or orally.

(viii) All persons summoned are bound to appear before the officers concerned, the only exception being women who do not by tradition appear in public or privileged persons. The exemption so available to these persons under Sections 132 and 133 of CPC, may be kept in consideration while investigating the case.

(ix) Issuance of repeated summons without ensuring service of the summons must be avoided. If summoned person does not join investigations even after being repeatedly summoned, in such cases, after giving reasonable opportunity, generally three summons at reasonable intervals, a complaint should be filed with the jurisdictional magistrate alleging that the accused has committed offence under Section 172 of Indian Penal Code (absconding to avoid service of summons or other proceedings) and/or 174 of Indian Penal Code (non-attendance in obedience to an order from public servant.

4.3. Recording of Statements:

A statement without the backing documentary or circumstantial evidence has little value. The value of a statement increases many folds, if disclosures made in the statement are corroborated by other material evidence. Conversely, a good incriminating statement can be obtained by confronting the accused/ witness with documentary evidence or statements of other persons. Therefore, a good investigation will bring sufficient material evidence on record and will not overtly depend on statements.

4.3.1. At the time of recording of statement, it is quite possible that a person doesn't have exact knowledge of facts and/or figures or might have forgotten the same. In such a case the documents can be referred to refresh memory and statements can be given accordingly.

As per section 59 of the Indian Evidence Act 1872, "a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if

when he read it he knew it to be correct. As regards to presence of advocate at the time of taking statement by tax authorities, it has been held that it is not a right of the tax payer to have its counsel along with him. However, looking to the medical or other conditions the counsel may be allowed to attend the proceedings, however no consultation is allowed at the time of recording the statements. Hon'ble Apex court in the case of Poolpandi Vs. Sup. Central Excise[8] while holding the same ratio observed that "The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non – cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be expanded to favour exploiters engaged in tax evasion at the cost of public exchequer."

4.3.2. Pattern for Recording Statements:

As a direct result of interrogation, statements have to be recorded. It is significant to note that the CGST Act, 2017 does not prescribe any procedure for recording of statements. The absence of the same has resulted in wide variance and disparity in the form and manner in which statements are being obtained. This has also resulted in officers having to face accusations of malpractice, unjustifiable exercise of power, irregularities, illegalities, etc. Hence, it is necessary that all officers follow a uniform manner and format for recording of statements. A systematic and detailed pattern of questioning and recording of statement as given below becomes necessary.

The following clauses/points should be incorporated/mentioned in a statement:

(i) "I am in receipt of your summon no. ……dated…… issued by ……I have been explained the provisions of Section 70 of the CGST Act,2017 and have been explained that giving false evidence in the enquiry proceedings is an offence punishable under

[8] (60 ELT 24)

Section 193 of the Indian Penal Code. Further, I have also been explained that my statement can be used against me or against any other person, in this enquiry proceedings or in any other proceedings as evidence."

(ii) The relevant Act and section should be boldly indicated.

(iii) Full name, age and address of the person giving the statement.

(iv) Full name and designation of the officer recording the statement.

(v) The reference number and date of issue of summons.

(vi) Date and time of appearance of the person summoned for giving the statement.

(vii) Statement should carry following information about the person.

- Full Name and aliases, if any.
- Address : (I) Business (II) Residential address ,
- Age:- Date of Birth
- Occupation
- Names and addresses of partners, if any
- Annual income
- Marital status
- Languages known – read/write/speak
- Any known medical complaints
- PAN number, passport number, UID, etc.

(viii) Reason why the person is giving the statement.

(ix) Factual details of the case as known to the person.

(x) How the above facts are known to the person: (1) Personal knowledge (2) Hearsay (3) Documentary evidence (4) Material evidence

(xi) If the evidence is hearsay, explanation of the person as to why it is reliable.

(xii) If other people are sought to be implicated, get: (1) Full identification (2) Address (3) Age (4) Precise role played

(xiii) The nature of the violation committed.

(xiv) Affirmation that all details have been truthfully disclosed and voluntarily given without any fear, favour or coercion.

(xv) Full signature and name to be obtained at the end of each page of the statement. Check genuineness of the signature.

(xvi) Date and time of conclusion of the statement.

(xvii) Full name, signature and designation of the officer recording the statement.

4.4. Judicial pronouncements on Power to Summon and admissibility of Statements:

4.4.1. Over the years the power to summon and admissibility of statements recorded as evidence has been examined by various courts of law. Some of the important pronouncements in this regard are as follows: -

(i) A person called for interrogations has no right to have his lawyer present during questioning by the officers as such person cannot be equated with an accused. {Poolpandi V. Superintendent Central Excise,[9]

(ii) Voluntary statements recorded under Section 14 are admissible as evidence in departmental proceeding and also in a court of law- (K. I. Povunny v. ACCE)[10].

(iii) Service of summon is not a condition precedent to recording of statement. There is no rule prescribing procedure for issuing any summon nor is there any form prescribed, therefore service of summon is not a condition precedent to recording of statement. - Laxman Padma Bhagat v. State of Maharastra,[11]

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[9] 1992 (60) ELT 24 (SC)}.
[10] 1997 (90) ELT 241,255 (SC)
[11] AIR 1965 Bom 195, 210

5. Various Provisions of Indian Penal Code/Code of Civil Procedure, relevant to investigation under CGST Act,2017

Certain provisions /Section of IPC and Code of Civil Procedure have been made applicable to the CGST matters also particularly in respect of issue of summons, search, seizure and arrest. The same are detailed below: -

5.1. Section 172 of the Indian Penal Code, 1860 172.

Absconding to avoid service of summons or other proceeding: -

Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

5.2. Section 174 of the Indian Penal Code, 1860 :

Non-attendance in obedience to an order from Public Servant: Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place of time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice, order of proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

5.3. Section 193 in the Indian Penal Code 193

Punishment for false evidence.— Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a

term which may extend to seven years, and shall also be liable to fine, and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

5.4. Section 228 of the Indian Penal Code 228

Intentional insult or interruption to public servant sitting in judicial proceeding :- Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

5.5. Section 132 of the Code of Civil Procedure

Exemption of certain women from personal appearance.

(1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

5.6 Section 133 of the Code of Civil Procedure

Exemption of other persons: -

The following persons shall be entitled to exemption from personal appearance in Court, namely- (i) the President of India; (ii) the Vice-President of India; (iii) the Speaker of the House of the People; (iv) the Ministers of the Union; (v) the Judges of the Supreme Court; (vi) the Governors of States and the administrators of Union Territories; (vii) the Speakers of the State Legislative Assemblies/ (viii) the Chairman of the State Legislative Councils; (ix) the Ministers of States; (x) the Judges of the High Courts; and (xi) the persons to whom section 87B applies.

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6. Search & Seizure:

Power of Search and Seizure are very strong investigation tool in the hands of revenue authorities, which gives enormous opportunity to gather evidences and unearth suppressed things and information so as to properly identify evasion of payment of tax and/ or contravention of any provisions of the law. However, such an action is having an effect of interfering into one's independence in addition to having a chances of hampering business activities to some extent, hence normally these powers are exercised as a last resort of gathering information. To ensure safeguarding interest of regular, law abiding and honest tax payers, reasonable provisions have been incorporated in law. Therefore, while exercising these provisions, utmost care is required especially documentation part related to such actions so that evidences collected during investigation should not fall victim of improper documentation and procedural defects.

The provisions of Section 67 to 72 of the Central/ State Goods and Services Tax Act 2017, and Rule 139 to Rule 141 of CGST Rules deal with powers and procedure of Inspection, Search & Seizure, summary of which can be presented as under:

6.1. Initiation of Inspection Proceedings:

Section 67(1) reads as "where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that;

a. a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

b. any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place." Some of key aspects of the above provisions are as under;

- Authorisation of Inspection has to be given by an officer of the rank of Joint Commissioner and above.
- Authorising officer must have Reason to Believe that a Taxable person is:-
- Suppressing any transaction; or
- Suppressing Stock in hand; or
- Claiming of excess Input Tax Credit; or
- Indulging in contravention of any of the provisions of the law to evade tax; or
- a transporter is keeping the goods which has escaped tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax
- an operator of warehouse or godown or any other place is keeping the goods which has escaped tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax
- Authorisation should be in writing in Form No. GST INS-01, for Inspection.
- Inspection can be of Place of Business only.

Place of Business has been defined in Section 2(85) to include godown or any other place where a taxable person stores his goods, maintain his books of accounts and place of agent. Accordingly, if books of accounts are being maintained or kept at residence of director or any other key managerial person the same may be treated as place of business and inspection can be carried out there.

6.2. Initiation of Search & Seizure Proceedings

Section 67(2) prescribes that "where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things."

Some of the key aspects of above provisions are as under:

- Authorisation of Search & Seizure has to be given by an officer of the rank of Joint Commissioner and above.
- Authorising officer must have Reason to Believe about o Goods liable for confiscation are secreted in any place
- Books, documents or something, which is useful or relevant for proceeding under GST law, are secreted in any place
- Authorisation should be in writing in form GST INS-01 for Search.
- In case of Seizure, Order of Seizure is to be issued in form GST INS-02.
- In search & seizure proceedings goods which are liable for confiscation can only be seized.
- As per Section 130(1) of the C/SGST Act, following goods are liable for confiscation, under the law:

- (i) If supply is made in contravention of any of the provisions of GST law with intention to evade payment of tax, or
- (ii) If goods are not accounted for on which tax is liable to be paid or
- (iii)If goods liable to tax are supplied without having applied for registration (30 days time limit is there for applying registration, from the date person becomes liable for paying tax).

6.3. Difference between Inspection & Search

Aspect	Inspection – Sec. 67(1)	Search – Sec. 67(2)
Primary Purpose	Verification of transactions of supplies, Stock in hand, claim of ITC & contravention of provisions of the Act to evade tax.	Unearthing of goods liable for confiscation or Secreted Books, documents or things
Scope	Inspection can be done at Place of Business only.	Search can be done at Any Place including residence of tax payer and/ or employees.
Powers	Forceful action (Sealing or Break Open) cannot be adopted	Seal or Break Open the door of any premises or break open any almirah, electronic devices, box, receptacle in which any goods accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied, can be resorted.
Seizure of Goods.	Goods cannot be seized in inspection proceedings.	Goods can be seized if they are liable for confiscation. If not practically possible To seize, constructive seizure can be there.
Seizure of Books of Accounts/ Documents.	Books/ documents cannot be seized in inspection proceeding.	Any secreted document, books or things, which may be useful or relevant to any proceedings can be seized.

6.4. Execution of search including preparation of Panchnama:

To ensure that prosecution is not failed during trial on account of some procedural defects /faults relating to execution of search and preparation of Panchama, due care may be given in execution of search and preparation of Panchnama.

Non observance of proper procedures during search proceedings and/or discrepancies in recording Panchnamas/statements weaken the judicial security of the ease at a later stage. CBIC-Investigation Wing, CBIC has come out with detailed a Instruction No. 01/2020-21[GST-Investigation] dated 02.02.2021 [12] regarding procedures to be followed during search operation. The salient features are as under: -

i) The officer issuing authorization for search should have valid and justifiable reasons for authorizing a search, which shall be duly recorded in the file. Search should be carried out only with a proper search authorization issued by the Competent Authority.

ii) The instructions related to the generation of DIN for each search authorization shall be scrupulously followed by the officer authorizing the search.

iii) The premises of a person cannot be searched on the authority of a search warrant issued for the premises of some other person.

iv) In case of a search of a residence, a lady officer shall necessarily be part of the search team.

v) The search shall be made in the presence of two or more independent witnesses who would preferably be respectable inhabitants of the locality, and if no such inhabitants are available or willing, the inhabitants of any other locality should be asked to be witness to the search. PSU employees, Bank employees, etc. may be included as witnesses during sensitive search operations to maintain transparency and credibility. The witnesses should be informed about the purpose of the search and their duties.

[12] Appendix-IV

vi) The officers conducting the search shall first identify themselves by showing their identity cards to the person-in-charge of the premises. Also, before the start of the search, the officers, as well as the independent witnesses, shall offer their personal search. After the conclusion of the search, all the officers and the witnesses should again offer themselves for their personal search.

vii) The search authorization shall be executed before the start of the search and the same shall be shown to the person in charge of the premises to be searched and his/her signature with date and time shall be obtained on the body of the search authorization. The signatures of the witnesses with date and time should also be obtained on the body of the search authorization.

viii) A Panchnama containing a truthful account of the proceedings of the search shall necessarily be made and a list of documents/goods/ things recovered should be prepared. It should be ensured that the time and date of start of search and conclusion of the search must be mentioned lathe Panchnama. The fact of offering personal search of the officers and witnesses before initiation and after the conclusion of the search must be recorded in the Panchnama,

ix) In the sensitive premises videography of the search, proceedings may also be considered and the same may be recorded in Panchnama.

x) While conducting a search, the officers must be sensitive towards the assesses/party. Social and religious sentiments of the person(s) under search and of all the person(s) present, shall be respected at all times. Special care/ attention should be given to the elderly, women, and children present on the premises under search. Children should be allowed to go to school, alter examining their bags. A woman occupying any premises, to be searched, has the right to withdraw before the search party enters, if according to the customs she does not appear in public. if a person on the premises is not well a medical practitioner may be called.

xi) The person from whose custody any documents are seized may be allowed to make copies thereof or take extracts therefrom for which he/she may be provided a suitable

time and place to take such copies or extract therefrom. However, if it is felt that providing such copies or extracts therefrom prejudicially affect the investigation, the officer may not provide such copies. If such a request for taking copies is made during the course of the search, the same may be incorporated in Panchmuna, intimating place and time to make such copies.

xii) The officer authorized to search the premises must sign each page of the Panchnama and annexures. A copy of the Panchnama along with all its annexures should be given to the person-in-charge of the premises being searched and acknowledgment in this regard may be taken. If the person-in-charge refuses to sign the Panchnama, the same may be pasted in a conspicuous place of the premises, in presence of the witnesses. Photograph of the Panchnama pasted on the premises may be kept on record.

xiii) In case any statement is recorded during the search, each page of the statement must be signed by the person whose statement is being recorded. Each page of the statement must also be signed by the officer recording the statement as 'before me'.

xiv) After the search is over, the- search authorization duly executed should be: returned to the officer who had issued the said search authorization with a report regarding the outcome of the search. The names of the officers who ha& participated in the search should be written on the reverse of the search authorization. If search authorization could not be executed due to any reason. the same should be mentioned in the reverse of the search authorization and a copy of the same may be kept in the case file before returning the same to the officer who had issued the said search authorization.

xv) The officers should leave the premises immediately after the completion of Panchnama proceedings.

6.5. Searches and seizures are always challenged before the court on two counts i.e. it is alleged that:

(a) The substantial due process was not followed; or

(b) Procedural due process was not followed.

The former revolves around the doctrine of '**reason to believe'** i.e. there was no reasonto search; the search was ordered without application of mind; there was no material to

substantiate the reason; the officer was biased; the search was subjective; it was basedon arbitrary grounds and at times that the search authorization was not issued by the proper officer.

Whereas, for the later, a number of pleas are taken and it is this part which is most vulnerable and sensitive for a successful and comprehensive outcome of a case till the prosecution of the offender before the Trail Court. Both these shall be discussed in detail in the following paragraphs.

6.5.1. Reason to Believe:

Proper Officer (not below the rank of Joint Commissioner) must have reason to believe before authorizing any action of Search & Seizure and Inspection as well. The phrase 'Reason to believe' is not defined under the GST law. The phrase 'reason to believe' is defined in Section 26 of the Indian Penal Code, 1860 as under:

"A person is said to have "reason to believe" a thing, if he has sufficient causeto believe that thing but not otherwise".

That means there are very less room for any doubt or ambiguity. Reason to believe refers to a positive, strong and firm opinion based on information and evidences. It definitely a subjective matter which may vary from case to case, however 'Reason to believe is not same as that of Reason to Suspect' - Indian Oil Corporation[13]. Further the scope of the said term is more or less settled under Income Tax Law. Accordingly, the expression 'reason to believe' in section 147 does not mean purely subjective satisfaction on the part of the Assessing Officer. The belief must be held in good faith, it cannot be merely a pretense. It is open to the court to examine whether the reason for the belief are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Assessing Officer in starting proceeding under section 147 is open to challenge in a court of law.

[13] 159 ITR 956 SC

[**S. Narayanappa vs. CIT]**[14] . Further, Hon'ble SC in the case of '**Lakhmani Mewal Das** [15],held that the reason for the formation of the belief must have rational connection with or relevant bearing on the formation of the belief.

The rational connection postulates that there must be direct nexus or link between the material coming to the notice of the officer and the formation of his belief. The reason for the formation of the belief must be held in good faith and should not be a mere pretense. DGIT, Pune vs. Space wood Furnishers Private Limited[16] , wherein the SC has summarized the applicable principles as:

"Such information must be in possession of the authorized official before the opinion is formed. There must be application of mind to the material and the formation of opinion must be honest and bonafide. Consideration of any extraneous or irrelevant material will vitiate the belief/satisfaction."

6.5.2. Belief may be subjective but reason is objective: "Reason to believe" is a common feature in taxing statutes. It has been considered to be the most salutary safeguard on the exercise of power by the officer concerned. It is made of two words "reason" and "to believe". The word "reason" means cause or justification and the word "believe" means to accept as true or to have faith in it. Before the officer has faith or accepts a fact to exist there must be a justification for it. The belief may not be open to scrutiny as it is the final conclusion arrived at by the officer concerned, as a result of mental exercise made by him on the information received. But, the reason due to which the decision is reached can always be examined. When it issaid that reason to believe is not open to scrutiny what is meant is that the satisfaction arrived at by the officer concerned is immune from challenge but where the satisfactionis not based on any material or it cannot withstand the test of reason, which is an integral part of it, then it falls through and the court is empowered to strike it down. Belief may be subjective but reason is objective: - [**Ganga Prasad Maheshwari vs. CIT**][17]. MP High Court recently in **Jagdish Arora vs DGGI**[18] interpreting the '*reason to believe'* while hearing the bail plea in an arrest case held that 'Bench does not perceive any

[14] (1967) 63 ITR 219(S.C)
[15] 1976 (SC 1976 AIR 1753)
[16] (2015) 12 SCC 179(2015) 374 ITR 595
[17] (1983)139 ITR 1043: (1981) 21 CTR 83 (All.)
[18] https://indiankanoon.org/doc/121651654/; August 18, 2020

material, except the statement of the employee about the involvement of the applicant' and that alone is not considered sufficient reason to believe and granted the bail however not commenting on the merit of the case. In **M/s Rimjhim Ispat Ltd. Vs State of U.P**[19] points that emerge for adjudication are whether the search and seizure under GST was carried out by observing the '**substantive due process'** as well as the '**procedural due process**.' Dismissing the petition, the Court observed that;

1. The Court observed that, it is essential that the officer authorized to carry outthe search should have 'reasons to believe 'which should be based on reasonable material and should not be arbitrary.
2. The reasons may or may not be communicated but the same should exist on record.
3. The officers concerned had recorded their 'reason to believe' which were based upon information received by the Department fortified by interception of the goods of the petitioner wherein the e-way bill was found to be suspicious which led to the search.
4. The HC held that 'reason to believe' did not appear to be arbitrary and it could not go into the question of validity of the reasons

As regards the substantive due process, which has to be followed before any search, is contained under sections 67(1) and 67(2) of GST Act and prior to exercise of the said powers, it is essential that the officer authorizing the search should have '*reasons to believe*.' The principles that are culled out from the catena of decisions referred aboveis that the 'reasons to believe' should exist and should be based on reasonable material and should not be fanciful or arbitrary. It is also well established that the reasons may or may not be communicated to the assessee but the same should exist on record.

Therefore, broadly the following may constitute the **Reason to Believe**: -

(i) There must be reason to believe that the tax due is being avoided or likelyto escape unless coercive action is not taken.
(ii) The existence of tangible material is necessary to form the opinion.
(iii) Reason to believe is stronger than "is satisfied".
(iv) Reason to believe does not mean "reason to suspect".
(v) It is exercised objectively.

[19] https://indiankanoon.org/doc/151890622/- (Allahabad HC); dated 15.03.2019

Hon'ble Supreme Court in the case of State of Punjab Vs Balbir Singh[20] has elaborately discussed various issues pertaining to the search and seizure (though in NDPS case, but are relevant to taxation laws also being general in nature). The Hon'ble Apex Court has held that search or arrest is illegal, if carried out by officers not duly authorised. In respect of search and arrest, it has been held that only an empowered officer can authorised his subordinates to carry it out, otherwise prosecution and conviction vitiated.

6.6. Checklist for Search:

1. Whether the procedure laid down vide Section 100 of CrPC followed? Has the Search authorisation by the proper officer been obtained or not?
2. Are grounds of belief regarding necessity of search be previously recorded?

6.6.1. Relating to Independence of witness: -

1. Whether the witnesses/ Panchas are independent? They should preferably be from the same locality. (Section 100(4) of CrPC).
2. Whether the copy of search authorization shown and signatures of two independent witnesses and the owner/occupier available in the premises at the time of search obtained/procured thereon?
3. If independent witnesses could not be secured, have the reasons been incorporated in the Panchnama proceedings and has the matter been reported to the immediate superior officer?
4. Has the statement of independent witnesses confirming the mahazar proceedings been recorded under proper authorization, preferably before a Gazetted officer?
5. Is the address of the independent witnesses is complete and verifiable?
6. Are the valid IDs of the witnesses enclosed?
7. Whether a written notice under Section 70 of the GST Act, 2017 served on the occupants of the premises or on the person who is intercepted at a public place and was the response to such a notice recorded in writing thereon?
8. Did the officers of search team offer their personal search by the owner/occupier of the premises before beginning the search of the premises? Whether the conditions laid under Sections 100 & 165 of Cr.PC, 1973 has been taken care?

[20] 1994 (70) E.L.T. 481 (S.C.)

8. Did the officers of search team offer their personal search by the owner/occupier of the premises before beginning the search of the premises? Whether the conditions laid under Sections 100 & 165 of Cr.PC, 1973 has been taken care?
9. Whether a lady officer present in the search team to ensure that a female is searched by a female?
10. Is personal search of the assessee warranted?
11. Has the search warrant duly executed returned in original to the issuing officer after the search is over, with a report regarding the outcome of the search? (The names of the officers who participated in the search may also be written on the reverse of the search warrant).
12. Has the issuing authority of search warrant had maintained register of records of search warrant issued? (The returned and used search warrants should be kept in records)

6.7. Checklist for Seizure:

1. Has the proper officer upon seizure of goods u/ s 67(2) prepared a note of the inventory as per Section 67(9)?
2. Has the order in GST INS-03 issued to the owner or custodian of goods where it is not practicable to seize any such goods?
3. Whether a report of Seizure and Arrest as envisaged in Section Section 67(2) of the Act, have been furnished to the superior officer within the stipulated time of- hours.
4. Whether all the goods, documents, articles, things and assets found relevant to the commission of offence and subsequent investigations, recovered during search, seized and the fact of seizure documented in inventory and in seizure memo, Panchnama?
5. Was the Panchanama /seizure memo/mahazar drawn carefully on the spot and correctly indicating the sequence of events including start and end time of the search proceedings?
6. Whether a copy of the Panchnama / Mahazar along with its annexure has been given to the person incharge/owner of the premises being searched under acknowledgement?
7. Whether the Panchnama / Mahazar and the list of goods/documents seized/detained invariably are signed by the witnesses, the in-charge/owner of the premises before whom the search is conducted and also by the officer(s) duly authorized for conducting the search?
8. If demanded photocopies of the documents can be provided to the person from whose custody documents are seized.
9. Has the notice for the seized goods issued within 6 months?

6.8. Issues related to Search and Seizure:

While exercising and executing the power of search and seizure officers encounters various practical issues. Some of the issues which are normally faced during search and seizures are detailed below along with legal authority which covers the particular situation. It is therefore advisable to take only appropriate actions, duly supported by the legal provisions in such situations, otherwise the action will always be subjected to objections and may lead to failure of the case in the trial court , during the prosecution proceedings.

Kerela HC in Suresh Kumar vs DGGI 16, August 14[21], , answered many relevantquestions about the substantial as well as procedural due process. Some of them are furnished herein below:

6.8.1. Can cheque be collected?

Hon'ble High Court has held as under:

" Section 87(3) proviso speaks of the restriction for deposit upto ten thousand rupees per challan. However, an officer above the rank of a Joint Commissioner or one authorized by such officer carrying out the investigation or enforcement activity is enabled to receive cash, cheque or demand draft in the course of an investigation or enforcement activity from the taxpayer. We do not find any extortion having been affected against the statute and Exhibit P3 specifically indicates that it is a voluntary payment, although it is made under protest." [Para 22]

Rule 87 CGST: (c) Proper officer or any other officer authorised for the amounts collected by way of cash, cheque or demand draft during any investigation or enforcement activity or any ad hoc deposit:

[21] 2020- 2020-TIOL-1376-HC-Kerela

6.8.2. On attachment of bank accounts: -

Hon'ble High Court has held as under:

" Principle of natural justice and giving hearing etc. does not apply insofar as an attachment made to protect the interest of the revenue. If notice is issued before attachment, then the account holder could as well defeat the purpose, by withdrawing the amounts kept in such accounts. The rule for a hearing does not arise prior to attachment. We leave the matter to be adjudicated before the appropriate authorities or forum. As a result, **Appeal dismissed."**

In **M/s. Khusiya Ind. vs State of Gujarat**[22], the department alleged a large-scale bogus billing activities against the petitioner whose **bank accounts, factory etc. were seized**. This was challenged before the Gujarat HC. Hon'ble Court has held the following:-

Held - At the prima facie stage, the department contends strongly that the petitioner has indulged into revenue defalcation. Possible tax and penalty liabilities are substantial. At the same time, it is not disputed that the petitioner is also involved in legitimate business activities. By freezing the petitioner's bank accounts and attaching the properties, the petitioner is temporarily rendered penalized. The petitioner cannot operate the business, cannot move the stock and cannot make payments. **Provisional attachments suspended subject to fulfilment of certain conditions**.

In the case of M/s Padmavati Industries, Jaipur vs Commissioner of Customs (Preventive), Jaipur[23], the Hon'ble High Court of Rajasthan has held that account cannot be frozen beyond the period of one year.

[22] 2019] 61 G S.T.R. 141 Dated: 26-10-2018
[23] 2020 (41) G.S.T.L. 461 (Raj.)

6.8.3. Sealing of Premises:

Hon'ble Delhi HC in **M/s Napin Impex vs DGGI-** [24] has deliberated on the issue of sealing of premises. In this case the , High Court noted that the petitioner's grievance is that the sealing of its business premises under Section 67 of the CGST Act, 2017, is illegal It is claimed that the authorization does not name the assessee; it only lists the two premises i.e. the business premises at Netaji Subhash Place and the DSIDC Unit at Narela. The Court has held as under:-

Held:- Given the plain text of the statute i.e. especially Section 67(4), which merely authorizes the concerned officials to search the premises and if resistance is offered, break-open the lock or any other almirah, electrical device, box, etc. containing books and documents, the complete **sealing of the premises, in the opinion of the court is per se illegal**. Even if it were assumed that the respondents temporarily restrained the petitioner from using its premises, for a few hours, till the books of accounts are made available in order to secure the evidence available in the premises, that could not have assumed the life on "its own", at least indefinitely. In these given circumstances, this petition succeeds.

6.8.4. Guidelines for Provisional Attachment of Property under Section 83 ofGST Act, 2017:

GST Policy Wing, CBIC, vide F. No. CBEC-20/16/05/2021-GST/359 dated 23/02/2021[25] has issued detailed guidelines for the provisional attachment of property for the purpose of protecting the interest of revenue during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74 of the Act. The guidelines are appended with this training material as Appendix – (VI).

6.8.5. Presence of Lawyer during Investigation:

In case of Poolpandi Etc. vs. Superintendent, Central Excise[26], the Hon'ble Supreme Court deliberated on the question whether a person is entitled to the aid of a counsel when he is questioned during investigation under the provisions of the CA, 1962 or the FERA 1973.

[24] 2018 (19) G. S. T. L. 578 (Del.) dated:- 28-9-2018-
[25] Appendix – (VI).
[26] 1992 AIR 1795, 1992 SCR (3) 247 (SC of India)

Initially the matter was decided by the Delhi HC against the Department whereas the Madras High Court took the opposite view. Both the views were challenged in supreme Court. The Hon'ble Supreme Court ruled the following:-

Held: The persons being interrogated during investigation under the provisions of the Customs Act,1962 or the FERA are not accused within the meaning of Article 20(3) of the

Constitution *20(3) No person accused of any offence shall be compelled to be a witness against himself* and the right reserved by the Constitution in favour of accused persons cannot be expanded to be enjoyed by others.

In Sudhir Kumar Agarwal vs. DGRI [27], Delhi HC held that **presence of lawyer cannot be allowed** at the time of questioning or examination of a person by the officers under the GST provisions. The Court observed that officers under GST law **are not police officers** and have been **conferred power to summon** any person whose attendance they consider necessary to give evidence or to produce a document.

Regarding the apprehensions of petitioner being physically assaulted or manhandled, the Court was of the opinion that it is well settled law that no investigation officer has a right to use any method which is not approved by law to extract information from a witness/suspect during examination. Supreme Court's decision in PoolPandi vs. Superintendent, Central Excise(supra), reiterated.

6.8.6. Can cash be seized?

In case of Smt. Kanishka Matta vs DGGI[28], the Hon'ble High Court of MP has observed:– -Goods as Pan Masala, Tobacco, Mouth Freshener, Confectionery, etc. valued at Rs.2.59 Crores were seized under Section 67(2) of the CGST Act read with Section 129, 130 of the CGST Act from six godowns as no bills / invoices could be produced by them – unaccountedcash of Rs.66.44 lacs was also seized from the residential premises of Smt. Kanishka Matta w/o Shri Sanjay Matta –Petitioner prayed to release the cash seized from the residential premises arguing that the respondent has got no power vested u/s 67(2) of the

[27] 2019-TIOL-2584-HC-DEL- November 06, 2019
[28] MP-2020-TIOL-1445-HC-MP-GST Dated 12.08.2020

CGST Act, 2017 to effect seizure of cash amount as the cash cannot be treated as "Document, Book or Things" as per the definition. Hon'ble High Court has held the following:-

Held: Core issue before this Court is that **whether expression "things" covers within its meaning the cash or not** - In the considered opinion of this Court, "money" can also

be seized by authorized officer - The word "things" appears in Section 67(2) of the CGST Act, 2017 is to be given wide meaning and the question of releasing the amount does not arise - The writ petition is dismissed.

6.8.7. Release of Goods Seized:

Section 67(6)/(7), Rule 140:

Goods seized at the time of search can be released on payment of applicable tax, interest and penalty. Alternatively, the goods seized can be released provisionally on furnishing of Bond in form No. GST INS-04for value of the goods, declaring that goods shall be produced as and when required by the proper officer and any tax, interest, penalty, fine or other law full charges shall be paid withinten days of their demand in writing. ***[for disposal of hazardous/ perishable good - Notification No. 27/2018–Central Tax 13th June, 2018 may be referred]***

6.8.8. Jurisdiction for Inspection, Search & Seizure:

Enabling cross jurisdiction by section 6, every tax payer gets covered by two jurisdictional authorities. In the 9th GST Council meeting held on 16th January 2017, it was decided that both the Central and the State tax administrations shall have the power to take intelligence-based enforcement action in respect of the entire value chain. For implementation of its decisions of cross empowerment GST council issued Circularno 1/2017 dated 20.09.2017 laying down the principles of **cross empowerment.**

6.9. Making of a Panchnama:

Panchnama is the primary document for establishing an offence even under the CGST Act,2017, as it has a very strong evidentiary value. Therefore, due care should be given in recording the Panchnama so as to make a case success in prosecution proceedings.

Panchnama is the record of events right from the commencement to conclusion of the search which includes stock taking. The manner of drawing the panchnama should be such that it should be a mirror image of the proceedings on the spot. Any person reading the panchnama should feel as if he is seeing through the eyes of the panchas or independent witnesses. Panchnama is a document where the record of proceedings of the search with regard to the recovery of goods, documents, cash, etc. are detailed. The Panchnama is required to be signed by the person in whose presence the search was conducted as also the independent witnesses besides the officer who executed the search warrant. A copy of the Panchnama is to be handed over to the persons whose signatures were obtained on the search warrant at the time of start of the search. This fact should be recorded in the Panchnama itself. Acknowledgement of the panchnama having been given to the person incharge of the premises must be obtained.

6.9.1. Types of Panchnama:

Panchnamas are of the following types:

i) Panchnama for checking (without search warrant) in the factory/dealers premises duly registered under CGST Act,2017.

ii) Panchnama for search of a factory/dealers' premises, business place or office on the authority of a search warrant.

iii) Panchnama for search of residential premises

iv) Panchnama during course of transit checks etc.

v) Panchnama for service of summons, notice, refusal to sign statements etc. by way of pasting on the walls, gates etc.

6.9.2. Points to be incorporated in a Panchnama:

As mentioned above, Panchnama is the single most important document in the context of search and seizure operations. This document should, therefore, be prepared carefully incorporating, inter alia, the following points.

(i) Name, parentage, age, address , Id and occupation of Panchas.

(ii) Date, time and place of proceedings.

(iii) Reason/authority for search or purpose of visit.

(iv) The fact that the officers conducting the search disclosed their identity to the Panchas.

(v) Name and designation of the officer leading the team.

(vi) The fact of presence of the occupants/representatives of the premises to be searched during the course of the search.

(vii) Execution of the search warrant upon the occupant/representative of the premises to be searched. The fact that one of the occupants/representatives of the party and both panchas have signed the search warrant.

(viii) The fact of offering personal search of each member of the search team before commencing search and again after conclusion of search.

(ix) The fact of presence of a lady officer in the party conducting the search (in case of search of residence etc.)

(x) Mention any important event taking place during the operation e.g. arrival of more officers/persons, calling a photographer for photography/Videography, drawing of samples, detection of large amount of cash, sealing of any almirah, cupboard etc.

(xi) Mention the details of production of statutory records and other private records, Account Books etc. presented by the representative of the party for inspection in case of checking (in case of search the officers themselves have to take into possession all records).

(xii) Mention how the verification of goods, inputs was undertaken (procedure adopted for weighment, measurement, test checking of standard packages/units etc). It should be supported by inventory of stocks verified.

(xiii) Record the fact that in respect of goods verified physically, no other stock was available/left over. Current day's production and issue of inputs may be specifically mentioned as excluded.

(xiv) Make a separate annexure for inventories of records/documents to be resumed and articles/goods seized.

(xv) Mention the grounds forming the reasons to believe that goods seized were liable to confiscation under the CGST Act,2017 or the rules made thereunder and the provisions under which seizure effected.

(xvi) Mention the value and duty of goods seized/detained & whether seized goods given in 'supurdagi' or taken into possession.

(xvii) Record facts regarding drawal of samples, if any. If sealed, a specimen of the seal to be given on the body of panchnama.

(xviii) Mention the details of brand name, trade name, standard packing and markings given on goods verified/seized.

(xix) In case of concealment of goods, records or evidences, give facts regarding place of storage (basement etc.) and manner of concealment.

(xx) Every page of records resumed/seized should be numbered following one set pattern viz. 1,2,3 etc. (& not 1,3,5….).

(xxi) The first and last page of every file, register, Account Book etc. should be got signed by the authorized representative of the party or the person upon whom the search warrant has been executed.

(xxii) Every loose paper/vital document should be got signed individually from the concerned person from whose seat or cabin the same was recovered and from the person on whom search warrant was executed.

(xxiii) In case any of the portion of the premises, almirah, safe, store etc. is found to be locked and cannot be opened for some reasons or the other, the same may be sealed and a mention may be made accordingly in the panchnama. This sealed premises can be searched using fresh search warrant on any following day.

(xxiv) The details of any locker, almirah or any section of premises which has been sealed for reasons that the officers could not immediately obtain access for want of the keys, hypothecation to the bank or any other reason, should be incorporated.

(xxv) The grounds for seizure/resumption of records/documents, should be described in the Panchnama.

The above list is only illustrative and not exhaustive as there can be numerous factors which may have to be incorporated in panchnama depending upon the nature of proceedings and the events taking place. For example, there may be a case where a panchnama may be drawn for the manufacturing process undertaken for manufacture of an good. Further, if two or more firms/units are operating from the same premises or there are common employees etc. the panchnama should contain relevant details, which may include ground plan, details of plant & machinery installed, etc.

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7. Arrest under GST Law.

In the administration of taxation, the provisions for arrests are created to tackle the situations created by some unscrupulous tax evaders. To some these may appear very harsh but these are necessary for efficient tax administration and also act as a deterrent and instil a sense of discipline. The provisions for arrests under GST Law have sufficient inbuilt safeguards to ensure that these are used only under authorisation from the Commissioner. Besides this, the GST Law also stipulates that arrests can be made only in those cases where the person is involved in offences specified for the purposes of arrest and the tax amount involved in such offence is more than the specified limit.

7.1. SECTION 69. Power to arrest. —

(1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.

(2) Where a person is arrested under sub-section (1) for an offence specified under sub-section (5) of section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.

(3) Subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), —

(a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;

(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station.

From the perusal of sub-section (1) of Section 69 of CGST, it is clear that a person can be arrested only if he commits an offence specified in clause (a), (b), (c) and (d) of sub-section (1) of Section 132 which is punishable under clause (i) or (ii) of sub-section (1) or sub-section (2) of Section 132.

7.2. Bailable and Non-bailable offences.

Before further discussion of this issue, it should be clear that the provisions for "Arrest" and "Bail" are different. Clause (a) of sub-section (3) of Section 69 provides provision of default bail if a person arrested for any offence specified under sub-section (4) of Section 132 of the Central Goods and Services Tax Act, 2017. Sub-section (4) of Section 132 reads as under:

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

So, except the offences referred to in sub-section (5), all offences are bailable and non-cognizable. Sub-section (5) of Section 132 reads as under:

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

Clause (e) of sub-section (1) of Section 132 clearly says that offences specified in clause (a), (b), (c), (d) and punishable under clause (i) shall be cognizable and non-bailable. As per clause (i) of sub-section (1) of Section 132 cases where amount of tax evaded exceeds five hundred lakh rupees are cognizable and non-bailable, except this all are bailable and non-cognizable. To better understanding, the same is summarized in the table given below:

Sl. No.	Arrest	Punishment	Bailable or non bailable
1.	any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132.	(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;	Cognizable and non-bailable
2.	any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132	(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine.	Bailable and non cognizable.

7.3. The salient points of these provisions are:-

(a) Provisions for arrests are used in exceptional circumstance and only with prior authorisation from the Commissioner.

(b) The law lays down a stringent criteria and procedure to be followed for arresting a person. A person can be arrested only if the criteria stipulated under the law for this purpose is

satisfied i.e. if he has committed specified offences (not any offence) and the tax amount is exceeding rupees 200 lakhs. However, the monetary limit shall not be applicable if the offences are committed again even after being convicted earlier i.e. repeat offender of the specified offence scan be arrested irrespective of the tax amount involved in the case.

(c) Further, even though a person can be arrested for specified offences involving tax amount exceeding Rs. 200 lakhs, however, where the tax involved is less than Rs. 500 lakhs, the offences are classified as non-cognizable and bailable and all such arrested persons shall be released on Bail by Deputy/Assistant Commissioner. But in case of arrests for specified offences where the tax amount involved is more than Rs. 500 lakhs, the offence is classified as cognizable and non-bailable and in such cases the bail can be considered by a Magistrate only.

7.3.1. As seen in section 69, the essential pre-requisite to arrest a person is that he should be liable for punishment under the Act or the rules made thereunder. The offences and penalties are provided in section 9 of the Central Excise Act, 1944. It is advised that the officers study this section carefully as this section provides the offences and the punishment for such offences.

In practice, arrest under section 69 of the CGST Act, 2017 is generally ordered, when following conditions are met:-

(a) the offence is of a serious nature involving a substantial loss of revenue,
(b) fraudulent intent is clear and
(c) the preliminary evidence is considered sufficient to obtain a conviction

Arrest can be made prior to the issue of the Show Cause Notice i.e. during the stage of pendency of proceedings, if the investigations have revealed a prima facie case against the person, that is to say, where fraudulent intent of the person is clear (prima facie, there is evidence of mens rea) or where the evidence is enough to secure a conviction or where the person is likely to abscond, tamper with evidence or influence the witnesses, if left at large. Arrest at the investigation stage should be restored to only when it is unavoidable. It is a tool to further the interest of investigation. The actual punishment on the basis of evidences

collected squarely lies with the judiciary. The factors which are of importance while considering arrest at the stage of investigation are:-

i. whether the person concerned is cooperating with investigation,
ii. possibility of his tampering with evidence,
iii. possibility of influencing co-accused or witnesses of the case,
iv. possibility of fleeing from justice.

Once a person is arrested, the he has to be produced before the Magistrate. The Magistrate may take him in judicial custody to further the interest of investigation. However, a person can be kept in judicial custody only for a maximum period of 60 days. If complaint is not filed within 60 days, i.e. prosecution is not initiated, the accused person is granted bail as a matter of right under section 167(2) of the Cr.P.C.

The arrest is generally made in the cases where it is intended to prosecute the offender. CBIC, vide Instruction No. 04/2022-23 [GST-Investigation], dated 1-9-2022[29] has issued guidelines for launching of Prosecution under the Central Goods & Services Tax Act, 2017 .These guidelines, which are already discussed in the early part of this training material therefore, need to be followed at the time of considering arrest of a person.

7.3.2. Whom to Arrest:

Any person who, the arresting officer has “reasons to believe”, has committed an offence punishable under the CGST act,2017 can be arrested with the approval of the Commissioner. However, a person committing an offence under the CGST Act,2017 is liable to be taken into custody only in exceptional cases and when a person is cooperating with the investigations and is also not likely to abscond or tamper with evidence he should not generally be arrested. Further, merely because a person is liable to prosecution is no ground for arresting him unless his "immediate arrest" is necessary for preventing the tampering of evidence, and unduly influencing the witnesses. Also, taking a person into custody is unwarranted when enquiry is only at a preliminary stage and further material is required for forming a tentative view.

[29] Appendix-1.

7.4. Arrests in case of offences committed by Companies or Partnership firms

In case the offence has been committed by a limited company or a partnership firm, then as per the provisions of Section 137 of the CGST Act,2017, the following persons are vicariously liable for the offence:

(i) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(ii) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or *karta* or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, *mutatis mutandis*, apply to such persons.

In the case against companies and firms, therefore, the persons vicariously liable can be arrested provided that the ingredients as mentioned in Section 69 are fulfilled.

The vital ingredient for arrest in offences under section 137 is that "an offence" should have been committed with the consent or connivance of, or is attributable to any negligence on the part of said persons. Thus, the section contains a deeming provision such that person of a company is deemed to be guilty of offence committed by the company. This section transfers the burden of proof from prosecutor to the accused, when an offence has been committed.

7.5. Arrest Procedure:

CBIC has come out with a detailed guidelines for arrest and bail in GST matters vide Instruction No. 02/2022-23(GST-Investigation) dated 17.08.2022[30].

[30] Appendix-V

Apart from the said guidelines, following aspects should be kept in mind before arrest of an accused. Before proposing arrest, complete details of the evidence giving rise to the reason to believe that the person proposed to be arrested has committed an offence punishable under the CGST Act,2017 for which his immediate arrest is necessary, should be recorded on the file. The arrest should then be approved by the Commissioner.

Before effecting an arrest the following documents are advised to be kept handy:-

i. Intelligence report, where detection is based on a prior information/ intelligence.
ii. Preliminary Investigation/Offence Report containing the name of the offender, names of the company/firms, approx. tax evasion detected or suspected, brief facts of the case, documents and statements relied upon, facts giving rise to the reason to believe that the person has committed an offence punishable under the CGST Act,2017.
iii. Copies of the documents relied upon have to be prepared as these documents have to be produced before the Magistrate when the accused is produced before him. A copy of the documents may also have to be supplied to the accused on his or on his lawyer's request, if the court so allows.
iv. Where any person is arrested without a warrant under the CGST Act2017, he must be informed of the grounds of arrest. This is done by furnishing him a copy of the Arrest Memo containing the grounds of arrest.

For format of arrest memo , C.B.I.C. Circular No. 128/47/2019-GST, dated 23-12-2019issued under File No. GST/INV/DIN/O1/19-20[31] may be referred wherein apart from format of arrest memo standard formats of Authorisation for search, summons, inspection notice, and provisional release order have been prescribed.

7.6. Precautions related to arrest: It should be ensured that dated signatures of the person arrested alongwith the time is obtained on the other two copies as a token of having received the Arrest Memo. Arrest Memo should be in a language which the accused can understand. In case of an illiterate person the Arrest Memo should be read out to the accused & the fact should be recorded on the Arrest Memo. Immediately after the arrest, the Arresting Officer should conduct a "Jamma Talashi' of the accused and record a report on Jamma Talashi on the body of all the three copies of the Arrest Memo along with his dated signatures.

[31] Appendix -II

A sample format of the manner of recording the proceedings of Jamma Talashi as prescribed under C.B.I. C. Circular No. 128/47/2019-GST, dated 23-12-2019[32].

Jamma Talashi essentially means taking an inventory of the goods/valuables which the arrested person is carrying on his person. This includes clothes, ornaments, wallet, watches, shoes, socks, spectacles, pen etc. It is advisable that the valuables which the arrested person is carrying on his person are kept in a sealed cover in custody of the Arresting Officer. A precise inventory of such valuables should be made. These valuables should be released to the person on his release on bail.

In making an arrest the officer shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Immediately after arrest, the CGST Officer can either admit the person to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to the Magistrate. The amount of bond executed for the purpose of bail is entirely at the discretion of the officer granting bail with the only restriction that it should not be excessive. When there is a possibility of the accused jumping the bail, high bond amount may be fixed. The officer may also take surety bonds from the known and respectable persons of the area, as a guarantee against the availability of the accused for investigations and prosecution purposes.

In case the Magistrate remands the accused to judicial custody and the preventive officers want to record a statement then they should apply to the Magistrate for the same. A statement in the judicial custody can only be recorded with the permission of the Magistrate.

7.7. Hon'ble Supreme Court Directives regarding Rights of an Arrestee:

The Hon'ble Supreme Court of India in their judgment dated 18.12.1996, in the case of Shri D.K Basu v. State of West Bengal in W.P. (CRL) No. 539 of 1986 with W.P (CRL)592 of 1987 in the case of Ashok K. Johri v. State of U.P[33] stipulated the following requirements to be observed by the officers of the Customs & Central Excise and DRI in all cases of arrest/detention.

[32] Ibid.
[33] [JT 1997 (1) S.C.1]

(i) The personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations.

(ii) The officer carrying out the arrest should prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where arrest is made. The memo should also be countersigned by the arrestee and shall contain the date/time of arrest.

(iii) A person who has been arrested or detained, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, unless the attesting witness of the memo of arrest is himself a friend or a relative of the arrest.

(iv) The time, place of arrest and venue of custody of arrestee must be notified, where the next friend or relative of arrestee lives outside the district or town, through the Legal Aid Organization in the District and the Police Station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(v) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(vi) An entry must be made in the diary, at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the officials in whose custody the arrestee is.

(vii) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The “Inspection Memo”, must be signed both by the arrestee and the officer effecting the arrest and its copy provided to the arrestee.

(viii) The arrestee should be subjected to medical examination by a trained doctor every 48 hours of his detention in custody by a doctor on the panel of approved doctors appointed by the Director of Health Services of the concerned State or Union Territory.

(ix) Copies of all the documents including the memo of arrest, referred to above, should be sent to the 'illaqa' Magistrate for his record.

(x) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

7.8. Other aspects related to arrest:

The Hon'ble High Court of Madras in the case of Roshan Beevi and others Vs Joint Secretary to the Govt. of Tamil Nadu, Public Department (Law and Order) and Others[34] has deliberated on various aspects relating to arrest. The relevant portions of the said judgment are reproduced below:-

Arrest – Connotation:

The word `arrest' is derived from the French word `arrester' meaning `to stop or stay' and signifies a restraint of the person. However, the term `arrest' is not defined either in the procedural Acts or in the various substantive Acts, though Section 46 of the Criminal Procedure Code lays down the mode of arrest to be effected. Lexcographically, the meaning of the word `arrest' given in various dictionaries, means in its ordinary and natural sense, the apprehension or restraint or the deprivation of one's personal liberty. [1970 (2) All E.R. 12, 1976 (3) All E.R. 71 relied upon]. [paras 12 & 13].

Arrest - When a Person can be said to be under Arrest:

The question whether the person is under arrest or not, depends on the legality of the arrest as to whether he has been deprived of his personal liberty to go where he pleases. But, when used in the legal sense regarding criminal offences, an arrest consists in the taking into custody or holding or detaining him to answer a criminal charge or of preventing the commission of criminal offence by a person empowered by law. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority accompanied by a seizure or detention of the person in the manner known to law which is so understood by the person arrested. [para 13]

Custody - Interpretation of.

Although the term `custody' appears in a number of enactments, yet the said word is not defined in any of these enactments. According to corpus juris secundum, when it is applied to persons, it implies restraint and may or may not imply physical force depending on the circumstances. With reference to persons charged with crime, it has been defined as meaning an actual confinement or the detention of the person contrary to his will. Applied to things it means to have a charge or safe keeping and connotes control implying a temporary physical

[34] 1984 (15) E.L.T. 289 (Mad.)

control, but does not require the element of physical or manual possession. So used, the word does not connote dominion or supremacy of authority. Therefore, the meaning of the word `custody' has to be given with reference to the context in which it is used. [para 14]

Arrest - mere taking of in custody does not amount to arrest - Section 439 of Criminal Procedure Code (Corresponding to Section 498 of the old Code).

Under Section 439 of the Code of Criminal Procedure, the High Court and the Sessions Court can exercise the power of granting bail on the satisfaction of two conditions, firstly the person who moves the bail must be a person accused of an offence bailable or non-bailable and secondly he must be in custody. Therefore, mere taking of a person into custody by an authority empowered to arrest or mere presence of the accused is not enough to constitute the arrest of the accused but the physical control or at least the physical appearance of the accused in court should be coupled with his submission to the jurisdiction and orders of the Court. Thus, on the Customs side, a person appearing before an officer of Customs in pursuance to Section 107 of the Customs Act for an enquiry or appears before an officer of Customs in connection with an enquiry relating to the smuggling of goods under Section 108 of the said Act is not person accused of an offence at that stage, therefore, it cannot be said that the person summoned under Section 107 or 108 of the Customs Act comes under the custody of the Customs Official and must be deemed to have been arrested under Section 439 of the Code of Criminal Procedure. (A.I.R. 1980 S.C. 785 relied on). [paras 17 & 18]

Since arrest takes away the liberty of an individual, the power of arrest must be exercised with utmost care and caution and only when the exigencies of the situation demand arrest. The field formations should adhere to the provisions of Section 132 of the CGST Act, 2017 and field formations are required to follow Code of Criminal Procedure, 1973 (2 of 1974) relating to arrest and access to compliances of supreme directions in the case of *D.K. Basu* v. *State of W.B.* [35]

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[35] (1997) 1 SCC 416.

8. Burden of Proof Under GST:

The term ‘Burden of Proof’ means when a person states something and considers it to be fact which he needs to prove. This is an important concept integrated in the Indian Evidence Act, 1872.

The Indian Evidence Act, 1872 has explained the entire aspect in regard with burden of proof. Burden of proof varies in civil and criminal matters as their needs and requirements.

Burden of proof is a legal standard that determines if a legal claim is valid or invalid based on the evidence produced. The burden of proof requirement is designed to ensure that legal decisions are made based on facts rather than conjecture.

The main principle is that a person who claims reliefs or any such orders or judgement from court, the burden of proof falls on that person unless the law specifically requires the other person to prove the fact’s existence or lead evidence. A person is deemed to be innocent until he is proven guilty by the court. Therefore, it is upon the Plaintiff to prove that the person has committed the offense.

The party initiating a case or lawsuit must support its claims with facts and evidence. There are three levels of the burden of proof that determine the amount of evidence required for a claim to be successful. These include "preponderance of the evidence," "clear and convincing," and "beyond a reasonable doubt.

There are certain provisions in the GST laws regarding burden of proof in certain situations. The implications of those provisions, relating to burden of proof, are required to be brought to the notice of all the field officers as while arguing the case of department before the Trial court during the prosecution proceedings, this different situations related to the burden of proof in CST Act,2017 must be taken into consideration.

8.1. Burden of proof in cases of wrong Input Tax Credit:

Section 155 of the Central Goods & Service Tax Act, 2017 (CGST) casts the burden of proof qua the ITC on the claimant businessman. It reads as follows:

'Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person.'

Even though the terms, 'Burden of Proof' and 'Onus of Proof' are being used interchangeably, still, those have definite meanings. The Bombay High Court in the case of Phoenix Mill Ltd. Vs. Union of India[36] has lucidly explained the difference between the two in the following words:-

'There is essential distinction between burden of proof and onus of proof. The burden of proof lies upon the person who has to prove a fact and it never shifts. However, the onus of proof shifts. Onus means a duty of adducing evidence.'

The term burden of proof used in Section 155, in the circumstances narrated above, is required to be interpreted to mean onus of proof. It would shift to the departmental officials, if no data or improper or insufficient data is available.

No doubt the ITC is the form of concession. Therefore, the law prescribing the grant of ITC subject to the compliance of the conditions is always upheld by the Supreme Court. Thus, the constitutional validity of the law granting ITC qua inter-State sale conditional on the production of C Form has been upheld by the Court in TVS Motors vs. State of Tamil Nadu[37]. It be noted that the condition prescribed therein of filing of C form was capable of performance and the legal burden could be cast on the claimant dealer. Therefore, it's validity was upheld. But even conditions for concessions are governed by Part III of the Constitution and hence cannot be arbitrary or unreasonable, or violative of any constitutional or fundamental right.

The Apex Court in The State of Karnataka Vs M/s ECOM Gill Coffee Trading Pvt Ltd[38], though in the context of ITC in the VAT regime, has held as follows:

[36] 2004 (168) ELT 310
[37] 2018 (18) GSTL 769
[38] 2023-TIOL-18-SC-VAT

'Burden of proof that the ITC claim is correct is squarely upon the assesse who has to discharge the said burden. Merely because the dealer claiming the such ITC claims that he is a bona fide purchaser is not enough and sufficient. The burden of proving the correctness of ITC remains upon the dealer claiming such ITC. Such a burden of proof cannot get shifted on the revenue.'

8.2. Burden of proof regarding presumption of Culpable Mental State:

It is enacted under Section 135 of the Act. However, it applies only to cases wherein the prosecution proceedings have commenced. It does not apply to normal penalty proceedings. The Telangana High Court in the case of P. V. Ramanna Reddy vs. Union of India[39] has refused to give an interim protection against the arrest to the high-ranking officials of the Corporates which were alleged to be involved in the circular trading. The Apex court approved the order of the High Court. It is reported in 2019 (26) GSTL J175.

Even if the Court has upheld the constitutionality, their Lordships have laid down certain principles, some of which would apply to all such enactments in India. The gist thereof is stated below:

I. The procedures laid down in these provisions should be strictly complied with;

II. The prosecution must first establish the basic facts. Placing persuasive burden on the accused persons must justify the loss of protection which would be suffered by the accused;

III. The trial should be a fair trial;

IV. The accused should not suffer punishment on the basis of past experience;

V. Considering the provisions, the heightened scrutiny test would be necessary to be applied;

VI. Suspicion, however high it may be, can under no circumstances, be held to be substitute for legal evidence;

[39] 2019(25) GSTL 185

VII. The provision, no doubt, raises presumption with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused, but presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is 'beyond all reasonable doubts' but it is, 'preponderance of probability 'on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of the law, the guilt can't be said to have been established;

VIII. A confessional statement becomes relevant for the purpose of proving the truth of fact only when it is signed before the competent authority and made during the course of enquiry;

IX. Confessional statement is an evidence weak in nature;

X. A retracted confessional statement may be relied upon but a rider must be attached thereto, namely, it is made voluntary. The burden of proving that such a statement was made voluntarily is on the prosecution.

(Principles stated in Para Nos. I to VII apply to Section 135 and from VIII to X apply to Section136 of GST laws.)

8.3. Burden of proof in case of Retraction

The law laid down by the apex court in the case of Vinod Solanki vs. Union of India[40], as regards retraction of confessional statement is now required to be understood considering the reverse burden, as discussed above, and the observations of the Supreme Court in Noor Aga case.

[40] 2009 (13) STR 337

8.4. Burden of proof - Cross-Examination

If the revenue relies on certain material against the tax payer for the purpose of fastening the liability, it should provide the copies thereof to the tax payer and if need be also the cross examination of the persons from whom such material was obtained. Vasanji Gela vs. The State of Maharashtra [41] and the judgment of the Supreme Court in Yashwant Sinha vs. CBI[42] are relevant in this regard. This judgement is under the RTI Act and has given new approach to the provisions of Evidence Act.

8.5. Burden of proof- Accounts

Section 35(6) of the CGST states that the proper officer can determine the tax liability if there is discrepancy. It be noted that even in this provision it is only the onus of proof which is involved and the same shall shift after proper explanation.

8.6. Burden of proof- Transaction Value

The transaction value declared by the Tax payer can't be rejected on the basis of earlier transactions. The Revenue is required to adduce contemporaneous evidence to reject the value so declared. The burden of proof is on the revenue as held in the case of Commissioner of Customs, Mumbai vs. J. D. Orgochem Ltd.[43] .

8.7. Burden of proof—in case of Classification.

The burden of proving the correct entry or sub-entry which would squarely cover the particular commodity is always on the Revenue - H. P. L. Chemicals Ltd. vs. Commissioner of Central Excise, Chandigarh[44] . However, it does not mean that the tax payer should not lead any evidence. In fact, at the first available opportunity the tax payer should submit entire relevant material before the authorities. The material will include the product composition, literature,

[41](1977) 40 STC 544
[42] 2019 (25) GSTL (161)
[43] 2008 (226) ELT 9 SC.
[44] 2006 (197) ELT 324, SC].

label, character, expert's opinion, user's certificate etc. Such documents should be submitted even if it is felt that the product is covered by some judgment.

8.8. Burden of proof in case of Exemption

Onus of proof of fulfilment of conditions subject to which the exemption is granted under the Notification is always on the Tax payer or the claimant who claims the benefit under that Notification - Collector of Customs Vs. Presto industries[45]

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[45] 2001 (128) ELT 321 SC].

9. Provisions relating to evidence in GST.

Section 136 of CGST Act, 2017 is relevant pertaining to the relevancy of statements as admissible evidence. The said section reads as under:

SECTION 136. Relevancy of statements under certain circumstances. — A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Further there may be situations, where statements are not reliable and not have any evidentiary value. Some of the situations are:

- Statements of witnesses are not cross-examined.
- Statements not recorded by Gazetted Officers of CGST.
- Unsigned documents or undisclosed identity of officials.

It may be noted that person is not accused when he is giving statement. A person who is 'not accused' cannot be compelled to testify in the courtroom. Even during the inquiry stage, the person is not considered as accused of an offense.

A statement to be stated must be done voluntarily and truthfully. It is vital that a person's statement is examined and verified thoroughly with other sources before arriving at a conclusion. Thus, if a statement is not true, though being confessional in nature, it is null and void. In order words, a confession has to bear true evidence. Overall, the conversion of confession to conviction is solely based on true evidence.

If a person makes a statement by force rather than voluntarily, then the case is rejected summarily. This is also applicable if a forcible statement made is a fallacy. Such a fallacy might be twisted evidence taken from documents/materials or fallacy taken from unsound/dubious materials. Hence, statements made by a person during the hearing must be scrutinized prior to concluding the case.

If a person make a statement out of coercion, he/she can retract the statement at the earliest. The vital fact about statement retraction is that it is never null and void. Another fact is that retraction is not deemed involuntary or unlawful. Retraction is in the best interest of a victim's safety. For a retraction to be valid, it is necessary to corroborate a retraction with proof or material evidence.

However, if the person fails to state the truth about coercion, competent authorities will rule out any possibility of coercion from a subjective standpoint. Late retracted confession can also form the legal basis of conviction under certain circumstances if it is evidential.

If documents are produced in the court of law or are seized from the custody of an individual under the Act or law, for the time being, such documents are served as evidence to prosecute an individual.

An expert who is skilled at professions like – Foreign law, Science, Arts, Chemical examiner, Chartered Accountant, Cost Accountant, Handwriting identification, and fingerprint expression, etc. can give their opinion. Such opinion is considered to be a relevant fact as per the Act. Further, experts are cross-examined to justify his/her findings if he/she is absent, either he is subpoenaed, or his findings are discarded. This is applicable to all professions, except chemical examiners. The chemical examiner can only produce test results and not his opinions.

It is also desirable that expert's Reports must contain facts upon which goods are valued or calculated. Only a mere or weak reference is insufficient to corroborate evidence. This reference does not rebut the challenge/counter-evidence.

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10. Digital Evidences:

There has been a sea change in the manner in which computers are used with advent of microprocessor technology and digital communication. It metamorphosed itself into a standalone personal tool for performing assorted routine tasks like word processing and accounting and then to today‘s network device permeating virtually everything including instantaneous and global personal and business interaction. The way business is conducted and records are maintained today is a far cry from days past. Accordingly, in enforcement agencies including the CGST department, more and more information is being stored, transmitted or processed in digital form. The laws of the country have also taken cognizance of this reality. The Information Technology Act, 2000 has been enacted recognizing electronic records as evidence, governing access to and acquisition of digital and electronic evidence from individuals, corporate bodies and/ or from the public domain. By way of this enactment, amendments were also brought in other laws like Indian Penal Code, Indian Evidence Act and Criminal Procedure Code, (Cr.PC).

Basic operating procedures for handling digital evidence are important to pass the evidence legal scrutiny. This includes procedures for getting access to digital evidence, acquisition of the same, their analyses and seizure maintaining the integrity of information taken from stand-alone electronic media, servers and networks where digital information/ evidence may be stored.

There are certain documents, which can be used as evidence. The details are: -

- Fax copy
- Micro film/reproduction of image
- Hard Disks
- Laptop
- Pen-drives
- Flash drives
- Different USB types
- CDs and DVDs
- Mobile SIM cards, Memory Card

- Device's internal memory
- Written or printed material.

10.1. The Challenges in collection of Digital Evidences:

- The records including books of account maintained on papers are mostly replaced by documents in digital form.
- Most organisations use networks connecting different PCs, and servers spread across geographical locations and even sovereign jurisdictions not only for communication but also for conduct of day to day business.
- Computer data including books of account are easy to modify, alter, delete or hide.
- It is very easy to protect data by passwords and encryption making deciphering of real data an extremely difficult task
- The data storage devices come in a large variety of technology, shapes and sizes e.g. Hard disks- IDE/ATA/PATA/SATA/SCSI/SAS Laptop Hard Disks – 2.5‖ & 1.8‖ USB Pen-drives and various types of Flash drives. USB i-Pods, USB MP3 players CD & DVD Media, Floppy Media Mobile SIM cards, Memory Card & Device's internal memory Discovery of these devices and retrieval of the data stored therein presents a challenge.
- Different kind of software, platforms and customized applications used for varied business purposes.
- Digital data being often stored on networked servers which are normally/ remotely accessed. Instances of such data being placed on shared International Networks and Platforms having transnational jurisdictions have come to light. The server may not be available for seizure during survey or search. Instead, all data may be stored in, what they call, ―cloud server‖, i.e., a server located in even a foreign country thousands of miles away and the searched / surveyed party is sitting merely with a monitor/ laptop.
- Specialized skills are required to identify relevant data, safely retrieve them, properly analyze them for their evidentiary value, and to subsequently produce them in a manner that their integrity can be established in any formal proceedings such as assessment/ appeals and prosecution, etc. With ever changing and improving technology, skills are also required to be honed and updated regularly.
- The environments in which Tax Authorities function during field actions are different from other law enforcement agencies. Thus, the requirement of standard procedure for

Tax Department is slightly different and needs to be flexible as compared to other agencies dealing with other crimes/laws.

10.2. Shortcomings in collection of digital evidences, which may lead to failure of case in prosecution:

If proper procedures are not followed data integrity and authenticity can be compromised. Some of the grounds on which integrity of a seized data can be challenged are:

(i) When a system, seized on a particular date, is switched on/ booted at a later date to view its content, the date and time of opening these files automatically get modified.

(ii) If a seized system is not booted on its own and its hard disk is attached to another system, even then Operating System has an automatic functionality to write to all attached media.

(iii) The anti-virus software on the Investigator‘s system scans files on the seized hard drive, in the process changing the date and time. The anti-virus program may even delete or quarantine critical evidence on the seized disk.

(iv) Accessing a system or hard disk in any way without the use of write-protect devices causes change in the hash value or digital fingerprint of the disk. This can render the evidence on such disks inadmissible.

(v) Sometimes even valuable data may be lost because of the use of unsound methods:

(vi) Logic Bombs: Some systems are loaded with destructive software tools which get activated if the system is not shut down / started with a particular set of keystrokes. These can cause severe/ unannounced damage to the file systems as well as to critical files if programmed to do so. It is important that the investigating team does not in any way trigger them.

(vii) Live Data: If a system is active or live when the search or survey team enters the premises and if these systems are made to shut down, then the live data in systems mainly the RAM memory cannot be retrieved. Such data are most vital in some cases because RAM may contain recently used passwords, details used in internet transactions etc. The programs and the processes which were running in the system may get closed leaving no clue on such information.

(viii) Some other ill consequences of using above methods can be as under:

- Password: In a case where the system has password(s), shutting down the system would create problems in opening the same later without knowing the password(s) and cracking the same is a time - consuming process.

- Another major problem in the current work practices is that the retrieval of hidden, password - protected and deleted files. These files cannot be retrieved by making copies of the hard disk or taking its printouts.

- Lack of knowledge on some new server architecture such as RAID, where normal cloning process doesn‘t work.

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11. Timely investigation and proper drafting of Show Cause Notices:-

11.1. Timely investigation is also one of the important aspect which needs to be taken care of for successful prosecution of the offenders. Besides adjudication orders are also mandatorily be issued within the time frame prescribed in the GST Act, 2017 to sustain the prosecution. Success of prosecution is largely dependent on the quality of the Show Cause Notice i.e. precisely as to whether the Show Cause Notice stands legal scrutiny both on procedural aspects and on merit as well.

11.2. Proper Drafting of Show Cause Notice:

Failure to draft proper Show Cause Notice is one of the reasons which leads to acquittal of offenders during trial. Therefore, it is important to properly draft Show Use Notices. The issue is being dealt in more detail below.

A Show Cause Notice is the starting point of any legal proceedings against the party. It lays down the entire framework for the proceedings that are intended to be undertaken and therefore it should be drafted with utmost care. Issuance of SCN is a statutory requirement and it is the basic document for settlement of any dispute relating to tax liability or any punitive action to be undertaken for contravention of provisions of GST Laws and/ or Allied Laws, which are required to be enforced by departmental officers. The issuance of show cause notice is a mandatory requirement according to the principles of natural justice which are commonly known as *audi alteram partem* which means that no one should be condemned unheard. Show Cause Notice (SCN) is the culmination of efforts from the beginning of investigation/proceedings for contravention of provisions of the tax statute(s) till conclusion of investigation /proceeding by way of formal issuance of a written notice to the noticee(s). It is the most important item of work and any lapse in timely issuance of SCNor issuing SCN of poor quality may lead to serious trouble in confirming the charges and filing prosecution against the offenders.

The tax officers discharge functions which are quasi-judicial in nature. These quasi-judicial functions require that the principles of natural justice be followed. The first principle of natural justice is that there should be no bias. The rule against bias is expressed in the maxim that "no one must be a judge in his own cause". The second broad rule is that "no party is condemned unheard". This right to be heard needs to be substantive and therefore, the party must know

precisely the case he has to meet. He also must have a reasonable opportunity to present his case both in writing and orally. The third rule entitles the party to know the reasons for eventual decision taken. The requirement of Show Cause Notice flows directly from the second rule.

Therefore, a Show Cause Notice is more than a notice. It gives an opportunity to the Department of leading evidence in support of its allegations and equally it gives an opportunity to the person/firm/company charged with, to make representation and adduce evidence against the allegations or charges made out against them. Good Show cause Notices require that the following aspects be taken care of:

(i) Once the necessary inquiries/investigations and critical examination of facts and evidence are completed, a draft Show Cause Notice (or a revised/supplementary Show Cause Notice, as the case may be) should be prepared incorporating all relevant facts and circumstances of the case in a logical, cogent and systematic manner.

(ii) The Show Cause Notice should be in writing (not oral). The date of issue of Show Cause Notice should be clearly written.

(iii) The Show Cause Notice must clearly specify the period to which the Notice relates and the goods/Services in respect of which alleged evasion of tax has occurred and must contain sufficient details to make clear to the noticee as to how the tax liability has been quantified. The duty demanded should be manifestly specified in the notice itself.

(iv) It should be clear on facts and legal provisions. Violation of the provisions of law should be clearly brought out in the Show Cause Notice. Each of the allegations proposed to be levelled against the tax payer should be carefully framed/ formulated. The provisions of the CGST Act,2017 and the Rules that are alleged to have been contravened by the Tax payer must be clearly mentioned after critical examination of available facts and evidence.

(v) The charges should be specific. They should not be vague/or contradictory. The Show Cause Notice should be specific and unambiguous. It should not be an exercise in deliberate ambiguity. Appropriate narration of relevant facts and circumstances linked

with or leading to an allegation must precede or follow each of the formulated allegation so as to clearly bring out the specific facts and acts of omission or commission which are alleged to have been committed by the Tax payer and which form the basis of an allegation. It is absolutely essential that each specific allegation is duly and adequately supported with substantive evidence so as to impart factual and legal sustainability to the allegation. This must be done by clearly spelling out in the Show Cause Notice the specific evidence that is proposed to be relied upon, documentary or otherwise, in relation to each distinct allegation. Extracts from documents /statements recorded under Section 70 may be reproduced appropriately wherever relevant.

(vi) The provisions for imposing penalty and reasons and conclusion for the same be clearly mentioned. The penal provisions proposed to be invoked against the Tax payers and the reasons i.e. existence of facts and circumstances resulting in contravention based on which such penal provisions are attracted, must also be clearly spelt out. In particular, section relating to liability to penalty and liability to interest under must be clearly indicated.

(vii) Extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that these ingredients are present in a given case is on revenue and these ingredients need to be clearly brought out in the Show Cause Notice alongwith evidence thereof. The active element of intent to evade duty by action or inaction needs to be present for invoking extended period.

(viii) Copies of the relied upon documents should be listed in seriatim as per the references made in the Show Cause Notice and given as Annexures to the Notice. The Show Cause Notice must also incorporate a list of all the documents proposed to be relied upon in support of the case and this list must be carefully prepared keeping in view the need to ensure that no relevant evidence is missed out, (but at the same time no irrelevant documents need be listed) since it is the responsibility of the department to supply to each of the noticees, copies of each and every document that is proposed to be relied upon in support of the case against the Tax payer, along with the Show Cause Notice. A dated acknowledgement of receipt of legible copy of relied upon document must be obtained

from the noticee. This is an area which requires special attention because non-supply/part supply of RUDs is seen to be one of the causes of delay in passing the adjudication order.

(ix) Supply of non-relied upon documents is a grey area. These documents are often the source of litigation and delay in adjudication proceedings. The documents which have not been relied upon in the Show Cause Notice and which are of no value to the Department should, therefore, be returned in original to the noticee under a dated acknowledgement. This will deprive the noticee of playing delaying tactics.

(x) Recently monetary limits for officers of various rank for the purposes of adjudication have been prescribed. The Show Cause Notice has been prescribed to be approved in writing and signed by the officer competent to adjudicate the Show Cause Notice. A SCN should ideally be issued by the authority empowered to adjudicate the case as this ensures accountability as well as rigour of examination as demands of higher amounts are adjudicated by the officers of higher rank. Therefore, while issuing the Show Cause Notice it should be ensured that the same is issued only by the officer competent to adjudicate the case.

(xi) It may be ensured that there should be a proper service of the Show Cause Notice to the Noticee. The procedure has been detailed in section 169 of the CGST Act,2017, which should be followed scrupulously.

(xii) If the time limit to reply is provided in Law, it should be adhered to, otherwise, adequate time should be given for filing a written reply.

(xiii) The Show Cause Notice should clearly mention whether the noticee(s) wishes to be heard in person, apart from filing a written representation, in the matter.

(xiv) The authority to whom the Show Cause Notice is answerable should be specifically stated alongwith the postal address.

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12. Adjudication:

Prosecution proceedings in a court of law are to be generally initiated after departmental adjudication of an offence has been completed, although there is no legal bar against launch of prosecution before adjudication. Though the findings in the adjudication proceedings against the person facing prosecution is not binding on the proceeding for criminal prosecution {Hon'ble Supreme Court of India in the case of Radheshyam Kejriwal[46]. To launch prosecution against top management of the company, sufficient and clear evidence to show their direct involvement in the offence is required. Therefore, in the adjudication order it is expected that authority should clearly bring out the role of the particular person in evasion of tax.

In cases other than the cases where complaint has been filed before adjudication of the case, the adjudicating authority should invariably indicate at the time of passing the order itself whether it considers the case fit for prosecution, so that it can be further processed and sent to the Pr. Commissioner/Commissioner for obtaining his sanction of prosecution. In cases, where Show Cause Notice has been issued by DGGI, the recommendation of adjudicating authority for filing of prosecution shall be sent to the Pr. Additional Director General/Additional Director General, DGGI of the concerned zonal unit/Hqrs. Further, Where at the time of passing of adjudication order, no view has been taken on prosecution by the Adjudicating Authority, the adjudication branch shall re-submit the file within 15 days from the date of issue of adjudication order to the Adjudicating Authority to take view on prosecution.

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[46] 2011 (266) E.L.T. 294 (S.C.).

13. Monitoring of prosecution and maintenance of records.

C.B.I. & C. in its Instruction No. 04/2022-23 [GST-Investigation], dated 1-9-2022[47] has come out with a guidelines related to timely launching of prosecution , precautions to be observed while launching the prosecution. In para 10.1 of the said instruction, it has been noted that delay in the Court proceedings is often due to non-availability of the records required to be produced before the Court or due to delay in drafting of the complaint, listing of the exhibits etc. Therefore, proper monitoring is required to ensure not only the timely filing of prosecution but also the availability of all the evidences and their submission before the Court of law. For a proper monitoring of each stage of the process of filing prosecution is expected from the field formations especially prosecution branch of the executive Commissionerate. For the purpose prosecution register maintained in the Commissionerate has to be periodically examined so as to ensure no delay is caused and all the documents/ exhibits of the complaint are available with the department. The register meant for the purpose should contain the date of sanction of prosecution, date of filing of complaint etc. This needs to be periodically reviewed by the Pr. Commissioner/ Commissioner. Owing to the importance of the matter, in the said instructions, it has been emphasized and made clear that :-

" Para 10.1 : It shall be the responsibility of the officer who has been authorized to file complaint, to take charge of all documents, statements and other exhibits that would be required to be produced before a Court. The list of exhibits etc. should be finalized in consultation with the Public Prosecutor at the time of drafting of the complaint. No time should be lost in ensuring that all exhibits are kept in safe custody. Where a complaint has not been filed even after a lapse of 60 days from the receipt of sanction for prosecution, ***the reason for delay shall be brought to the notice of the Pr. Commissioner/Commissioner or the Pr. Additional Director General/Additional Director General of DGGI*** *by the Additional/Joint Commissioner in-charge of the Commissionerate or Additional/Joint Director of DGGI, responsible for filing of the complaint."*

[47] Appendix -I

Further, it is mandated that prosecution once launched should be followed vigorously. In para 12.1 of the said instruction following guidelines have been prescribed in this regard.

"12.1 Prosecution, once launched, should be vigorously followed. The Pr. Commissioner/Commissioner of CGST or Pr. Additional Director General/ Additional Director General of DGGI ***should monitor cases of prosecution at monthly intervals and take the corrective action wherever necessary to ensure that the progress of prosecution is satisfactory****. In DGGI, an Additional/Joint Director in each zonal unit and DGGI (Hqrs.) shall supervise the prosecution related work and take stock of the pending prosecution cases. For keeping a track of prosecution cases, entries of all prosecution cases should promptly be made in DIGIT/Investigation Module, within 48 hours of sanction of prosecution and the entries must be updated from time to time. Additional/Joint Commissioner or Additional/Joint Director, in-charge of supervising prosecution cases shall ensure making timely entries in the database."*

To ensure that no case which otherwise is fit for launching of prosecution is left unattended, the said instruction categorically clarified as under:-

"Para 10.3 The Superintendent in-charge of adjudication section should endorse copy of all adjudication orders to the prosecution section. The Superintendent in-charge of prosecution section should monitor receipt of all serially numbered adjudication orders and obtain copies of adjudication orders of missing serial numbers from the adjudication section every month. In respect of adjudication orders related to DGGI cases, Superintendent in-charge of adjudication section should ensure endorsing a copy of adjudication order to DGGI. Concerned Zonal Units/Hqrs. of DGGI shall also follow up the status of adjudication of the case from the concerned Commissionerate or adjudicating authority."

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14. Close Liaison and Proper briefing of Public Prosecutor.

It is to be appreciated that Public Prosecutors are state-appointed, Counsel that assist in the prosecution of criminals. The main role of the public prosecutor is to serve the ends of justice in the best interests of the public. The public prosecutor is expected to act impartially and present all the facts of the case, documents, and evidence so as to assist the court in arriving at a correct judgement**.** The Public Prosecutor represents the State's interests in court.

In cases involving tax prosecutions, defence counsel must be particularly knowledgeable about tax law and its complex regulations. They must be able to analyze financial records and other evidence, and be prepared to challenge the government's interpretation of tax law and the evidence presented in court.

It is therefore imperative that he may be properly briefed about the case as well as the nature of evidences available to sustain the case of prosecution. Proper briefing of defence counsel is essential in ensuring government receives a fair and effective defence. Briefing is the process of providing counsel with all relevant information, evidence, and instructions necessary for them to represent the case of prosecution effectively. This includes providing them with a complete understanding of the charges against the offender; the evidence the government intends to rely on; and any relevant legal issues. The importance of proper briefing cannot be overstated. Without adequate information and instruction, defence counsel may not be able to effectively represent the case of prosecution, and their client's constitutional rights may be at risk. In some cases, inadequate briefing may even result in a wrongful conviction.

Proper briefing is particularly important in government cases, where the government has significant resources and power. The government has access to a wide range of information and evidence, and defence counsel must be adequately briefed to be able to challenge the government's case effectively. This may involve working with experts, analyzing complex financial documents, or challenging the government's interpretation of tax law.

In addition to providing counsel with the necessary information and evidence, briefing also helps to build a strong attorney-client relationship. When counsel is well-informed and prepared, they are better able to communicate with their client, identify potential legal issues, and provide effective representation.

A close liaison is also required to be maintained with him so that case may not fall for non-compliance / non submission of required evidences. He may be contacted periodically to get the latest status of the case and any further compliance to be made before the Court.

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Appendix-I

Launching of Prosecution under Section 132 of CGST Act, 2017 — Guidelines

C.B.I. & C. Instruction No. 04/2022-23 [GST-Investigation], dated 1-9-2022

F. No. GST/INV/Instructions/2021-22

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Indirect Taxes & Customs, New Delhi

Subject : Guidelines for Launching of Prosecution under the Central Goods & Services Tax Act, 2017 - Regarding.

Prosecution is the institution or commencement of legal proceeding; the process of exhibiting formal charges against the offender.

2. Section 132 of the Central Goods and Services Tax Act, 2017 (CGST Act, 2017) codifies the offences under the Act which warrant institution of criminal proceedings and prosecution. Whoever commits any of the offences specified under sub-section (1) and sub-section (2) of Section 132 of the CGST Act, 2017, can be prosecuted.

3. ***Sanction of prosecution :***

3.1 Sanction of prosecution has serious repercussions for the person involved, therefore, the nature of evidence collected during the investigation should be carefully assessed. One of the important considerations for deciding whether prosecution should be launched is the availability of adequate evidence. The standard of proof required in a criminal prosecution is higher than adjudication proceeding as the case has to be established beyond reasonable doubt. Therefore, even cases where demand is confirmed in adjudication proceedings, evidence collected should be weighed so as to likely meet the above criteria for recommending prosecution. Decision should be taken on case-to-case basis considering various factors, such as, nature and gravity of offence, quantum of tax evaded, or ITC wrongly availed, or refund wrongly taken and the nature as well as quality of evidence collected.

3.2 Prosecution should not be filed merely because a demand has been confirmed in the adjudication proceedings. Prosecution should not be launched in cases of technical nature, or where additional claim of tax is based on a difference of opinion regarding interpretation of law. Further, the evidence collected should be adequate to establish beyond reasonable doubt that the person had guilty mind, knowledge of the offence, or had fraudulent intention or in any manner possessed *mens rea* for committing the offence. It follows, therefore, that in the case of public limited companies, prosecution should not be launched indiscriminately against all the Directors of the company but should be restricted to only persons who oversaw day-to-day operations of the company and have taken active part in committing the tax evasion etc. or had connived at it.

4. Decision on prosecution should normally be taken immediately on completion of the adjudication proceedings, except in cases of arrest where prosecution should be filed as early

as possible. Hon'ble Supreme Court of India in the case of *Radheshyam Kejriwal* [2011 (266) E.L.T. 294 (S.C.)] has, *inter alia*, observed the following :

(i) Adjudication proceedings and criminal proceedings can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The findings against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vi) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

In view of the above observations of Hon'ble Supreme Court, prosecution complaint may even be filed before adjudication of the case, especially where offence involved is grave, or qualitative evidences are available, or it is apprehended that the concerned person may delay completion of adjudication proceedings. In cases where any offender is arrested under Section 69 of the CGST Act, 2017, prosecution complaint may be filed even before issuance of the Show Cause Notice.

5. ***Monetary limits :***

5.1 ***Monetary Limit :*** Prosecution should normally be launched where amount of tax evasion, or misuse of ITC, or fraudulently obtained refund in relation to offences specified under sub-section (1) of Section 132 of the CGST Act, 2017 is more than Five Hundred Lakh rupees. However, in following cases, the said monetary limit shall not be applicable :

(i) ***Habitual evaders :*** Prosecution can be launched in the case of a company/taxpayer habitually involved in tax evasion or misusing Input Tax Credit (ITC) facility or fraudulently obtained refund. A company/taxpayer would be treated as habitual evader, if it has been involved in two or more cases of confirmed demand (at the first adjudication level or above) of tax evasion/fraudulent refund or misuse of ITC involving fraud, suppression of facts etc. in past two years such that the total tax evaded and/or total ITC misused and/or fraudulently obtained refund exceeds *Five Hundred Lakh rupees.* DIGIT database may be used to identify such habitual evaders.

(ii) ***Arrest Cases :*** Cases where during the course of investigation, arrests have been made under Section 69 of the CGST Act.

6. ***Authority to sanction prosecution :***

6.1 The prosecution complaint for prosecuting a person should be filed only after obtaining the sanction of the Pr. Commissioner/Commissioner of CGST in terms of sub-section (6) of Section 132 of CGST Act, 2017.

6.2 In respect of cases investigated by DGGI, the prosecution complaint for prosecuting a person should be filed only after obtaining the sanction of Pr. Additional Director General/Additional Director General, Directorate General of GST Intelligence (DGGI) of the concerned zonal unit/Hqrs.

7. ***Procedure for sanction of prosecution :***

7.1 ***In cases of arrest(s) made under Section 69 of the CGST Act, 2017 :***

7.1.1 Where during the course of investigation, arrest(s) have been made and no bail has been granted, all efforts should be made to file prosecution complaint in the Court within sixty (60) days of arrest. In all other cases of arrest, prosecution complaint should also be filed within a definite time frame. The proposal of filing complaint in the format of investigation report prescribed in *Annexure-I*, should be forwarded to the Pr. Commissioner/Commissioner, within fifty (50) days of arrest. The Pr. Commissioner/Commissioner shall examine the proposal and take decision as per Section 132 of CGST Act, 2017. If prosecution sanction is accorded, he shall issue a sanction order along with an order authorizing the investigating officer (at the level of Superintendent) of the case to file the prosecution complaint in the competent court.

7.1.2 In cases investigated by DGGI wherever an arrest has been made, procedure as detailed in para 7.1.1 should be followed by officers of equivalent rank of DGGI.

7.1.3 The Additional/Joint Commissioner or Additional/Joint Director in the case of DGGI, must ensure that all the documents/evidence and list of witnesses are kept ready before forwarding the proposal of filing complaint to Pr. Commissioner/Commissioner or Pr. ADG/ADG of DGGI.

7.2 ***In case of filing of prosecution against legal person, including natural person :***

7.2.1 Section 137(1) of the Act provides that *where an offence under this Act has been committed by a company, every person who, at the time offence was committed was in-charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Section 137(2) of the Act provides that where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.* Thus, in the case of Companies, both the legal person as well as natural person are liable for prosecution under section 132 of the CGST Act. Similarly, under sub-section (3) of Section 137, the provisions have been made for partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a Trust.

7.2.2 Where it is deemed fit to launch prosecution before adjudication of the case, the Additional/Joint Commissioner or Additional/Joint Director, DGGI, as the case may be, supervising the investigation, shall record the reason for the same and forward the proposal to the sanctioning authority. The decision of the sanctioning authority shall be informed to the concerned adjudicating authority so that there is no need for him to examine the case again from the perspective of prosecution.

7.2.3 In all cases (other than those mentioned at para 7.2.2 and arrests where prosecution complaint has already been filed before adjudication), the adjudicating authority should invariably indicate at the time of passing the order itself whether it considers the case fit for

prosecution, so that it can be further processed and sent to the Pr. Commissioner/Commissioner for obtaining his sanction of prosecution.

7.2.4 In cases, where Show Cause Notice has been issued by DGGI, the recommendation of adjudicating authority for filing of prosecution shall be sent to the Pr. Additional Director General/Additional Director General, DGGI of the concerned zonal unit/Hqrs.

7.2.5 Where at the time of passing of adjudication order, no view has been taken on prosecution by the Adjudicating Authority, the adjudication branch shall re-submit the file within 15 days from the date of issue of adjudication order to the Adjudicating Authority to take view on prosecution.

7.2.6 Pr. Commissioner/Commissioner or Pr. Additional Director General/Additional Director General of DGGI may on his own motion also, taking into consideration *inter alia*, the seriousness of the offence, examine whether the case is fit for sanction of prosecution irrespective of whether the adjudicating authority has recommended prosecution or not.

7.2.7 An investigation report for the purpose of launching prosecution should be carefully prepared in the format given in *Annexure-I*, within one month of the date of receipt of the adjudication order or receipt of recommendation of Adjudicating Authority, as the case may be. Investigation report should be signed by an Deputy/Assistant Commissioner, endorsed by the jurisdictional Additional/Joint Commissioner, and sent to the Pr. Commissioner/Commissioner for taking a decision on sanction for launching prosecution. In respect of cases booked by DGGI, the said report shall be prepared by the officers of DGGI, signed by the Deputy/Assistant Director, endorsed by the supervising Additional/Joint Director and sent to the Pr. Additional Director General/Additional Director General of DGGI for taking a decision on sanction for launching prosecution. Thereafter, the competent authority shall follow the procedure as mentioned in para 7.1.1.

7.2.8 Once the sanction for prosecution has been obtained, prosecution in the court of law should be filed as early as possible, but not beyond a period of sixty days by the duly authorized officer (of the level of Superintendent). In case of delay in filing complaint beyond 60 days, the reason for the same shall be brought to the notice of the sanctioning authority *i.e.*, Pr. Commissioner/ Commissioner or Pr. Additional Director General/Additional Director General, by the officer authorised for filing of the complaint.

7.2.9 In the cases investigated by DGGI, except for cases pertaining to single/multiple taxpayer(s) under Central Tax administration in one Commissionerate where arrests have not been made and the prosecution is not proposed prior to issuance of show cause notice, prosecution complaints shall be filed and followed up by DGGI. In other cases, the complaint shall be filed by the officer at level of Superintendent of the jurisdictional Commissionerate, authorized by Pr. Commissioner/Commissioner of CGST. However, in all cases investigated by DGGI, the prosecution shall continue to be sanctioned by appropriate officer of DGGI.

8. ***Appeal against Court order in case of inadequate punishment/ acquittal :***

8.1 The Prosecution Cell in the Commissionerate shall examine the judgment of the Court and submit their recommendations to the Pr. Commissioner/Commissioner.

Where Pr. Commissioner/Commissioner is of the view that the accused person has been let off with lighter punishment than what is envisaged in the Act or has been acquitted despite the evidence being strong, filing of appeal should be considered against the order within the stipulated time. Before filing of appeal in such cases, concurrence of Pr. CC/CC should be

obtained. Sanction for appeal in such cases shall, however, be accorded by Pr. Commissioner/Commissioner.

8.2 In respect of cases booked by DGGI, the Prosecution Cell in the Directorate shall examine the judgment of the court and submit their recommendations to the Pr. Additional Director General/Additional Director General who shall take a view regarding acceptance of the order or filing of appeal. However, before filing of appeal, concurrence of DG or Pr. DG (for cases booked by HQ Unit) should be obtained.

9. ***Procedure for withdrawal of prosecution :***

9.1 ***Procedure for withdrawal of sanction-order of prosecution :***

9.1.1 In cases where prosecution has been sanctioned but complaint has not been filed and new facts or evidence have come to light necessitating review of the sanction for prosecution, the Commissionerate should immediately bring the same to the notice of the sanctioning authority. After considering the new facts and evidence, the sanctioning authority, if satisfied, may recommend to the jurisdictional Pr. Chief Commissioner/Chief Commissioner that the sanction for prosecution be withdrawn who shall then take a decision.

9.1.2 In the cases investigated by DGGI, such withdrawal of sanction order may be made with the approval of Director General of DGGI of concerned sub-national unit. In the cases booked by DGGI, Hqrs., Pr. Director General shall be competent to approve the withdrawal of sanction order.

9.2 ***Procedure for withdrawal of complaint already filed for prosecution :***

9.2.1 Attention is invited to judgment of Hon'ble Supreme Court on the issue of relation between adjudication proceedings and prosecution in the case of *Radheshyam Kejriwal*, (supra). Hon'ble Supreme Court in para 43 have observed as below :

"In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court."

The said ratio is equally applicable to GST Law. Therefore, where it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings and such order has attained finality, Pr. Commissioner/Commissioner or Pr. Additional Director General/Additional Director General after taking approval of Pr. Chief Commissioner/Chief Commissioner or Pr. Director General/ Director General, as the case may be, would ensure filing of an application through Public Prosecutor in the court to allow withdrawal of prosecution in accordance with law. The withdrawal can only be affected with the approval of the Court.

10. ***General guidelines :***

10.1 It has been reported that delay in the Court proceedings is often due to non-availability of the records required to be produced before the Court or due to delay in drafting of the

complaint, listing of the exhibits etc. It shall be the responsibility of the officer who has been authorized to file complaint, to take charge of all documents, statements and other exhibits that would be required to be produced before a Court. The list of exhibits etc. should be finalized in consultation with the Public Prosecutor at the time of drafting of the complaint. No time should be lost in ensuring that all exhibits are kept in safe custody. Where a complaint has not been filed even after a lapse of 60 days from the receipt of sanction for prosecution, the reason for delay shall be brought to the notice of the Pr. Commissioner/Commissioner or the Pr. Additional Director General/Additional Director General of DGGI by the Additional/Joint Commissioner in-charge of the Commissionerate or Additional/Joint Director of DGGI, responsible for filing of the complaint.

10.2 Filing of prosecution need not be kept in abeyance on the ground that the taxpayer has gone in appeal/revision. However, to ensure that the proceeding in appeal/revision are not unduly delayed because the case records are required for the purpose of prosecution, a parallel file containing copies of essential documents relating to adjudication should be maintained.

10.3 The Superintendent in-charge of adjudication section should endorse copy of all adjudication orders to the prosecution section. The Superintendent in-charge of prosecution section should monitor receipt of all serially numbered adjudication orders and obtain copies of adjudication orders of missing serial numbers from the adjudication section every month. In respect of adjudication orders related to DGGI cases, Superintendent in-charge of adjudication section should ensure endorsing a copy of adjudication order to DGGI. Concerned Zonal Units/Hqrs. of DGGI shall also follow up the status of adjudication of the case from the concerned Commissionerate or adjudicating authority.

11. ***Publication of names of persons convicted :***

11.1 Section 159 of the CGST Act, 2017 grants power to the Pr. Commissioner/Commissioner or any other officer authorised by him on his behalf to publish name and other particulars of the person convicted under the Act. It is directed that in deserving cases, the department should invoke this section in respect of all persons who are convicted under the Act.

12. ***Monitoring of prosecution :***

12.1 Prosecution, once launched, should be vigorously followed. The Pr. Commissioner/Commissioner of CGST or Pr. Additional Director General/ Additional Director General of DGGI should monitor cases of prosecution at monthly intervals and take the corrective action wherever necessary to ensure that the progress of prosecution is satisfactory. In DGGI, an Additional/Joint Director in each zonal unit and DGGI (Hqrs.) shall supervise the prosecution related work and take stock of the pending prosecution cases. For keeping a track of prosecution cases, entries of all prosecution cases should promptly be made in DIGIT/Investigation Module, within 48 hours of sanction of prosecution and the entries must be updated from time to time. Additional/Joint Commissioner or Additional/Joint Director, in-charge of supervising prosecution cases shall ensure making timely entries in the database.

13. ***Compounding of offence :***

13.1 Section 138 of the CGST Act, 2017 provides for compounding of offences by the Pr. Commissioner/Commissioner on payment of compounding amount. The provisions regarding compounding of offence should be brought to the notice of person being prosecuted and such

person be given an offer of compounding by Pr. Commissioner/Commissioner or Pr. Additional Director General/Additional Director General of DGGI, as the case may be.

14. ***Transitional Provisions :***

14.1 All cases where sanction for prosecution is accorded after the issue of these instructions shall be dealt in accordance with the provisions of these instructions irrespective of the date of the offence. Cases where prosecution has been sanctioned but no complaint has been filed before the magistrate shall also be reviewed by the prosecution sanctioning authority considering the provisions of these instructions.

15. ***Inspection of prosecution work by the Directorate General of Performance Management :***

15.1 Director General, Directorate General of Performance Management and Pr. Chief Commissioners/Chief Commissioners, who are required to inspect the Commissionerates, should specifically check whether instructions in this regard are being followed scrupulously and make a mention of the implementation of the guidelines in their inspection report apart from recording of statistical data. Similarly exercise should also be carried out in DGGI.

16. Where a case is considered suitable for launching prosecution and where adequate evidence is forthcoming, securing conviction largely depends on the quality of investigation. It is, therefore, necessary for senior officers to take personal interest in the investigation of important cases of GST evasion and in respect of cases having money laundering angle and to provide guidance and support to the investigating officers.

17. To ensure proper training to the officers posted for prosecution work, the Pr. Director General, National Academy of Customs, Indirect Taxes and Narcotics (NACIN), Faridabad, should organize separate training courses on prosecution/arrests etc. from time to time and should incorporate a series of lectures on this issue in the courses organized for investigation. The Pr. Commissioner/Commissioner or Pr. ADG/ADG of DGGI should judiciously sponsor officers for such courses.

18. These instructions/guidelines may be circulated to all the formations under your charge for strict compliance. Difficulties, if any, in implementation of the aforesaid instructions/guidelines may be brought to the notice of the Board.

19. Receipt of this Instruction may please be acknowledged. Hindi version will follow.

Annexure-I

F. No.

INVESTIGATION REPORT FOR THE PURPOSE OF LAUNCHING PROSECUTION AGAINST_____

COMMISSIONERATE/DGGI_____DIVISION/ZONAL UNIT/Hqrs. DGGI____

1. Name & address of the person(s), including legal person(s) :

2. GSTIN (If any) :

3. Nature of offence including commodity/Service :

4. Charges :

5. Period of offence :

6. Amount involved :

7. Particular of persons proposed to be prosecuted :

a. Name :

b. Father's Name :

c. Age : Sex :

d. Address :

e. Occupation :

f. Position held in the Company/Firm :

g. Role played in the offence :

h. Material evidence available against the accused *(please indicate separately documentary and oral evidence)* :

i. Action ordered against the accused in adjudication :

8. Brief note why prosecution is recommended :

(Deputy/Assistant Commissioner, CGST_____)

(Deputy/Assistant Director, DGGI_____)

Place :

Date :

9. I have carefully examined the Investigation Report and find it in order for filling criminal complaint under section 132 of the CGST Act, 2017.

(Additional/Joint Commissioner, CGST_____)/

(Additional/Joint Director, DGGI_____)

Place :

Date :

1. The proposal should be made in the above form in conformity with the guidelines issued by the Board. Regarding SI. No. 4 above, all the charging sections in the CGST Act, 2017 and other allied Acts should be mentioned. Regarding Sl. No. 7, information should be filled separately for each person sought to be prosecuted.

2. A copy of the Show Cause Notice as well as the Order of Adjudication (wherever SCN or adjudication order has been issued) should be enclosed with this report.

3. If any appeal has been filed, then this fact should be specifically stated.

Appendix-II

Generation and quoting of DIN required on any communication issued by C.B.I. & C. to taxpayers w.e.f. 24-12-2019 — Formats notified for Standardized Authorisation for search, summons, inspection notice, arrest memo and provisional release order to be used w.e.f. 1-1-2020

C.B.I. & C. Circular No. 128/47/2019-GST, dated 23-12-2019
F. No. GST/INV/DIN/O1/19-20

Subject : Generation and quoting of Document Identification Number (DIN) on any communication issued by the officers of the Central Board of Indirect Taxes and Customs (CBIC) to taxpayers and other concerned persons - Regarding.

Attention is invited to *Board's Circular No. 122/41/2019-GST, dated 5th November, 2019* [2019 (30) G.S.T.L. C17] that was issued to implement the decision for Generation and Quoting of Document Identification Number (DIN) on specified documents. This was done with a view to leverage technology for greater accountability and transparency in communications with the trade/ taxpayers/other concerned persons.

2. Vide the aforementioned Circular, the Board had specified that the DIN monitoring system would be used for incorporating a DIN on search authorisations, summons, arrest memos, inspection notices etc. to begin with. Further, a facility was provided to enable the recipient of these documents/ communications to easily verify their genuineness by confirming the DIN online at *cbic.gov.in.* In continuation of the same, the Board has now directed that electronic generation and quoting of *Document Identification Number (DIN) shall be done in respect of all communications (including e-mails) sent to taxpayers and other concerned persons by any office of the Central Board of Indirect Taxes and Customs (CBIC) across the country.* Instructions contained in this Para would come into effect from 24-12-2019.

3. Accordingly, the online digital platform/facility already available on the DDM's online portal *"cbicddm.gov.in"* for electronic generation of DIN has been suitably enhanced to enable electronic generation of DIN in respect of all forms of communication (including e-mails) sent to taxpayers and other concerned persons. On the one hand electronic generation of DIN's would create a digital directory for maintaining a proper audit trail of communications sent to taxpayers and other concerned persons and on the other hand, it would provide the recipient of such communication a digital facility to ascertain the genuineness of the communication.

4. In this context, the Board also felt it necessary to harmonize and standardize the formats of search authorisations, summons, arrest memos, inspection notices etc. issued by the GST/Central Excise/Service Tax formations across the country. Accordingly, the Board had constituted a committee of officers to examine and suggest modifications in the formats of these documents. The committee has submitted its recommendations. The standardized documents have since been uploaded by DDM and are ready to be used. *When downloaded and printed, these standardized documents would bear a pre-populated DIN thereon.* Accordingly, the Board directs that all field formations shall use the standardized authorisation for search, summons, inspection notice, arrest memo and provisional release order (the formats are attached). *These formats shall be used by all the formations w.e.f. 1-1-2020.*

5. The Board once again directs that any specified communication which does not bear the electronically generated DIN and is not covered by the exceptions mentioned in paragraph 3 of Circular No. 122/41/2019-GST, dated 5-11-2019, shall be treated as invalid and shall be deemed to have never been issued.

6. The Chief Commissioner(s)/Director General(s) are requested to circulate these instructions to all the formations under their charge for strict compliance. Difficulties faced, if any, in implementation of these instructions may be immediately brought to the notice of the Board.

Hindi version to follow.

Enclosure

SUMMONS

[under Section 70 of the Central Goods and Services Tax Act, 2017]

To

……

……

(Name and address)

WHEREAS, I,…… am making inquiry in connection with …… under the Central Goods and Services Tax Act, 2017.

AND WHEREAS, I consider your attendance necessary to

(a) give evidence and/or

(b) produce documents or things of the following description in your possession or under your control :

1. …….

2. …….

3. …….

NOW, THEREFORE, in exercise of powers vested in me under Section 70 of the Central Goods and Services Tax Act, 2017, I do hereby summon you to appear before me in person on ……. (date) at …… (time) at the office of ……. (office address).

Inquiry as aforesaid is deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860) and non-compliance of this summon is an offence punishable under Section 174 & 175 of the Indian Penal Code, 1860.

Given under my hand and seal of office to-day the……day of ……(month), 20...(year) at …….(place of issue).

Name ……
Signatur ……

Designation ……..

Seal of Office.

ARREST MEMO

[Under Section 69 of the Central Goods and Services Tax, 2017]

Whereas, the Principal Commissioner/Commissioner……. (Office Address) has reasons to believe that you, ……. (Name of the person to be arrested and his designation), age about …… years, son/daughter of Shri ……., and address …… (address of the premises) have committed an offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 of the Central Goods and Services Tax, 2017 which is punishable under clause (i) or (ii) of sub-section (1) or sub-section (2) of the said section.

I, …….. (name), ……., (designation), Office of the Principal Commissioner/Commissioner, CGST ……. (office Address), being duly authorized, hereby arrest you today at ……. (time) on …… (date) at …….. (Place of arrest) under Section 69 of the said Act.

Accordingly, Shri…… S/o …….. has been placed under arrest and he has been explained the grounds of his arrest. He was also informed about his right to have someone informed about his arrest and Sh./Ms ……. has been informed about his arrest.

Signature……
Name……..
Designation……

4. I have been explained the grounds of my arrest. The fact of my arrest has been witnessed by Shri …… (name and designation of witness), son/daughter of …….(name of father/mother), resident of …….. (address of witness).

Received copy of arrest Memo.
Signature of the Arrestee……..
Counter Signature of Witness

JAMA TALASHI

On the arrest of Shri……(name and designation), son/daughter of ……. (name of father/mother), resident of …… (address), his 'Jama Talashi' was conducted in the presence of two witnesses and the following items have been recovered from his possession :

i. ----------

ii. ----------

iii. ----------

iv. ----------

Aforesaid items have been sealed in the presence of witness(s).

Signature ……..

Name and designation of Officer

Witness No. (1) Signature :
Name
Address

Witness No. (2) Signature :
Name
Address

Signature of the Arrestee ……..

AUTHORISATION FOR SEARCH

[Section 12F of Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017]

To

……..

……..

(name, designation, office)

Whereas, I have reason to believe that goods liable to confiscation or documents or things relevant to the proceedings under the Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017 are secreted in the following place -

…….

…….

Now, therefore, in exercise of the powers conferred upon me under Section 12F of Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017, I authorize and require you to conduct search of the above mentioned place with such assistance as may be necessary and the said goods or documents and/or any other things relevant to the proceedings, under the said Act, found in the said place be seized forthwith for further action under the Central Excise Act, 1944 and rules made thereunder.

Given under my hand & seal this …… day of …….. month …… 20……

Signature, Name and designation of issuing authority

Seal of issuing Authority

SUMMONS

[under Section 14 of the Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017]

To

……

……

(Name and address)

WHEREAS, I,…… am making inquiry in connection with …… under the Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017.

AND WHEREAS, I consider your attendance necessary to

(a) give evidence and/or

(b) produce documents or things of the following description in your possession or under your control :

1. …….

2. …….

3. …….

NOW, THEREFORE, in exercise of powers vested in me under Section 14 of the Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017, I do hereby summon you to appear before me in person on ……. (date) at …… (time) at the office of ……. (office address).

Inquiry as aforesaid is deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860) and non-compliance of this summon is an offence punishable under Section 174 & 175 of the Indian Penal Code, 1860.

Given under my hand and seal of office to-day the……day of ……(month), 20...(year) at …….(place of issue).

Name ……
Signatur ……
e
Designation ……..

Seal of Office.

ARREST MEMO

[Under Section 13 of Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017]

Whereas, I have reason to believe that you, …… (Name of the person to be arrested and his designation), age about ……. years, son/daughter of Shri ……, and address …… (address of the premises) has committed an offence punishable under

section 9 of the Central Excise Act, 1944 read with Section 174(2) of Central Goods and Services Tax Act, 2017.

2. Therefore, with the due approval of the Principal Commissioner/ Commissioner (Office Address) ……. I, …….. (name), …….., (designation), Office of the Commissioner, Central Excise …… (office Address), hereby arrest you today at …….. (time) on ……. (date) at …… (Place of arrest) under the powers vested in me under Section 13 of the said Act read with Section 174(2) of Central Goods and Services Tax, 2017.

3. Accordingly, Shri…… S/o …….. has been placed under and he has been explained the grounds of his arrest. He was also informed about his right to have someone informed about his arrest and …….. has been informed about his arrest.

Signature……
Name……..
Designation……

4. I have been explained the grounds of my arrest. The fact of my arrest has been witnessed by Shri …… (name and designation of witness), son/daughter of …….(name of father/mother), resident of …….. (address of witness).

Received copy of arrest Memo.
Signature of the Arrestee……..
Counter Signature of Witness

JAMA TALASHI

On the arrest of Shri……(name and designation), son/daughter of ……. (name of father/mother), resident of …… (address), his 'Jama Talashi' was conducted in the presence of two witnesses and the following items have been recovered from his possession :

i. ----------

ii. ----------

iii. ----------

iv. ----------

Aforesaid items have been sealed in the presence of witness(s).

Signature …….

Name and designation of Officer

Witness No. (1) Signature :
Name
Address
Witness No. (2) Signature :
Name
Address

Signature of the Arrestee ……..

PROVISIONAL RELEASE ORDER (in the form of letter)

To

…….

…….

Subject : Provisional release of seized goods, documents and things under Central Excise Act, 1944 read with Section 174(2) of the Central Goods and Services Tax Act, 2017 in the case of M/s. …….. & others.

Please refer to your letter F. No. ……. seeking provisional release of seized goods, documents and things (seized on -------- under Central Excise Act, 1944 read with Section 174(2) of the Central Goods and Services Tax Act, 2017.

2. Adjudicating authority hereby allow provisional release of seized goods, documents and things (as per details given below) subject to compliance of following conditions/requirements :

i. Details of goods/documents/things allowed provisional release :

(Description, quantity, estimated value)

ii. Conditions for provisional release :

i. Execution of Bond for the full value/estimated value of the seized goods i.e. Rs. -------;
ii. Furnishing Bank Guarantee or Security Deposit of Rs. -----/-;.

iii ……. (any other conditions, as prescribed by adjudicating authority)

3. Bond referred to in Para above should contain an undertaking that the you will pay the duty, fine and/or penalty as may be adjudged by the Adjudicating Authority, subject to appellate provisions under the Act. Further, where security is furnished by way of Bank Guarantee, the Bank Guarantee should contain a clause binding the issuing bank to keep it renewed and valid till adjudication of the case, or in the event of non-renewal of Bank Guarantee as above, the guaranteed amount shall be credited to the Government account by the bank on its own.

Name ……
Signatur ……
e
Designation ……..

Seal of Office.

AUTHORISATION FOR SEARCH

[Section 82 of the Finance Act, 1994 read with Section 174(2) of the Central Goods and Services Tax Act, 2017]

To

……..

……

(name, designation, office)

Whereas, I have reason to believe that goods liable to confiscation or documents or things relevant to the proceedings under the Finance Act, 1994 read with Section 174(2) of the Central Goods and Services Tax Act, 2017 are secreted in the following place -

……..

……..

Now, therefore, in exercise of the powers conferred upon me under Section 82 of the Finance Act, 1994 read with Section 174(2) of the Central Goods and Services Tax Act, 2017, I authorize and require you to conduct search of the above mentioned place with such assistance as may be necessary and the said goods or documents and/or any other things relevant to the proceedings, under the said Act, found in the said place be seized forthwith for further action under the Finance Act, 1994 and rules made thereunder.

Given under my hand & seal this …… day of …… month …….. 20…….

Signature, Name and designation
of issuing authority

Seal of issuing Authority

SUMMONS

[under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and further read with Section 174(2) of Central Goods and Services Tax Act, 2017]

To

……

……

(Name and address)

WHEREAS, I,…… am making inquiry in connection with …… under the Finance Act, 1994 read with Section 174(2) of the Central Goods and Services Tax Act, 2017.

AND WHEREAS, I consider your attendance necessary to

(a) give evidence and/or

(b) produce documents or things of the following description in your possession or under your control :

1. …….

2. …….

3. …….

NOW, THEREFORE, in exercise of powers vested in me under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and further read with Section 174(2) of the Central Goods and Services Tax Act, 2017, I do hereby summon you to appear before me in person on ……. (date) at …… (time) at the office of ……. (office address).

Inquiry as aforesaid is deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860) and non-compliance of this summon is an offence punishable under Section 174 & 175 of the Indian Penal Code, 1860.

Given under my hand and seal of office today the……day of ……(month), 20...(year) at …….(place of issue).

Name …….
Signature …….

Designation ……..

Seal of Office.

ARREST MEMO

[Under Section 91 of Finance Act, 1994 read with Section 174(2) of Central Goods and Services Tax Act, 2017]

Whereas, the Principal Commissioner/Commissioner……. (Office Address) has reasons to believe that you, ……. (Name of the person to be arrested and his designation), age about …… years, son/daughter of Shri ……., and address …… (address of the premises) have committed an offence specified in sub-section (1) of Section 89 of the Finance Act, 1994 read with Section 174(2) of the Central Goods and Services Tax Act, 2017.

2. I, …….. (name), ……., (designation), Office of the Principal Commissioner/Commissioner, ……. (office Address), being duly authorized, hereby arrest you today at ……. (time) on …… (date) at …….. (Place of arrest) under Section 91 of the said Finance Act read with Section 174(2) of the Central Goods and Services Tax Act, 2017.

3. Accordingly, Shri…… S/o …….. has been placed under arrest and he has been explained the grounds of his arrest. He was also informed about his right to have someone informed about his arrest and Sh./Ms. ……. has been informed about his arrest.

Signature……
Name……..
Designation……

4. I have been explained the grounds of my arrest. The fact of my arrest has been witnessed by Shri …… (name and designation of witness), son/daughter of ……. (name of father/mother), resident of …….. (address of witness).

Received copy of arrest Memo.
Signature of the Arrestee……..
Counter Signature of Witness

JAMA TALASHI

On the arrest of Shri…… (name and designation), son/daughter of ……. (name of father/mother), resident of …… (address), his 'Jama Talashi' was conducted in the presence of two witnesses and the following items have been recovered from his possession :

i. ----------

ii. ----------

iii. ----------

iv. ----------

Aforesaid items have been sealed in the presence of witness(s).

Signature …….

Name and designation of Officer

Witness No. (1) Signature :
Name
Address

Witness No. (2) Signature :
Name
Address

Signature of the Arrestee ……..

Appendix-III

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
GST-INVESTIGATION WING
NEW DELHI

INSTRUCTION NO - 03/2022-23 (GST - Investigation); Dated: August 17, 2022

SUBJECT: GUIDELINES ON ISSUANCE OF SUMMONS UNDER SECTION 70 OF THE CENTRAL GOODS 6b SERVICES TAX ACT, 2017 - REG.

It has been brought to the notice of the Board that in certain instances, summons under Section 70 of the Central Goods and Services Tax Act, 2017 (the CGST Act') have been issued by the field formations to the top senior officials of the companies in a routine manner to call for material evidence/ documents. Besides, summons have also been issued to call for statutory records viz. GSTR-3B, GSTR-1 etc., which are available online in the GST portal.

2. As per Section 70 (1) of the CGST Act, summons can be issued by the proper officer to any person whose attendance is considered necessary either for giving evidence or producing a document or any other thing in an inquiry in the same manner, as provided in the case of a civil court under the provisions of Code of Civil Procedure, 1908 (5 of 1908). As per sub-section (2) of Section 70, securing such documentary and oral evidence under the said legal provision shall be deemed to be a "judicial proceedings" within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860). While issuing of summons is one of the instruments with the Department to get/obtain information or documents or statement from any person to find out the evasion of the tax etc., however, it needs to be ensured that exercise of such power is done judiciously and with due consideration. Officers are also advised to explore instances when instead of resorting to summons, a letter for requisition of information may suffice. Previously in respect of legacy laws, the Board has sensitized the officers regarding use of power of issuance of summons diligently. However, Board finds it necessary to issue fresh guidelines under CGST.

3. Accordingly, Board desires that the following guidelines must be followed in matters related to investigation under CGST:

(i) Power to issue summons are generally exercised by Superintendents, though higher officers may also issue summons. Summons by Superintendents should be issued after obtaining prior written permission from an officer not below the rank of Deputy/ Assistant Commissioner with the reasons for issuance of summons to be recorded in writing.

(ii) Where for operational reasons it is not possible to obtain such prior written permission, oral/telephonic permission from such officer must be obtained and the same should be reduced to writing and intimated to the officer according such permission at the earliest opportunity.

(iii) In all cases, where summons are issued, the officer issuing summons should record in file about appearance/ non-appearance of the summoned person and place a copy of statement recorded in file.

(iv) Summons should normally indicate the name of the offender(s) against whom the case is being investigated unless revelation of the name of the offender is detrimental to the cause of investigation, so that the recipient of summons has prima-facie understanding as whether he has been summoned as an accused, co-accused or as witness.

(v) Issuance of summons may be avoided to call upon statutory documents which are digitally/ online available in the GST portal.

(vi) Senior management officials such as CMD/ MD/ CEO/ CFO/ similar officers of any company or a PSU should not generally be issued summons in the first instance. They should be summoned when there are clear indications in the investigation of their involvement in the decision making process which led to loss of revenue.

(vii) Attention is also invited to Board's Circular No. 122/41/2019-GST dated 5th November, 2019 which makes generation and quoting of Document Identification Number (DIN) mandatory on communication issued by officers of CBIC to tax payers and other concerned persons for the purpose of investigation. Format of summons has been prescribed under Board's Circular No. 128/47/2019-GST dated 23rd December, 2019.

(viii) The summoning officer must be present at the time and date for which summons is issued. In case of any exigency, the summoned person must be informed in advance in writing or orally.

(ix) All persons summoned are bound to appear before the officers concerned, the only exception being women who do not by tradition appear in public or privileged persons. The exemption so available to these persons under Section 132 and 133 of CPC, may be kept in consideration while investigating the case.

(x) Issuance of repeated summons without ensuring service of the summons must be avoided. Sometimes it may so happen that summoned person does not join investigations even after being repeatedly summoned. In such cases, after giving reasonable opportunity, generally three summons at reasonable intervals, a complaint should be filed with the jurisdictional magistrate alleging that the accused has committed offence under Sections 172 of Indian Penal Code (absconding to avoid service of summons or other proceedings) and/or 174 of Indian Penal Code (non-attendance in obedience to an order from public servant), as inquiry under Section 70 of CGST Act has been deemed to be a "judicial proceedings" within the meaning of Section 193 and Section 228 of the Indian Penal Code. Before filing such complaints, it must be ensured that summons have adequately been served upon the intended person in accordance with Section 169 of the CGST Act. However, this does not bar to issue further summons to the said person under Section 70 of the Act.

4. These instructions may be brought to the notice of all the field offices/formations under your charge for strict compliance. Non-observance of the instructions will be viewed seriously. Difficulties, if any, in implementation of the aforesaid instructions may be brought to the notice of the Board.

5. Receipt of this Instruction may please be acknowledged. Hindi version will follow.

[F.No.GST/INV/Instructions/2021-22]

(Vijay Mohan Jain)
Commissioner (GST-Inv.), CBIC

Appendix-IV

MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
GST-INVESTIGATION WING
NEW DELHI

INSTRUCTIONS NO - 01/2020-21 [GST-Investigation], Dated: February 2, 2021

SUBJECT: Instructions/Guidelines regarding procedures to be followed during Search Operation - regarding.

Specific instances have come to the notice of the Board and Central Vigilance Commission wherein proper procedures have apparently not been followed during search proceedings and/or the Panchnamas/statements have not been recorded as per extant guidelines & instructions. Such discrepancies weaken the judicial scrutiny of the case at later stage. Accordingly, the instructions contained in the Central Excise Intelligence and Investigation Manual (2004). which hold good even in GST regime, are hereby, reiterated for compliance by DGGI/ filed formations.

2. Section 67 of the Central Goods and Services Tax Act, 2017 contains the provisions for search. Similar provisions are contained in Section 18 of the Central Excise Act, 1944. These provisions prescribe that all the searches be carried out in accordance with the provisions of Code of Criminal Procedure, 1973. Thus, the following guidelines must be adhered to while carrying out search proceedings:

(i) The officer issuing authorization for search should have valid and justifiable reasons for authorizing a search, which shall be duly recorded in the file. Search should be carried out only with a proper search authorization issued by the Competent Authority.

(ii) The instructions related to generation of DIN for each search authorization shall be scrupulously followed by the officer authorising search.

(iii) The premises of a person cannot be searched on the authority of a search warrant issued for the premises of some other person. Where a search warrant, through oversight, has been issued in the name of a person who is already dead, the authorised officer should report to the Competent Authority and get a fresh warrant issued in the names of the legal heirs.

(iv) In case of search of a residence, a lady officer shall necessarily be part of the search team.

(v) The search shall be made in the presence of two or more independent witnesses who would preferably be respectable inhabitants of the locality, and if no such inhabitants are available or willing, the inhabitants of any other locality should be asked to be witness to the search. PSU employees, Bank employees etc. may be included as witnesses during sensitive search operations to maintain transparency and credibility. The witnesses should be informed about the purpose of the search and their duties.

(vi) The officers conducting the search shall first identify themselves by showing their identity cards to the person in-charge of the premises. Also, before the start of the search, the officers as well as the independent witnesses shall offer their personal search. After the conclusion of the search all the officers and the witnesses should again offer themselves for their personal search.

(vii) The search authorization shall be executed before the start of the search and the same shall be shown to the person in charge of the premises to be searched and his/her signature with date and time shall be obtained on the body of the search authorization. The signatures of the witnesses with date and time should also be obtained on the body of the search authorization.

(viii) A Panchnama containing truthful account of the proceedings of the search shall necessarily be made and a list of documents/goods/things recovered should be prepared. It should be ensured that time and date of start of search and conclusion of search must be mentioned in, the Panchnama. The fact of offering personal search of the officers and witnesses before initiation and after conclusion of search must be recorded in the Panchnama.

(ix) In the sensitive premises videography of the search proceedings may also be considered and the same may be recorded in Panchnama.

(x) While conducting search, the officers must be sensitive towards the assessee/party. Social and religious sentiments of the person(s) under search and of all the person(s) present, shall be respected at all times. Special care/attention should be given to elderly, women and children present in the premises under search. Children should be allowed to go to school, after examining of their bags. A woman occupying any premises, to be searched, has the right to withdraw before the search party enters, if according to the customs she does not appear in public. If a person in the premises is not well, a medical practitioner may he called.

(xi) The person from whose custody any documents are seized may be allowed to make copies thereof or take extracts therefrom for which he/she may be provided a suitable time and place to take such copies or extract therefrom. However, if it is felt that providing such copies or extracts therefrom prejudicially affect the investigation, the officer may not provide such copies, If such request for taking copies is made during the course of search, the same may be incorporated in Panchnama, intimating place and time to take such copies.

(xii) The officer authorized to search the premises must sign each page of the Panchnama and annexure. A copy of the Panchnama along with all its annexures should be given to the person in-charge of the premises being searched and acknowledgement in this regard may be taken. If the person in-charge refuses to sign the Panchnama, the same may he pasted in a conspicuous place of the premises, in presence of the witnesses. Photograph of the Panchnama pasted on the premises may be kept on record.

(xiii) In case any statement is recorded during the search, each page of the statement must be signed by the person whose statement is being recorded. Each page of the statement must also be signed by the officer recording the statement as 'before me'.

(xiv) After the search is over, the search authorization duly executed should be returned to the officer who had issued the said search authorization with a report regarding the outcome of the search. The names of the officers who had participated in the search should be written on the reverse of the search authorization. If search authorization could not be executed due to any reason, the same should be mentioned in the reverse of the search authorization and a copy of the same may be kept in the ease file before returning the some to the officer who had issued the said search authorization.

(xv) The officers should leave the premises immediately after completion of Panchnama proceedings.

(xvi) During the prevalent COVID-I9 pandemic situation, it is imperative to take precautionary measures such as maintaining proper social distancing norms, use of masks and hand sanitizers etc. The search team should take all measures as contained in the guidelines of Ministry of

Home Affairs, and Ministry of Health & Family Welfare, and also the guidelines issued by the State Government from time to time.

4. Specific instructions regarding search of premises/persons are contained in the Central Excise Intelligence and Investigation Manual issued by the DGCEI, New Delhi. Subsequent instructions have also been issued from time to time as per the need of the hour, latest being DGGI Instruction dated 14.08.2020. The instructions as elaborated in the preceding para(s) are to be followed in continuation to the earlier instructions.

5. This issues with the approval of Member (Investigation), CBIC, New Delhi.

[F. No. GST/INV/DGOV Reference/20-21]

(Neeraj Prasad)
Commissioner (GST-Inv.), CBIC

Appendix-V

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
GST-INVESTIGATION WING
NEW DELHI

INSTRUCTION NO - 02/2022-23 (GST - Investigation); Dated: August 17, 2022

SUBJECT: GUIDELINES FOR ARREST AND BAIL IN RELATION TO OFFENCES PUNISHABLE UNDER THE CGST ACT, 2017 - REG.

Hon'ble Supreme Court of India in its judgment dated 16th August, 2021 in Criminal Appeal No. 838 of 2021, arising out of SLP (Crl.) No. 5442/2021, has observed as follows:

"We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused."

2. Board has examined the above-mentioned judgment and has felt the need to issue guidelines with respect to arrest under CGST Act, 2017. Even, under legacy laws i.e. Central Excise Act, 1944 (1 of 1944) and Chapter V of the Finance Act, 1994 (32 of 1994), the instructions regarding exercise of power to arrest had been issued.

3. **Conditions precedent to arrest:**

3.1 Sub-section (1) of Section 132 of CGST Act, 2017 deals with the punishment for offences specified therein. Sub-section (1) of Section 69 gives the power to the Commissioner to arrest a person where he has reason to believe that the alleged offender has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132 which is punishable under clause (i) or clause (ii) of subsection (1), or sub-section (2) of the Section 132 of CGST Act, 2017. Therefore, before placing a person under arrest, the legal requirements must be fulfilled. The reasons to believe to arrive at a decision to place an alleged offender under arrest must be unambiguous and amply clear. The reasons to believe must be based on credible material.

3.2 Since arrest impinges on the personal liberty of an individual, the power to arrest must be exercised carefully. The arrest should not be made in routine and mechanical manner. Even if all the legal conditions precedent to arrest mentioned in Section 132 of the CGST Act, 2017 are fulfilled, that will not, ipso facto, mean that an arrest must be made. Once the legal ingredients of the offence are made out, the Commissioner or the competent authority must then determine if the answer to any or some of the following questions is in the affirmative:

3.2.1 Whether the person was concerned in the non-bailable offence or credible information has been received, or a reasonable suspicion exists, of his having been so concerned?

3.2.2 Whether arrest is necessary to ensure proper investigation of the offence?

3.2.3 Whether the person, if not restricted, is likely to tamper the course of further investigation or is likely to tamper with evidence or intimidate or influence witnesses?

3.2.4 Whether person is mastermind or key operator effecting proxy/ benami transaction in the name of dummy GSTIN or non-existent persons, etc. for passing fraudulent input tax credit etc.?

3.2.5 As unless such person is arrested, his presence before investigating officer cannot be ensured.

3.3 Approval to arrest should be granted only where the intent to evade tax or commit acts leading to availment or utilization of wrongful Input Tax Credit or fraudulent refund of tax or failure to pay amount collected as tax as specified in sub-section (1) of Section 132 of the CGST Act 2017, is evident and element of metis rea / guilty mind is palpable.

3.4 Thus, the relevant factors before deciding to arrest a person, apart from fulfillment of the legal requirements, must be that the need to ensure proper investigation and prevent the possibility of tampering with evidence or intimidating or influencing witnesses exists.

3.5 Arrest should, however, not be resorted to in cases of technical nature i.e. where the demand of tax is based on a difference of opinion regarding interpretation of Law. The prevalent practice of assessment could also be one of the determining factors while ascribing intention to evade tax to the alleged offender. Other factors influencing the decision to arrest could be if the alleged offender is co-operating in the investigation, viz. compliance to summons, furnishing of documents called for, not giving evasive replies, voluntary payment of tax etc.

4. **Procedure for arrest**

4.1 Pr. Commissioner/Commissioner shall record on file that after considering the nature of offence, the role of person involved and evidence available, he has reason to believe that the person has committed an offence as mentioned in Section 132 and may authorize an officer of central tax to arrest the concerned person(s). The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) read with section 69(3) of CGST Act relating to arrest and the procedure thereof, must be adhered to. It is, therefore, advised that the Pr. Commissioner/Commissioner should ensure that all officers are fully familiar with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

4.2 The arrest memo must be in compliance with the directions of H'ble Supreme Court in the case of *D.K Basu vs State of West Bengal reported in 1997(1) SCC 416 = 2002-TIOL-230-SC-MISC* (see paragraph 35). Format of arrest memo has been prescribed under Board's Circular No. 128/47/2019-GST dated 23rd December, 2019. The arrest memo should indicate relevant section (s) of the CGST Act, 2017 or other laws attracted to the case and to the arrested person and inapplicable provisions should be struck off. In addition,

4.2.1 The grounds of arrest must be explained to the arrested person and this fact must be noted in the arrest memo;

4.2.2 A nominated or authorized person (as per the details provided by arrested person) of the arrested person should be informed immediately and this fact shall be mentioned in the arrest memo;

4.2.3 The date and time of arrest shall be mentioned in the arrest memo and the arrest memo should be given to the person arrested under proper acknowledgment.

4.3 A separate arrest memo has to be made and provided to each individual/arrested person. This should particularly be kept in mind in the event when there are several arrests in a single case.

4.4 Attention is also invited to Board's Circular No. 122/41/2019-GST dated 5th November, 2019 which makes generation and quoting of Document Identification Number (DIN) mandatory on communication issued by officers of CBIC to tax payers and other concerned persons for the purpose of investigation. Any lapse in this regard will be viewed seriously.

4.5 Further there are certain modalities which should be complied with at the time of arrest and pursuant to an arrest, which include the following:

4.5.1 A woman should be arrested only by a woman officer in accordance with section 46 of Code of Criminal Procedure, 1973.

4.5.2 Medical examination of an arrested person should be conducted by a medical officer in the service of Central or State Government and in case the medical officer is not available, by a registered medical practitioner, soon after the arrest is made. If an arrested person is a female, then such an examination shall be made only by or under supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

4.5.3 It shall be the duty of the person having the custody of an arrested person to take reasonable care of the health and safety of the arrested person.

4.5.4 Arrest should be made with minimal use of force and publicity, and without violence. The person arrested should be subjected to reasonable restraint to prevent escape.

5. **Post arrest formalities**

5.1 The procedure is separately outlined for the different categories of offences, as listed in sub-section (4) and (5) of Section 132 of the CGST Act, 2017, as amended:

5.1.1.1 In cases, where a person is arrested under sub-section (1) of Section 69 of the CGST Act, 2017, for an offence specified under sub-section (4) of Section 132 of the CGST Act, 2017, the Assistant Commissioner or Deputy Commissioner is bound to release a person on bail against a bail bond. The bail conditions should be informed in writing to the arrested person and also on telephone to the nominated person of the person (s) arrested. The arrested person should also be allowed to talk to the nominated person.

5.1.1.2 The conditions will relate to, inter alia, execution of a personal bail bond and one surety of like amount given by a local person of repute, appearance before the investigating officer when required and not leaving the country without informing the officer. The amount to be indicated in the personal bail bond and surety will depend upon the facts and circumstances of each case, inter-alia, on the amount of tax involved. It has to be ensured that the amount of Bail bond /Surety should not be excessive and should be commensurate with the financial status of the arrested person.

5.1.1.3 If the conditions of the bail are fulfilled by the arrested person, he shall be released by the officer concerned on bail forthwith. However, only in cases where the conditions for granting bail are not fulfilled, the arrested person shall be produced before the appropriate Magistrate without unnecessary delay and within twenty-four hours of arrest. If necessary, the arrested person may be handed over to the nearest police station for his safe custody, during the night under a challan, before he is produced before the Court.

5.1.2 In cases, where a person is arrested under sub-section (1) of Section 69 of the CGST Act, 2017, for an offence specified under sub-section (5) of Section 132 of the CGST Act, 2017, the officer authorized to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours. However, in the event of circumstances preventing the production of the arrested person before a Magistrate, if necessary, the arrested person may be handed over to nearest Police Station for his safe custody under a proper challan and produced before the Magistrate on the next day, and the nominated person of the arrested person may also be informed accordingly. In any case, it must be ensured that the arrested person should be produced before the appropriate Magistrate within twenty four hours of arrest, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

5.2 Formats of the relevant documentation i.e. Bail Bond in the Code of Criminal Procedure, 1973 (2 of 1974) and the Challan for handing over to the police should be followed.

5.3 After arrest of the accused, efforts should be made to file prosecution complaint under Section 132 of the Act, before the competent court at the earliest, preferably within sixty days of arrest, where no bail is granted. In all other cases of arrest also, prosecution complaint should be filed within a definite time frame.

5.4 Every Commissionerate/Directorate should maintain a Bail Register containing the details of the case, arrested person, bail amount, surety amount etc. The money/ instruments/documents received as surety should be kept in safe custody of a single nominated officer who shall ensure that these instruments/ documents received as surety are kept valid till the bail is discharged.

6. **Reports to be sent**

6.1 Pr. Director-General (DGGI)/ Pr. Chief Commissioner(s)/Chief Commissioner(s) shall send a report on every arrest to Member (Compliance Management) as well as to the Zonal Member within 24 hours of the arrest giving details as has been prescribed in Annexure-I. To maintain an all India record of arrests made in CGST, from September, 2022 onwards, a monthly report of all persons arrested in the Zone shall be sent by the Principal Chief Commissioner(s)/Chief Commissioner(s) to the Directorate General of GST Intelligence, Headquarters, New Delhi in the format, hereby prescribed in Annexure-II, by the 5th of the succeeding month. The monthly reports received from the formations shall be compiled by DGGI, Hqrs. and a compiled Zone wise report shall be sent to Commissioner (GST-Investigation), CBIC by 10th of every month.

6.2 Further, all such reports shall be sent only by e-mail and the practice of sending hard copies to the Board should be stopped with immediate effect.

7. The field formations are hereby directed to circulate these guidelines/instructions to all the formations under their charge for strict compliance. Difficulties, if any, in implementation of the aforesaid guidelines/instructions may be brought to the notice of the Board.

8. Receipt of this Instruction may please be acknowledged. Hindi version will follow

[F.No.GST/INV/Instructions/2021-22]

(Vijay Mohan Jain)
Commissioner (GST-Inv.), CBIC

ANNEXURE-I

(To Board's Instruction No. 02/2022-23)

F. No. Date:

From: The Principal Chief Commissioner/ Chief Commissioner, CGST Zone_____/Pr. Director General, DGGI

To,

The Member (Compliance Management) CBIC

Intimation of Arrest
(In terms of Para 6 of Board's Instruction No. 02/2022-23 dated 17.08.2022)

1. Date of Arrest :

2. Time of arrest :

3. Place of arrest with address :

4. Name of the person :

5. Date of birth :

6. S/o, D/o, W/o :

7. Identification document type :

8. Identification document No. :

9. Nationality : Indian/Others (if others, specify)

10. Offence committed :

11. Details of offence (not more than 50 words) :

12. Whether any seizure made : Yes/No

13. If yes, specify :

Signature

Name of the Pr. Director General/ Pr. Chief Commissioner/Chief Commissioner

ANNEXURE-II

(To Board's Instruction No. 02/2022-23)
Monthly Report on Person(s) Arrested in the Zone

Sr. No.	CGST Zone	Name of the Arrested person	Age	Date of Arrest	Status of Person [Proprietor, Partner, Director, Professional (Lawyer/ Chartered Accountant/ Company Secretary, etc.)]	Amount of tax evaded (Rs. Crore)	Name of the entity involved	GSTIN of the entity involved	Brief description of role played by the Arrested Person

Appendix - VI

Provisional attachment of property under CGST Section 83 — Guidelines

C.B.I. & C. Letter F. No. CBEC-20/16/05/2021-GST/359, dated 23-2-2021

Subject : Guidelines for provisional attachment of property under section 83 of the CGST Act, 2017 - Regarding.

I am directed to refer to the section 83 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act"). This section provides for provisional attachment of property for the purpose of protecting the interest of revenue during the pendency of any proceeding under section 62 or section 63 or section 64 or section 67 or section 73 or section 74 of the Act.

2. Doubts have been raised by the field formations on various issues pertaining to provisional attachment of property under the provisions of section 83 of the Act read with rule 159 of Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the "CGST Rules"). Besides in a number of cases, Hon'ble Courts have also made observations on the modalities of implementation of provisions of section 83 of the Act by the tax officers. In view of the same, the following guidelines are hereby issued with respect to the exercise of power under section 83 of the Act.

3.1 ***Grounds for provisional attachment of property.***

3.1.1 Section 83 of the Act is reproduced hereunder :

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

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

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

3.1.2 Perusal of the above provision of the law suggests that the followings grounds must exist for resorting to provisional attachment of property under the provisions of section 83 of the Act :

(i) There must be pendency of a proceeding against a taxable person under the sections mentioned in section 83 of the Act.

(ii) The Commissioner must have formed the opinion that provisional attachment of the property belonging to the taxable person is necessary for the purpose of protecting the interest of the Government revenue.

3.1.3 For forming an opinion under section 83, 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.

3.1.4 The basis, on which, Commissioner has formed such an opinion, should be duly recorded on file.

3.1.5 It is reiterated that the power of provisional attachment must not be exercised in a routine/mechanical manner and careful examination of all the facts of the case is important to determine whether the case(s) is fit for exercising power under section 83. The collective evidence, based on the proceedings/enquiry conducted in the case, must indicate that *prima facie* a case has been made out against the taxpayer, before going ahead with any provisional attachment. The remedy of attachment being, by its very nature, extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution.

3.2 ***Procedure for provisional attachment of property***

3.2.1 In case, the Commissioner forms an opinion to attach any property, including bank account, of the taxable person in terms of section 83, he should duly record on file the basis, on which he has formed such an opinion. He should, thereafter, pass an order in *FORM GST DRC-22* with proper Document Identification Number (DIN) mentioning therein the details of property being attached.

3.2.2 A copy of the order of attachment should be sent to the concerned Revenue Authority or Transport Authority or Bank or the relevant Authority to place encumbrance on the said movable or immovable property. The property, thus attached, shall be removed only on the written instructions from the Commissioner.

3.2.3 A copy of such attachment order shall be provided to the said taxable person as early as possible so that objections, if any, to the said attachment can be made by the taxable person within the time period prescribed under rule 159 of the CGST Rules. If such objection is filed by the taxable person, Commissioner should provide an opportunity of being heard to the person filing the objection. After considering the facts presented by the person in his written objection as well as during the personal hearing, if any, the Commissioner should form a reasoned view whether the property is still required to be continued to be attached or not, and pass an order in writing to this effect. In case, the Commissioner is satisfied that the property was or is no longer liable for attachment, he may release such property by issuing an order in *FORM GST DRC-23.*

3.2.4 Even in cases where objection is not filed within the time prescribed under rule 159(5) of CGST Rules, the Commissioner may take the grounds mentioned in the said objection/representation on record and pass a reasoned order. Where the Commissioner is satisfied that the property was or is no longer liable for attachment, he may release such property by issuing an order in *FORM GST DRC-23.*

3.2.5 Each such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order of attachment.

3.2.6 If the provisionally attached property is of perishable/hazardous nature, then such property shall be released to the taxable person by issuing order in *FORM GST DRC-23,* after taxable person pays an amount equivalent to the market price of such property or the amount that is or may become payable by the taxable person, whichever is lower, and submits proof of payment. In case the taxable person fails to pay the said amount, then the said property of perishable/hazardous nature may be disposed of and the amount recovered from such disposal of property shall be adjustable against the tax, interest, penalty, fee or any other amount payable by the taxable person. Further, the sale proceeds thus obtained must be deposited in the nearest Government Treasury or branch of any nationalised bank in fixed deposit and the receipt thereof must be retained for record, so that the same can be adjusted against the amount determined to be recoverable from the said taxable person.

3.3 ***Cases fit for provisional attachment of property***

3.3.1 As mentioned above, the remedy of attachment being, by its very nature, extraordinary, needs to be resorted to with utmost circumspection and with maximum care and caution. It normally should not be invoked in cases of technical nature and should be resorted to mainly in cases where there is an evasion of tax or where wrongful input tax credit is availed or utilized or wrongfully passed on. While the specific facts of the case need to be examined in detail before forming an opinion in the matter, the following are some of type of cases, where provisional attachment can be considered to be resorted to subject to specific facts of the case :

Where taxable person has :

(a) supplied any goods or services or both without issue of any invoice, in violation of the provisions of the Act or the rules made there under, with an intention to evade tax; or

(b) issued any invoice or bill without supply of goods or services or both in violation of the provisions of the Act, or the rules made there under; or

(c) availed input tax credit using the invoice or bill referred to in clause (b) or fraudulently availed input tax credit without any invoice or bill; or

(d) collected any amount as tax but has failed to pay the same to the Government beyond a period of three months from the date on which such payment becomes due; or

(e) fraudulently obtained refund; or

(f) passed on input tax credit fraudulently to the recipients but has not paid the commensurate tax

3.3.2 The above list is illustrative only and not exhaustive. The Commissioner, may examine the specific facts of the case and take a reasoned view in the matter.

3.4 ***Types of property that can be attached***

3.4.1 It should be ensured that the value of property attached provisionally is not excessive. The provisional attachment of property shall be to the extent it is required to protect the interest

of revenue, that is to say, the value of attached property should be as near as possible to the estimated amount of pending revenue against such person.

3.4.2 More than one property may be attached in case value of one property is not sufficient to cover the estimated amount of pending revenue against such person. Further, different properties of the taxpayer can be attached at different points of time subject to the conditions specified in section 83 of the Act.

3.4.3 It may be noted that the provisional attachment can be made only of the property belonging to the taxable person, against whom the proceedings mentioned under section 83 of the Act are pending.

3.4.4 Movable property should normally be attached only if the immovable property, available for attachment, is not sufficient to protect the interests of revenue.

3.4.5 As far as possible, it should also be ensured that such attachment does not hamper normal business activities of the taxable person. This would mean that raw materials and inputs required for production or finished goods should not normally be attached by the Department.

3.4.6 In cases where the movable property, including bank account, belonging to taxable person has been attached, such movable property may be released if taxable person offers, in lieu of movable property, any other immovable property which is sufficient to protect the interest of revenue. Such immovable property should be of value not less than the tax amount in dispute. It should also be free from any subsisting charge, liens, mortgages or encumbrances, property tax fully paid up to date and not involved in any legal dispute. The taxable person must produce the original title deeds and other necessary information relating to the property, for the satisfaction of the concerned officer.

3.5 *Attachment Period*

3.5.1 Every provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the provisional attachment order.

3.5.2 Besides, the provisional attachment order shall also cease to have effect if an order in *FORM GST DRC-23* for release of such property is made by the Commissioner.

3.6 *Investigation and Adjudication*

As the provisional attachment of property is resorted to protect the interests of the revenue and may also affect the working capital of the taxable person, it may be endeavoured that in all such cases, the investigation and adjudication are completed at the earliest, well within the period of attachment, so that the due liability of tax as well as interest, penalty etc. arising upon adjudication can be recovered from the said taxable person and the purpose of attachment is achieved.

3.7 *Share in property*

Where the property to be provisionally attached consists of the share or interest of the concerned taxable person in property belonging to him and another as co-owners, the

provisional attachment shall be made by order to the concerned person prohibiting him from transferring the share or interest or charging it in any way.

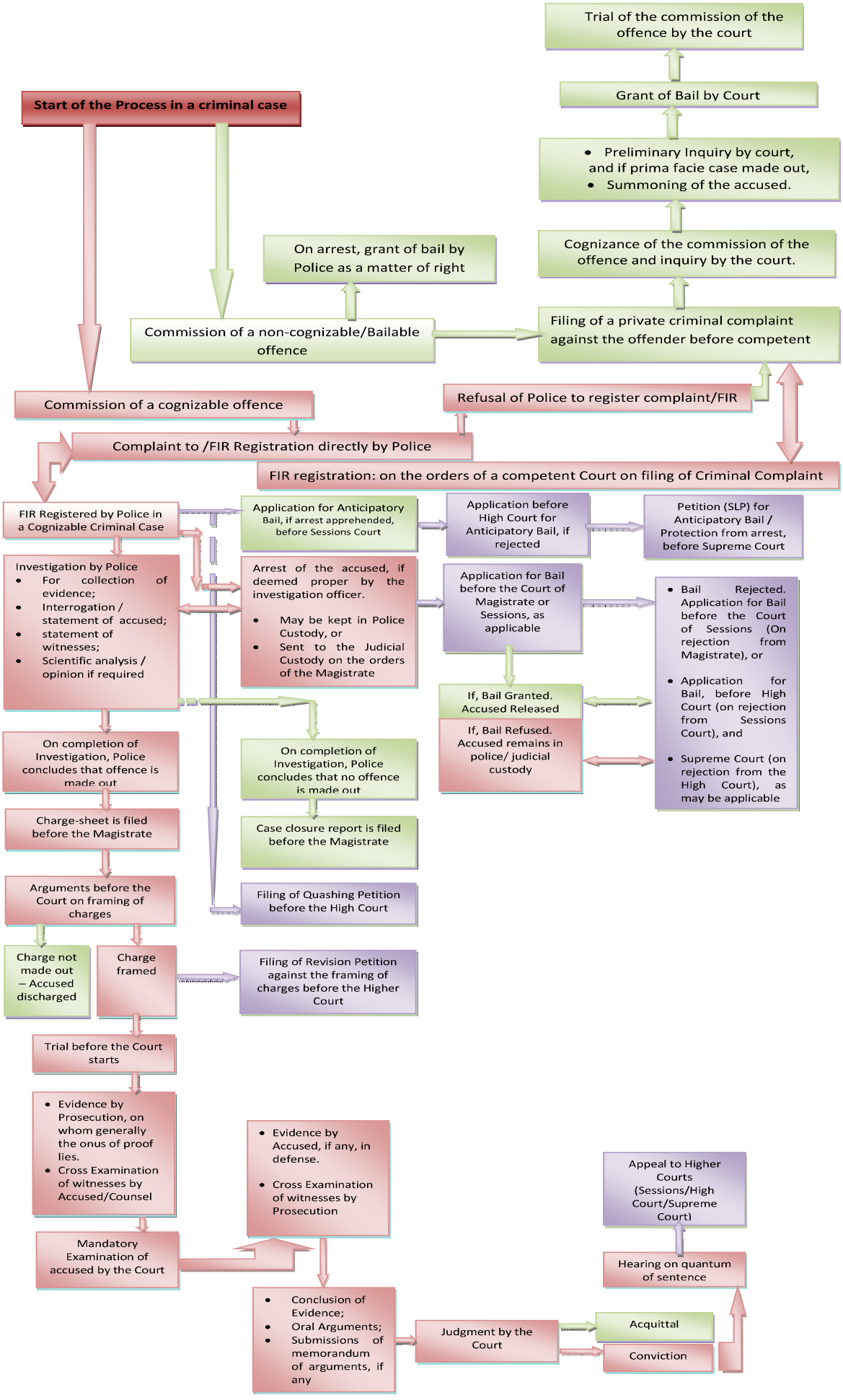
3.8 ***Property exempt from attachment***

All such property as is by the Code of Civil Procedure, 1908 (5 of 1908), exempted from attachment and sale for execution of a Decree of a Civil Court shall be exempt from provisional attachment.

4. It may be noted that an amendment to section 83 has been proposed in Finance Bill, 2021. However, such proposed amendment shall come into effect only from a date to be notified in future. The present guidelines, which are based on the existing provisions of section 83 of the Act, shall stand modified according to the amended provisions of section 83, once the said amendment comes into effect.

5. Difficulty, if any, in the implementation of the above guidelines may please be brought to the notice of the Board

FLOW CHART OF TRIAL OF CRIMINAL CASES IN INDIA

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