

“National Conference on GST”
Organized by WIRC of ICAI on 16th & 17th December, 2022 at Mumbai-
Panel Discussion on “Frauds and Arrest under GST” on 17-12-2022

Panelist:

CA. Sushil Solanki (SS)

CA. Adv. Dr. Avinash Poddar (AP)

Adv. Shailesh Sheth (SPS)

Moderator:

CA. Pranav Kapadia

Points for Discussion :

A. Fraud, willful mis-declaration and suppression of facts:

A.1 What is meant by the term ‘Fraud’ and what is its relevance under the GST law ? (SPS)

- Fraud – A false representation of a matter of fact, in any manner, including concealment of that which should have been disclosed, which deceives and is intended to deceive another.
- “Fraudulent” - A statement or claim or document falsely made, or caused to be made, with the intent to deceive.
- To act with ‘intent to defraud’ means to act wilfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.
 - [Black’s Law Dictionary – 6th Edition]
- **Cosmic Dye Chemical – 1995 (75) ELT 721 (SC)**

“Fraud and collusion: As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words.

Mis-statement or suppression: So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words 'mis-statement or suppression of facts' which means with intent to evade duty.

- There cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of invocation of the proviso to S. 11A (now, S.74 of the CGST Act).
- **Tamil Nadu Housing Board - 1994 (74) ELT 9 (SC)**
- Intention to evade payment of duty is not mere failure to pay duty. It must be something more. That is, the Assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word 'evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word 'intent'.
- **Pushpam Pharmaceuticals Co. – 1995 (78) ELT 401 (SC)**
- Expression 'suppression of facts' in proviso to S.11A(1) to be interpreted strictly because it has been used in company of such strong words as fraud, collusion or wilful default. Where facts are known to both the parties, the omission by one to do what he might have done and not that he must have done does not render it suppression of fact.
- **Uniworth Textiles Ltd. – 2013 (288) ELT 161 (SC)**
- The main body of the Section (11A) [now,S. 73], in fact contemplates ordinary default in payment of duties and leaves cases of collusion or wilful mis-statement or suppression of facts, a smaller, specific and most serious niche, to the proviso [now, S.74]. Therefore, something more must be shown to construe the acts of the Appellant as fit for the applicability of the proviso.

A.2 How to distinguish between fraud, wilful- misstatement and suppression of facts ? What are its implications on Notices issued u/s 73 and 74 of the CGST Act ? (SPS)

Reference :

Section 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts

Section 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful- misstatement or suppression of facts

Comments:

- Refer the comments at A.1 above
- Existence of fraud or wilful mis-statement or suppression of facts invites the extended period of limitation for the purpose of demand in terms of S.74
- 'Fraud' nullifies everything [S.17 of the Limitation Act, 1963]
- See, **Candid Enterprises – 2001 (130) ELT 404 (SC) [Note: Elaborate]**
- Also see, **Samsung India Electronics Ltd. – 2014 (307) ELT 160 (Tri-Delhi)**

- **Laxmi Engineering Works – 1989 (44) ELT 353 (Tribunal) (Maintained in 1991 (55) ELT A 33 SC)**

- The concept of suppression amounts to that which one is legally to state but one intentionally or deliberately or consciously does not state. In other words, the term 'suppression' includes a mental element to deliberately omit to state certain things

- **Q.** In case involving fraud, whether the time limit prescribed under S.74 will be rendered inapplicable? (See, **Satish Mohan Agarwal -2016 (336) ELT 562 (Tri-Chennai).** – A case of false, forged and fabricated TRAs covering DEPB Scrips not legitimately acquired and used for the imports)

A.3 What are the consequences of fraud under GST ? (AP)

Reference :

Sec.29(2)(e): Cancellation of registration, if it has been obtained by means of fraud, wilful misstatement or suppression of facts:

Sec. 54 (11) Where an order giving rise to a refund is the subject matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine.

Sec.75 (2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73

Section 81. Transfer of property to be void in certain cases.-

Where a person, after any amount has become due from him, creates a charge on or parts with the property belonging to him or in his possession by way of sale, mortgage, exchange, or any other mode of transfer whatsoever of any of his properties in favour of any other person with the intention of defrauding the Government revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the said person:

Provided that...

Sec.122(1) (viii) fraudulently obtains refund of tax under this Act;

Sec. 126 (1) No officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

Sec. 132(1) (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;

Sec.132(1)(e) evades tax 3 or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

Supplementary Comments by SPS:

- S.54 (11) – Withholding of refund.
 - ‘Malfeasance’ – Meaning.
 - ‘Malfeasance’ or ‘fraud’ need not be related to the claim of refund under appeal.
 - Maintainability of the provision.
- S.75 (2)
 - Sustainability of the notice for the normal period of limitation when the demand is held as time barred.
 - Whether penalty u/s 73(9) is imposable?
 - **SC in HMM’s case – 1995 (76) ELT 467 (SC).**

B. Summons u/s 70

Reference :

Section 70. Power to summon persons to give evidence and produce documents.-

(1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(2) Every such inquiry referred to in sub-section (1) 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).

B.1 Who is the proper officer for issuing summons and what powers are given to the officer u/s 70 of the CGST Act? (SS)

Supplementary Comments by SPS:

- Board’s Circulars dated 05.07.2017
- S.2 (91)
- ‘Superintendent’ is the ‘proper officer’

B.2 Who can be summoned and who can or should attend the summons proceedings ? Can a Practitioner be authorised to attend the summons

? Or can the practitioner remain present along with the person who is attending the summons ? (AP)

Supplementary Comments by SPS:

- 'Any person' – S.70
- **Vithalnathan vs. CC-1989 (42) ELT 523 (Mad)**
Power u/s 108 of CA
- **Sunil Gupta vs. CC-2000 (118) ELT 0008 (P&H)**
Substantive powers of arrest of C. Ex-Officer
- No right of lawyer to remain present
- **P Rustomji – AHR 19 H SC 1087**
- **Poolpandi vs. Superdt. – 1992 (60) ELT 24 (SC)**
No right
- **Jugal Kishore Samra – 2011 (270) ELT 147 (SC)**
- **A.T. Trading – 2021 – TIOL -255-HC-MP-GST**
- **Amit Joshi – 2020(42) GSTL – 35 (Del)**
No right to insist on the presence of lawyer
No physical or mental torture
- See also, **Sudhir Kumar Aggarwal vs. DGGST – 2020(34) GSTL 155 (Del)**
- **Aggarwal Foundries Pvt Ltd – 2021 (44) GSTL 240 Telangana**
Presence of lawyer allowed
Statement between 10.30 am and 5.00 pm
Advocate to be in visible range
- **K.T. Advani – 1987 (30) ELT 390 (Del.)**
3 aspects of the presence of lawyer during interrogation

B.3 Can Summons be issued for 'any Inquiry' under the GST law ? (SS)

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B.4 What is the importance of 'summons'? How to deal with the same? (SPS)

Comments:

- Meaning of 'Summons'.

- Provision is similar to S.14 of CEA/S.108 of CA.
- Difference between 'Summons' and 'Notice'.
- How to deal with Summons?
 - Response in writing.
 - Request for a fresh date.
 - No delaying tactics.
 - No frivolous reasons.
 - Documents/records to be furnished in writing.
 - Ack. Letter.
 - Duplicate set of records.
- Consequences of non-adherence to Summons?
 - Proceeding is deemed to be 'judicial proceeding'.
 - If non-appearance is without any reasonable justification, then prosecution action may follow.
 - ✓ Prosecution u/s 174 of IPC.
 - ✓ Absconding person – S.172 of IPC.
 - ✓ Non-production of the documents/records – S.175 of IPC.
 - ✓ False evidence – S.193 of IPC.
 - ✓ Intentional insult or interruption to public servant – S.228 of IPC.
 - ✓ Penalty of Rs. 25,000/- u/s 122(3)(d) of the Act.
 - ✓ Applicability of CPC, 1908.
 - ✓ FAQ dated 15.12.2018 (3rd Ed.).

C. Inspection, Search, Seizure u/s 67

Reference :

Sec. 67 (1) 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.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under subsection

(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:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

C.1 Who is the proper officer who can carry out Inspection, search and seizure proceedings u/s 67 ?(SS)

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C.2 Can a Practitioner remain present during the inspection proceedings ? Is it advisable ? (AP)

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D. Offences u/s 132(1) and power to arrest u/s. 69:

D.1 Which are the offences for which a person can be arrested ? (SPS)

Comments:

- S.3 (38) of General Clauses Act, 1897.
“ ‘Offence’ shall mean any act or omission made punishable by any law for the time being in force.”

- ‘Non-cognizable and bailable’ & ‘Cognizable and bailable’.

✓ **Om Prakash vs. UOI - 2011 (272) ELT 321(SC)**

- Total 12 clauses – (Compare with S.122 (1) that lists total 21 situations).

Reference

Sec. 132. (1) ^{35a}[Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences], namely:—

(a)	<i>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;</i>
(b)	<i>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;</i>
^{35b} [(c)	<i>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;]</i>
(d)	<i>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;</i>
(e)	<i>evades tax ^{35c}[***] or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);</i>
(f)	<i>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;</i>
(g)	<i>obstructs or prevents any officer in the discharge of his duties under this Act;</i>
(h)	<i>acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;</i>
(i)	<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;</i>
(j)	<i>tampers with or destroys any material evidence or documents;</i>
(k)	<i>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</i>
(l)	<i>attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section,</i>

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D.2 What is the quantum of tax not paid/ evaded for which a person can be arrested?(SPS)

Comments:

- Period of imprisonment/fine vis-à-vis quantum.
- Nature of offence.
- S.132 (4) - all offences are 'Non-cognizable and bailable' [Except those referred to in sub-section (5)].
- S.132 (5) – Offences listed in SS. (5) are 'Cognizable and non-bailable'.
- S.69 vis-à-vis S.132
- Inherent incongruities/contradictions in S.69.
 - **P.V. Ramana Reddy vs. UOI – 2019 (25) GSTL 185 (Telangana).**

....sec132(1).....shall be punishable—

(i)	<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;</i>
(ii)	<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 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;</i>
(iii)	<i>in the case of any other offence 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;</i>
(iv)	<i>in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.</i>

(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.*

D.3 Can a person be arrested during Summons proceedings ? Who can be arrested ? (AP)

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D.4 Can a person be arrested during search or investigation proceedings ? Who can be arrested and under what circumstances ? (AP)

Reference :

Sec.67(10) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

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D.5 What is the difference between Cognizable and non-cognizable offences ? (SS)

Reference :

...Sec.132 (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.

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D.6 What is the difference between Bailable and Non Bailable offences ? (SS)

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D.7 What are the Conditions precedent to Arrest ? (AP)

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D.8 What is the Procedure for Arrest?(AP)

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D.9 What are the Post Arrest formalities ?(SS)

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D.10 What is culpable mental state and presumption by the court in such cases ?(SPS)

Reference :

Sec. 135 : 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 defence 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 provision is identical to S.138A of the Customs Act, 1962**
- Presumption as to the existence of the 'culpable state of mind'.
- Rebuttable presumption.

- **S.135 is in two parts:**
- **First part –**
- It requires the court to presume existence of culpable mental state on the part of the accused in any prosecution for an offence which requires such mental state.
- "In any prosecution" refers to the prosecution launched by filing complaint before the Magistrate and it is during the trial that the Magistrate is governed by the requirement of S. 135.

- **Second Part –**
- Opportunity to the accused to rebut the presumption of the existence of culpable mental state.
- See, **ACCEX vs. Kallatra Abdul Khader Haji – 1987 (32) ELT 479 (Ker.)** [pg.238 of the Book].
- Presumption not available in case of S.130 – **Synergy Fertichem - (33) GSTL 513 (Guj).**
- **Govind Enterprises - 2019 (27) GSTL 161 (All).**
- Standard of proof required for the offences under IPC is higher than that under GST law.
- Offences punishable under IPC are qualitatively different than those under GST law.

Sec. 69 – Powers to Arrest

Reference:

Sec. 69(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.

D.11 Please guide on the powers of the GST officers to arrest ? (SS)

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D.12 Imprisonment of the accused can be done at which stage? (AP)

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D.13 Is F.I.R. necessarily to be filed by the Department and when?(SPS)

Comments:

- Registering of FIR not a condition precedent.
 - **Ashok Kumar vs. CCGST – 2020 (41) GSTL 311 (Bom.)**

D.14 Is a Warrant / Charge Sheet necessary before arrest?(SS)

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D.15 Who can be arrested? Director / Partner / CFO / General Manager / Taxation Department Manager, Professional CA/CS/Adv ? (SPS)

Comments:

- S.132 (1).
- Clause (1) of S.132 (1).
- Clauses (f), (g) and (j) – Clause (iv) of S.132(1).
- Clauses (h), (i) and (k) of S.132 (1).
- S.137 – Offences by Companies.
- Can CA/CS/Adv. be arrested?

D.16 What are the processes to be followed during Interrogation ? Are there any specific guidelines ? Is recording under cctv camera mandatory during interrogation ? Is it necessary during investigation? (AP)

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D.17 Can the accused person be physically abused during interrogation ? Is there any protection against the same ? Any specific provisions for female accused person? (SS)

Supplementary Comments by SPS:

- See, Agarwal Foundries – (44) GSTL 240 (Telengana)
- Sanjay M. Patel – 2022 (64) GSTL 313 (Guj).

D.18 When can an application for Anticipatory Bail be made ? (SPS)

Comments

- ✓ ACB application during investigation.
- ✓ 'Catch 22' situation

D.19 It has been observed that many arrests take place on Friday and the courts are closed on subsequent days due to holidays ? What is the remedy in such cases? (SS)

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D.20 Can payment of tax, interest, penalty and fine absolve the person from arrest and at what stage?(AP)

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D.21 What are the implications of the Explanation 1 to S.74? (SPS)

Reference :

Sec. 74 Explanation 1 .- For the purposes of section 73 and this section,-

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132 ;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74 , the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded

Comments:

- S.73 (5) & (6)

- ✓ Payment before issue of SCN
- ✓ No proceedings would lie u/s 132

- S.73 (8)

- ✓ Payment within 30 days of the issue of the SCN
- ✓ Conclusion of 'all proceedings in respect of the notice'
- ✓ Exclusion of the proceeding's u/s 132
- ✓ However, action u/s 132 would lie only in cases of special nature enumerated in S. 132(1)
- ✓ Every case u/s 73 would not invite S.132

- S.74 (5) & (6)

- ✓ Payment before issue of SCN
- ✓ No notice
- ✓ No action u/s 132

- S.74 (8)

- ✓ Action u/s 132 would lie
- ✓ Payment within 30 days of the issue of the SCN

- S.74 (11)

- ✓ Payment within 30 days of the communication of the order

- ✓ Action u/s 132 would still lie notwithstanding the conclusion of proceedings

E. Retraction and cross-examination:

E.1 Is the copy of statement made during summons provided by the department? Can we ask for a copy of the statement and when? (SPS)

Comments:

- Copy of the statement not provided during investigation
- Of the statement is relied upon then provided as 'RUD' with SCN
- No statutory provision or instructions NOT to provide the copy of the statement
- Copy can be demanded
- Request in writing
- Other precautions
- **K. E. Agro Products (P) Ltd vs STO**
 - **2022 (64) GSTL 524 (Ker.)**

E.2 Can a statement made or submitted during summons proceedings be retracted? At what stage can the statement be retracted? What are the implications of such retraction? Is the retraction required to be placed on records of the investigating officer? Shall the retraction be only through Affidavit? (SS)

Supplementary Comments by SPS:

- Retraction to be at the earliest
- To be placed on records
- Precautions during investigation
- **K.I Pavunny – 1997 (90) ELT 241 (SC)**
 - ✓ Retracted statement can be relied upon along with corroborated evidence
- **Vinod Solanki – 2009 (233) ELT 157 (SC)**
 - ✓ Retracted statement to be corroborated

- **K. T. M.S. Mohd**
 - **AIR 1992 SC 1831**
- S.24 of the Evidence Act to apply
- **Ramesh Chandra Mehta**
 - **AIR 1970 SC 940**
- **Roshan Bervi**
 - **1984 (15) ELT 289 (Mad.)**
- **ED vs. Deepak Mahajan**
 - **AIR 1994 SC 1775**
- **Padam Narain Aggarwal**
 - **2008 (231) ELT 397 (SC)**
 - Summons – Power to summon persons by Customs officer under Section 108 of the Customs Act, 1962 – Such Provision enables the officer to elicit truth from person examined- Underlying object of Section 108 ibid is to ensure that officer questioning the person gets all the truth concerning the incident. [para 56]
 - Evidence – Statements recorded under Section 108 of Customs Act, 1962 are distinct and different from statements recorded by Police officers during investigation under code of Criminal Procedures, 1973. [para 59]
- **Sanket Food Products Pvt Ltd**
 - **2019 (370) ELT 180 (Bom)**
 - Evidence – Confessional statement – Retraction of – Statements of Directors not retracted till they were examined before Commissioner – Statements recorded under Section 14 of Central Excise Act, 1944 of the witnesses, who were examined before the adjudicating authority can be used as admissions in relation to the material, private documents recovered from the premises of the assessee and the premises of the suppliers, who had supplied raw material like laminated films even though they are retracted – Decision of the Appellate Tribunal is bad in law as the relevant material is not considered by the Appellate Tribunal – Section 35G of Central Excise Act, 1944.

**E.3 When can a Cross examination be demanded by the accused person ?
Can the officers arrest the accused based on statement given by third party ? (AP)**

Supplementary Comments by SPS:

- Right to cross - examination
- S. 136 (Analogous to S. 9D of CEA)
- **J. K Cigarettes Ltd**
 - **2009 (242) ELT 189 (Del)**

- **Metro (India) wood Crafts Pvt Ltd**
 - **2016 (333) ELT 418 (Tri – Kol.)**

- **Sri Bala Ganeshan Spinners**
 - **2021 (377) ELT 510 (Mad.)**

- **J. P. Iscon Pvt Ltd**
 - **2022 (63) GSTL 64 (Tri- Ahd.)**

- **Swiber offshore Construction Pvt Ltd**
 - **2014 (301) ELT 119 (Tri – Ahd.)**

- **Mahek Glashes Pvt Ltd**
 - **2014 (300) ELT 25 (Guj.)**

- **Manek Chemicals Pvt Ltd**
 - **2016 (334) ELT 302 (Guj.)**

- **Balaji Enterprises**
 - **2018 (362) ELT 94 (Guj.)**

- **Andaman Timber Industries**
 - **2015 (324) ELT 641 (SC)**

- **Basudev Targ**
- **2013 (294) ELT 353 (Del)**

E.4 Can a confessional statement be admitted as evidence? Under what circumstances can it be admitted? Whether protection under Article 20 of the Constitution of India is available to the person under interrogation? (SPS)

Comments:

- Comments at E.3 above

C. Sampath Kumar vs. ED – 1997 (96) ELT 511 (SC)

- Distinction between 'Statement' and 'Confession'
 - ✓ **N.S. R Krishna Prasad – 1992 (ST) ELT 568 (AP)**
 - ✓ S. 164(2) of G..P.C
 - ✓ S. 108 of CA (S.70 of CGST Act) empowers the proper officer only to record statement and not a confession or 'confessional statement'
 - ✓ Only magistrate can record a confessional statement after administering a warning u/s 164(2) of G.P.C
 - ✓ Proper officer to administer the warning/caution
 - ✓ Absence of warning would render the statement inadmissible in evidence – defeat not curable u/s 463 of G.P.C
 - ✓ **Reference to SC in Kehar Singh – AIR 1988 SC 1883**
- S. 108 of CA (S. 70) does not compel a person to incriminate himself
- If he makes the statements he has to state the truth to avoid the punishment u/s 193 of IPC
 - ✓ **N.S. R Krishna Prasad (Supra)**
 - ✓ **Hira H Goenka**
 - **AIR 1971 SC 44**
 - ✓ **K. K Goenka**
 - **1978 (2) ELT (J637) (Calcutta)**
- All confessions are statements but all statements are not confessions

F. Compounding of offence u/s. 138:

F.1 Which offences can be compounded, by whom and at what stage ? (SS)

Reference :

Sec. 138(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....

F.2 Is the compounding amount prescribed under law and what are the conditions ? (AP)

Reference:

Sec.138(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 ten thousand rupees or fifty per cent. of the tax involved, whichever is higher, and the maximum amount not being less than thirty thousand rupees or one hundred and fifty per cent. of the tax, whichever is higher.

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F.3 Can compounding of offence abate the criminal proceedings initiated against the accused person ? (SS)

Reference :

(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.

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G. Other Points for discussion:

G.1 There is a thin line of demarcation between circular trading and fake invoicing. Many such cases have been unearthed by the department and arrests made. Can the accused person be arrested before giving him sufficient opportunity to prove genuineness of the matter (where indeed the matter is genuine)? (SS, SPS & AP)

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G.2 Can detention/confiscation of goods due to non compliance with E-way Bill provisions lead to Arrest ? (AP)

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G.3 When is the Prosecution Complaint admitted?(SS)

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G.4 Who and what can be inspected u/s 67 ? (SS)

(Registered person/ Unregistered person / Taxable Person / Director/Partner/CFO/CEO/Manager / Transporter/ Owner or operator of warehouse/Godown / Residence of Director/Partner / Family members/ staff)

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Other References:

- 1. Instruction No. 03/2022-23 (GST -Inv.) dtd. 17-08-2022 – Guidelines on Issuance of Summons u/s 70 of CGST Act -**
- 2. Board’s Circular No. 122 /41/2019-GST dated 5th November, 2019 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.**
- 3. Format of summons has been prescribed under Board’s Circular No. 128/47/2019-GST dated 23rd December, 2019.**
- 4. Instruction No. 02/2022-23 (GST -Inv.) dtd. 17-08-2022 – Guidelines for Arrest and Bail in relation Offences under CGST Act.**

Supreme Court in criminal Appeal No. 838 of 2021 [SLP (Criminal) No. 5442/2021] in Siddharth v. The State of Uttar Pradesh & Anr. (2021) 8 TMI 977 (Madras) observed and held that: a) 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. b) 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.

5. Supreme Court granted bail to applicant since investigation was complete for allegations of GST evasion [2022] 145 taxmann.com 296 (SC)[05-12-2022] Ratnambar Kaushik vs UOI

As the petitioner was arrested on 21.07.2022 and while in custody, the investigation has been completed and the charge sheet has been filed and the alleged evasion of tax by the petitioner is to the extent as provided under Section 132(1)(l)(i) is punishable with imprisonment which may extend to 5 years and fine and the petitioner has already undergone incarceration for more than four months and completion of trial would take some time and as there can be no apprehension of tampering, intimidating or influencing in view of the fact that evidence to be tendered by the respondent would essentially be documentary and electronic, the petitioner's prayer for bail is granted subject to conditions to be imposed by trial court.

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