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Shivam Goel (Advocate)

High Court of Delhi

CONCEPT OF ARREST BEFORE ASSESSMENT, ANTICIPATORY BAIL AND COMPOUNDING OF OFFENCES IN THE CGST ACT, 2017

BROAD PROPOSITIONS OF LAW UNDER THE TAXING STATUTES:

- That officer under various tax laws such as the Central Excise Act etc. are not police officers to whom Section 25 of the Indian Evidence Act, 1872 applies.
- That the power conferred upon the officers appointed under various tax enactments for search and arrest is intended to aid and support their main function of levy and collection of taxes and duties.
- That a person against whom an enquiry is undertaken under the relevant provisions of the tax laws does not automatically become a person accused of an offence until the prosecution is launched.
- That the statements made by persons in the course of enquiries under the tax laws, cannot be equated to statements made by persons accused of an offence.
- That as a consequence, there is no protection for such persons under Article 20 (3) of the Constitution of India, 1950, as the persons summoned for enquiry are not persons accused of any offence within the meaning of Article 20 (3) of the Constitution of India, 1950.

BROAD PROPOSITIONS OF LAW UNDER THE GST REGIME (THE CENTRAL GOODS & SERVICES TAX ACT, 2017)

- That until a prosecution is launched, by way of a private complaint with the previous sanction of the Commissioner, no criminal proceedings can be taken to commence.
- That person who is summoned under Section 70 (1) of the CGST Act and persons whose arrest is authorized under Section 69 (1) of the CGST Act are not to be treated as persons accused of any offence until a prosecution is launched.
- That an officer of the Central Tax authorized under Section 69 (1) of the CGST Act to arrest a person is not a police officer.
- According to Section 70 (2) of the CGST Act, an enquiry by the officers of the GST Commissionerate is not a criminal proceeding, it is nevertheless a judicial proceeding.

Moreover, under Section 70 (1) of the CGST Act, the proper officer under the CGST Act has the power to summon a person either to give evidence or to produce a document; this power has to be exercised in the manner as provided in the Civil Procedure Code, 1908 as regards his pending before a Civil Court. The proper officer under the CGST Act can be taken to have been conferred with the powers as conferred upon the Civil Court under Order XVI of the Civil Procedure Code, 1908.

- Sub-section (2) of Section 70 of the CGST Act declares that every enquiry to which Section 70 (1) of the CGST Act relates is to be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860. Hence, a person who is summoned under Section 70 (1) of the CGST Act, to give evidence or to produce document becomes liable for punishment, if he intentionally gives false evidence or fabricates false evidence or intentionally offers any insult or causes any interruption to any public servant.

ANTICIPATORY BAIL UNDER THE GST REGIME

- It is settled law that where the applicability of Section 438 of the Criminal Procedure Code, 1973 is specifically excluded (for example Section 18 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989), the High Court would be extremely cautious in exercising the same power indirectly by resorting to Article 226 of the Constitution of India, 1950.
- In absence of provision for grant of anticipatory bail in the CGST Act, technically speaking, a writ of mandamus should not lie. There is a fundamental distinction between a petition for anticipatory bail and the writ of mandamus to direct an officer not to effect the arrest. A writ of mandamus would lie only to compel the performance of statutory or other duty. No writ of mandamus would lie to prevent an officer from performing his statutory functions.
- That pre-arrest bail under GST regime can be sought by invoking writ jurisdiction of the Hon'ble High Court under Article 226 of the Constitution of India, 1950 relying upon the words "directions" and "orders" used in the said provision, that is, Clause (1) of Article 226 of the Constitution of India, 1950.

CAN A PERSON WHO COMMITS AN OFFENCE UNDER THE CGST ACT, TAKE UMBRAGE UNDER SECTIONS 41 AND 41-A OF THE CRIMINAL PROCEDURE CODE, 1973?

- Section 41-A was inserted in the Criminal Procedure Code, 1973 by way of Criminal Procedure Code (Amendment) Act, 2008 and it was further modified by the Criminal Procedure Code (Amendment) Act, 2010.

- Section 41-A (3) of the Criminal Procedure Code, 1973 prohibits the arrest of a person who complies and continues to comply with a notice of appearance issued under Sub-section (1) of Section 41-A of the Criminal Procedure Code, 1973.
- However, Section 41-A (3) of the Criminal Procedure Code, 1973 also gives discretion to the Police Officer, for reasons to be recorded, to arrest the person even though he complied with and continued to comply with the notice under Sub-section (1) of Section 41-A of the Criminal Procedure Code, 1973.
- That Commissioner of GST is conferred with the powers of search and seizure under Section 67 (10) of the CGST Act, in the same manner as provided in Section 165 of the Criminal Procedure Code, 1973, thus, it may not be correct to state that a person who commits an offence under the CGST Act cannot take umbrage under Section 41 and Section 41-A of the Criminal Procedure Code, 1973.

INCONGRUITY IN SECTION 69 AND SECTION 132 OF THE CGST ACT

- Under Section 69 (1) of the CGST Act, the power to order arrest is available only in cases where the Commissioner has reasons to believe that a person has committed any offence specified in Section 132 (1) (a) to (d) of the CGST Act which is punishable under Clause (i)/ (ii) of Sub-section (1) of Section 132 of the CGST Act, or offence specified under Section 132 (2) of the CGST Act punishable with punishment stipulated therein, that is, Clause (2) of Section 132 of the CGST Act.
- That offences specified in Section 132 (1) (a) to (d) of the CGST Act are cognizable and non-bailable as per Section 132 (5) of the CGST Act, if punishable under Clause (i) of Sub-section (1) of Section 132 of the CGST Act.
- Offences under Section 132 (1) (a) to (d) of the CGST Act:
 - 1) Section 132 (1) (a) of the CGST Act deals with the offence of supply of goods or services or both without the issue of any invoice in violation of the provisions of the CGST Act (and Rules framed therein) with the intent to evade tax.
 - 2) Section 132 (1) (b) of the CGST Act deals with the offence of issue of any invoice/ bill without supply of goods or services or both in violation of the provisions of the CGST Act (and Rules framed therein) leading to wrongful availing of or utilization of input tax credit/ refund of tax.
 - 3) Section 132 (1) (c) of the CGST Act deals with the offence of availing of input tax credit using the invoice/ bill referred to in Section 132 (1) (b) of the CGST Act.

4) Section 132 (1) (d) of the CGST Act deals with the offence of collecting any amount of tax but failing to pay the same to the Government beyond a period of three months from the date on which such payment becomes due.

- The power of the Commissioner to order the arrest of a person can be exercised only in cases where such a person is believed to have committed a cognizable and non-bailable offence.
- That, on one hand, the offences specified in Section 132 (1) (a) to (d) of the CGST Act (punishable under Clause (i) of Sub-section (1) of Section 132 of the CGST Act) are cognizable and non-bailable as per Section 132 (5) of the CGST Act, and on the other hand, offences specified in Section 132 (1) (f) to (l) of the CGST Act are non-cognizable and bailable as per Section 132 (4) of the CGST Act.

**THAT THE INCONGRUITY BETWEEN SECTION 69 (1) OF THE CGST ACT AND
SUB-SECTIONS (4) AND (5) OF SECTION 132 OF THE CGST ACT OCCURS ON
THE FOLLOWING COUNT**

Section 69 (1) of the CGST Act reads as follows:

- “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, authorize any officer of central tax to arrest such person.”
- Thus, Section 69 (1) of the CGST Act states that power to order arrest is confined only to cognizable and non-bailable offences (Section 132 (5) of the CGST Act), that is, offences mentioned in Section 132 (1) (a) to (d) of the CGST Act, punishable under Clause (i) of Sub-section (1) of Section 132 of the CGST Act.
- However, Section 69 (3) (a) of the CGST Act states that: “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.”
- That Section 69 (1) of the CGST Act does not deal with Section 132 (4) of the CGST Act, and it confines itself only to Section 132 (5) of the CGST Act (that is, offence committed under Section 132 (1) (a) to (d) of the CGST Act and punishable under Clause (i) of Sub-section (1) of Section 132 of the CGST Act), thus, the language of Section 69 (3) (a) of the CGST Act is puzzling as it is not known as to how an order for arrest can be passed under Section 69 (1) of the CGST Act in respect of offences which are declared non-cognizable and bailable under Section 132 (4) of the CGST Act.

- Therefore, it is not known how a person whom the Commissioner believes to have committed an offence specified in Clauses (f) to (l) of Sub-section (1) of Section 132 of the CGST Act (which are non-cognizable and bailable) can at all be arrested since Section 69 (1) of the CGST Act does not confer the power of arrest in such cases.

1) That it is equally important to note that Sub-section (2) of Section 69 of the CGST Act states that arrest under Section 69 (1) of the CGST Act can take place for offences specified under Section 132 (5) of the CGST Act.

2) Thus, offences specified under Section 132 (4) of the CGST Act fall outside the ambit of Section 69 (1) of the CGST Act and therefore, no arrest can take place under Section 69 (1) of the CGST Act for offences specified under Section 132 (4) of the CGST Act.

3) That another glitch which is apparent on the analysis of Section 69 of the CGST Act is that Sub-sections (1) and (2) of Section 69 of the CGST Act which deal with the power of arrest and production before the Magistrate in case of cognizable and non-bailable offences, do not use the phrase “Subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)”. However, the aforesaid phrase is used only in Sub-section (3) of Section 69 of the CGST Act about the arrest and grant of bail for offences which are non-cognizable and bailable, though no power of arrest is expressly conferred about non-cognizable and bailable offences.

4) In the matter of **P.V. Rama Reddy v. Union of India**, W.P. No. 4764/ 2019, High Court of Telangana, Date of Decision: 18.04.2019, it was observed that:

a) The duty imposed upon a Police Officer under Section 41-A (1) of the Criminal Procedure Code, 1973, to summon a person for enquiry about a cognizable offence, is what is substantially ingrained in Section 70 (1) of the CGST Act.

b) Though Section 69 (1) of the CGST Act confers powers upon the Commissioner to order the arrest of a person does not contain the safeguards that are incorporated in Section 41 and Section 41-A of the Criminal Procedure Code, 1973, but Section 70 (1) of the CGST Act takes care of the contingency.

c) In Para 42 of the report, it has been observed that:

d) “... In any case, the moment the Commissioner has reasons to believe that a person has committed a cognizable and non-bailable offence warranting his arrest, then we think that the safeguards before arresting a person, as provided in Section 41 and Section 41-A of Cr.P.C., may have to be kept in mind.” (emphasis supplied)

e) It is to be remembered that Section 41-A (3) of the Criminal Procedure Code, 1973, does not provide an absolute irrevocable guarantee against arrest. Despite the

compliance with the notices of appearance, a police officer himself is entitled under Section 41-A (3) of the Criminal Procedure Code, 1973, for reasons to be recorded, arrest a person.

f) “Reasons are to be recorded” and “Reasons to believe”:

- There is a difference in language between Section 41-A (3) of the Criminal Procedure Code, 1973 and Section 69 (1) of the CGST Act.
- Under Section 41-A (3) of the Criminal Procedure Code, 1973, “reasons are to be recorded”, once the police officer thinks that the persons concerned ought to be arrested. In contrast, Section 69 (1) of the CGST Act uses the phrase “reasons to believe”. There is a vast difference between “reasons are to be recorded” and “reasons to believe”.
- Whether “reasons to believe” should be recorded in the authorization for arrest regard being had to Section 69 (1) of the CGST Act?
- So far as the provisions in the CGST Act are concerned, if reasons to believe are recorded in the files, then it is not necessary to record those reasons in the authorization for arrest under Section 69 (1) of the CGST Act.
- In Para 46 of the report, it was observed that:
- “... Since Section 69 (1) of the CGST Act, 2017 specifically uses the words “reasons to believe”, in contrast to the words “reasons to be recorded” appearing in Section 41-A (3) of the Cr.P.C., we think that it is enough if the reasons are found in the file, though not disclosed in the order authorizing the arrest.” That the Special Leave Petition (SLP (CrL.) No. 4430/ 2019) challenging the ratio in the matter of P.V. Rama Reddy (Supra) was dismissed by the Hon’ble Supreme Court of India vide order dated: 27.05.2019.

CAN A PERSON, APPREHENDING ARREST UNDER THE CGST ACT, SEEK PROTECTION FROM ARREST BY INVOKING THE WRIT JURISDICTION OF THE HON’BLE HIGH COURT UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, 1950, IN ABSENCE OF ANY SPECIFIC PROVISION AKIN TO SECTION 438 OF THE CRIMINAL PROCEDURE CODE, 1973, IN THE CGST ACT?

- Answer to the afore-stated question is in the affirmative.
- That in Para 47 of the report, in the matter of P.V. Rama Reddy (Supra), it was observed that: “... Once it is found that Article 226 of the Constitution of India can be invoked even in cases where Section 438 Cr.P.C. has no application (in contrast to cases such as those under the SC/ ST Act where it stands expressly excluded) and once it is found that the limited protection against arrest available under Sections 41 and 41-A Cr.P.C. may be available even to a person

sought to be arrested under Section 69 (1) of the CGST Act, 2017 (though the necessity to record reasons in the authorization for arrest may not be there), it should follow as a corollary [corollary] that the writ petitions cannot be said to be not maintainable.”

CAN THERE BE ARREST BEFORE ASSESSMENT REGARD BEING HAD TO THE PROVISIONS OF THE CGST ACT?

- That the CGST Act provides for:
 - 1) Self-assessment under Section 59 of the CGST Act;
 - 2) Provisional-assessment under Section 60 of the CGST Act;
 - 3) Scrutiny of returns under Section 61 of the CGST Act;
 - 4) Assessment of persons who do not file returns under Section 62 of the CGST Act;
 - 5) Assessment of unregistered persons under Section 63 of the CGST Act;
 - 6) Summary assessment in special cases under Section 64 of the CGST Act; and,
 - 7) Audit under Sections 65 and 66 of the CGST Act.
- To say that prosecution, in terms of the provisions contained in the CGST Act, can be launched only after the completion of the assessment, goes contrary to Section 132 of the CGST Act.
- That the list of offences included in Sub-section (1) of Section 132 of the CGST Act have no co-relation to assessment. Issue of invoices/ bills without a supply of goods and the availing of input-tax credit by using such invoices/ bills are made offences under Clauses (b) and (c) of Sub-section (1) of Section 132 of the CGST Act. The prosecutions for these offences do not depend upon the completion of the assessment. Therefore, it is incorrect to state that arrest before adjudication/ assessment cannot take place in terms of the provisions of the CGST Act.

COGNIZANCE OF OFFENCES

As per Section 134 of the CGST Act, no court is to take cognizance of any offence punishable under the CGST 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 is to try any such offence.

COMPOUNDING OF OFFENCES UNDER THE CGST ACT

- According to Section 138 (1) of the CGST Act: “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 may be...” Thus, compounding of offence, by the Commissioner, under Section 138 of the CGST Act can take place even before the institution of prosecution.

- Under the third proviso to Sub-section (1) of Section 138 of the CGST Act, compounding of offence is allowed only after making payment of tax, interest and penalty involved in a given case.
- Section 69 (2) of the CGST Act obliges the officer authorized to arrest the person, to produce the arrested person before a Magistrate within 24 hours, and immediately upon production, the Magistrate may either remand him to judicial custody or admit the arrested person to bail, following the procedure prescribed under the Criminal Procedure Code, 1973. Thus, there is no question of police custody/ custody to the proper officer in cases involving arrest regard being had to the provisions contained in the CGST Act.
- Rule 162 (Chapter XIX: Offences & Penalties) of the Central Goods & Services Tax Rules, 2017 provides for the procedure for compounding of offences, and it states that an applicant may, either before or after the institution of prosecution, make an application under Sub-section (1) of Section 138 of the CGST Act in FORM GST CPD- 01 to the Commissioner for compounding of an offence. Further, the Commissioner, after taking into account the contents of the said application (FORM GST CPD- 01), may, by order in FORM GST CPD- 02, on being satisfied that the applicant has co-operated in the proceedings before him and has made full and true disclosure of facts relating to the case allow the application indicating the compounding amount and grant him immunity from prosecution or reject such application within 90 days of the receipt of the application. It is important to note that, the application (FORM GST CPD- 01) is not to be decided without affording an opportunity of being heard to the applicant and recording the grounds of such rejection.

EXCURSUS

- **Anomaly in provisions- Section 69 (1) of the CGST Act, and, Section 132 (1) (a) to (d) of the CGST Act punishable under Clauses (i)/ (ii) of Sub-section (1) of Section 132 of the CGST Act read with Section 132 (5) of the CGST Act:**
 - 1) That for an offence to be cognizable and non-bailable in terms of Section 132 of the CGST Act, it has to fulfil the following conditions:
 - a. It should relate to an offence mentioned under Section 132 (1) (a) to (d) of the CGST Act; and,
 - b. It should be punishable under Clause (i) of Sub-section (1) of Section 132 of the CGST Act, in terms of Section 132 (5) of the CGST Act.

2) Section 69 of the CGST Act deals with “Power to arrest”, and Section 69 (1) of the CGST Act provides that arrest of a person, in terms of the provisions of the CGST Act, can be caused if:

- a. The offence is one which is specified under Section 132 (1) (a) to (d) of the CGST Act and it is punishable under Clause (i)/ (ii) of Sub-section (1) of Section 132 of the CGST Act; or,
- b. The offence is one which is specified and is punishable under Sub-section (2) of Section 132 of the CGST Act.

3) That in terms of Section 132 (5) of the CGST Act, if an offence falls in Clauses (a) to (d) of Section 132 (1) of the CGST Act, but is punishable under Clause (ii) of Sub-section (1) of Section 132 of the CGST Act, then it is neither cognizable nor non-bailable offence. Thus, power under Section 69 (1) of the CGST Act can be exercised to cause arrest for non-cognizable and bailable offences also, namely, those falling outside the ambit of Section 132 (5) of the CGST Act, that is, offences enumerated under Section 132 (1) (a) to (d) of the CGST Act but punishable under Clause (ii) of Sub-section (1) of Section 132 of the CGST Act. But it seems that the legislature has made a mistake while enacting these provisions because the general rule is that in non-cognizable and bailable offences, power of arrest is ideally not to be exercised.

- **Arrest before assessment**

The list of offences included in Section 132 (1) of the CGST Act has no co-relation to assessment. Issue of invoices/ bills without a supply of goods and the availing of input-tax credit by using such invoices/ bills, are made offences under Section 132 (1) (b) and (c) of the CGST Act, respectively. The prosecutions for these offences do not depend upon the completion of the assessment. Thus, it is incorrect to state that arrest before adjudication/ assessment cannot take place in terms of the provisions of the CGST Act.

- **Anticipatory bail under the CGST Act**

A person, apprehending arrest under the CGST Act, can seek protection from arrest by invoking the writ jurisdiction of the Hon’ble High Court under Article 226 of the Constitution of India, 1950, as there is no specific provision akin to Section 438 of the Criminal Procedure Code, 1973, in the CGST Act.

COMPOUNDING OF OFFENCES UNDER THE CGST ACT

Under the third proviso to Sub-section (1) of Section 138 of the CGST Act, compounding of offence is allowed only after making payment of tax, interest and penalty involved in a given case.

