Handbook on Inspection, Search, Seizure and Arrest under GST

GST & Indirect Taxes Committee
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Basic draft of this publication was prepared by CA. A Jatin Christopher.

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Foreword

The GST & Indirect Taxes Committee of ICAI has always been proactive in providing the needed support to the members and honing their skills by organising courses, conferences and programmes, live webcasts, e-learning etc. on GST. Further, it has been regularly bringing out useful technical publications on various aspects of GST.

I am happy to note that the GST & Indirect Taxes Committee of ICAI has come out with another useful publication titled, "Handbook on Inspection, Search, Seizure and Arrest under GST". The readers may refer this handbook to understand the intricacies of the provisions and the remedy available to them when such provisions are exercised against them.

I congratulate CA. Rajendra Kumar P, Chairman, CA. Umesh Sharma, Vice-Chairman, and other members of GST & Indirect Taxes Committee for this initiative and all those who have contributed towards bringing out this publication for the benefit of the members and other stakeholders at large.

I am confident that the members would find this publication very useful in their professional assignments.

Place : New Delhi **CA. (Dr.) Debashis Mitra**

Date : 24th August, 2022 President, ICAI

Preface

With the introduction of Goods and Services Tax (GST), India has witnessed historic and impactful economic reforms. GST is a comprehensive, multi-stage, destination-based indirect tax that is levied on every stage of value addition across the country. Being a transaction tax, GST is a highly dynamic tax as it continually evolves to suit the needs of the businesses in the changing economic conditions of the country. Another reason for the ever- changing nature of GST is that it is still in its nascent stage.

ICAI being a 'partner in nation building' and the GST & Indirect Taxes Committee being entrusted with the responsibility of 'GST Knowledge Dissemination', we try our best in providing unstinted support to the Government in implementing the GST law in the best possible manner. The Committee spares no effort in developing various knowledge resources on GST like technical publications, e-learning, newsletter, updates etc. from time to time to make the members as well as other stakeholders more able and proficient in GST. The handbooks on various provisions of GST released by the Committee are one of the ongoing initiatives of the Committee towards the objective of GST knowledge dissemination. Augmenting this initiative, the Committee has developed another handbook titled 'Handbook on Inspection, Search, Seizure and Arrest under GST'.

The Handbook aims to explain the complex law relating to inspection, search, seizure and arrest as also the various legal issues associated with such provisions, at one place in simple language. The publication provides useful value-added analysis of such provisions. The statutory provisions, notifications, circulars etc. relevant to the discussion contained in the Handbook are given at the end of the Handbook for ease of reference of the readers. Further, various suggestive formats for different communications to be made by the taxpayer in relation to the provisions of inspection, search, seizure and arrest have also been included in the Handbook for the guidance of the taxpayers.

We sincerely thank CA. (Dr.) Debashis Mitra, President, ICAI and CA. Aniket Sunil Talati, Vice-President, ICAI for the encouragement and support extended by them to the various initiatives of the GST & Indirect Taxes Committee. We express our profound gratitude for the untiring efforts of CA. A Jatin Christopher in diligently preparing this Handbook. We are also grateful to CA. Pramod Jain, Central Council Member, CA. S. Thirumalai, CA. J Purushothaman, CA. Virender Chauhan and CA. R Krishna Kumar in meticulously reviewing this Handbook. We

would also like to thank the members of our Committee who have always been a significant part of all our endeavours. Last, but not the least, I commend the efforts made by the Secretary to the Committee, CA. Smita Mishra and her team comprising of CA. Deepak Aggarwal and CA. Tanya Pandey in providing the requisite technical and administrative assistance for successfully releasing this publication. We are sure that this Handbook will be of practical use to all the members of the Institute and other stakeholders.

Though all efforts have been taken to provide correct information in this Handbook, there can be different views/opinions on the various issues addressed to in this Handbook. We request the readers to bring to our notice any inadvertent errors or mistakes that may have crept in during the development of this Handbook.

We will be glad to receive your valuable feedback at gst@icai.in. We also request you to visit our website https://idtc.icai.org and share your suggestions and inputs, if any, on indirect taxes.

CA. Rajendra Kumar P
Chairman
GST & Indirect Taxes Committee

CA. Umesh Sharma
Vice- Chairman
GST & Indirect Taxes Committee

Date: 24th August, 2022

Place: New Delhi

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Contents

Readers may make note of the following while reading the publication:

Unless otherwise specified, the section numbers and rules referred to in this publication pertain to Central Goods and Services Tax Act, 2017 and Central Goods and Services Tax Rules, 2017 respectively.

Chapter 1
Introduction

1.1 Inspection under GST

Inspection is not search; these are two different proceedings and the subtility of the differences must be appreciated from the law itself. Inspection is a permitted method to access a taxpayer's premises, but only as an anti-evasion measure as laid down in the law in the form of 'pre-requisites' to invoke the exceptional powers allowed. After all, GST is a self-assessment-based tax regime. Any provision that appears to enter into the self-assessment regime, needs the express consent of the Parliament. Any proceeding that invokes such authority must be tested for its validity before applying the same as it is an exceptional power contained in section 67 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the CGST Act or Central GST Act). This Handbook discusses the contours of this power and presents the do's and don'ts that taxpayers and professionals need to be aware of, as misapplication of this provision is easily possible, especially due to the wide-ranging powers that tax authorities enjoyed under the earlier tax regime.

1.2 Mandate to 'question the questionable proceedings'

Section 160(2) of the CGST Act prohibits a taxpayer from 'questioning invalid proceedings' as responding to matters contained in an invalid notice (order or communication) tant amounts to entertaining such proceeding indirectly. This provision may be understood as taxpayer giving validity to an otherwise invalid proceeding by (i) failing to question its validity or (ii) attending to it on merits before examining its validity. This is also called 'acquiescence', which means 'admitting its validity by omission or submission' to requirements in such notice, order, or communication.

1.3 'Access to business premises' does not authorize 'inspection'

This handbook discusses the scope of section 71 of the CGST Act and the extent to which the power of access under this section can be availed by the Proper Officers to carry out their objects. Taxpayers are well within their rights in law to question the validity of any action by an officer for the purpose of seeking access to business premises including checks and

verification based on a logical exercise of authority, akin to those under earlier tax regime. Also, the powers under section 71 appear to overlap with those under section 67 and the nature of their difference is sought to be brought to reader's attention in this Handbook.

1.4 GST ushers in a 'self-assessment' tax regime

If one were to look for the most powerful provision in the entire CGST Act, section 59 would take the top spot. It is a very short provision, but it appoints the registered person to be the only one with authority to conduct 'assessment' of tax payable under the Act (and under IGST and Cess Acts). When the law appoints the registered person to carry out assessment of tax payable, the Proper Officer cannot seek to carryout assessment. And once self-assessment has been made and the Proper Officer is dissatisfied with the outcome of such self-assessment then it is the responsibility of the Proper Officer to produce material to question the validity of the self-assessment carried out by the registered person and demand tax, in accordance with the procedures established in this law.

Section 155 of the CGST Act places the 'burden of proof' upon the registered person only in respect of 'eligibility to input tax credit' and therefore, by implication of this provision, the burden of proof on 'all other aspects' of assessment carried out, lies on the Proper Officer. This is evident from the provisions of section 75(7) of the CGST Act, which only makes it necessary that show cause notice issued should contain specific 'grounds' which support the demand and also requires the Adjudicating Authority to confine the order confirming demand, if any, to be based on those 'grounds' and no other.

1.5 No burden to prove innocence

Previously, the taxpayer was expected to prove the innocence or demonstrate the correctness of tax position (levy, classification, valuation, credit, etc.) adopted and Revenue would merely question its correctness. But in GST, given that every administrative proceeding is laid down with a clear 'due process', it may be argued that the provisions of section 59 read with section 155 of the CGST Act, makes it abundantly clear that the taxpayer does not bear the initial burden to prove that the self-assessment carried out is accurate. This is significant and one must take time to read any good book on 'Rule of Law' to appreciate this concept and to recognize the responsibility that GST has placed the burden on the Revenue in case of dissatisfaction over the self-assessment carried out by any registered person.

1.6 Burden in case of 'tax evasion'

Where a taxpayer is answerable to a notice demanding tax, involving evasion of tax and once the Revenue makes out a *prima facie* case on facts, it raises a presumption against such taxpayer. Now, it becomes imperative for the taxpayer to either rebut that presumption or to affirm that presumption due to failure of rebuttal. There is a difference between 'burden' and 'onus' under the Evidence law where the burden always remains on the person whom the law states to bear it, but when new material is introduced, in rebuttal or otherwise, then the onus to prove all the requirements of its admissibility shifts to the person introducing such material. In *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors. AIR 1960 SC 100*, the Apex Court has held that when both sides introduce evidence, the question of 'burden of proof' becomes academic. Care must be taken not to displace the burden by doing anything that can cause it to shift on to the taxpayer. After all, in a self-assessment based tax regime, the Revenue must show that a *prima facie* case exists against the taxpayer's determination of liability and it does not suffice to put forward an alternate interpretation and leave the taxpayer to prove the correctness of the self-assessment carried out. To do so would be violative of the mandate contained in section 59 of the CGST Act.

1.7 Applicability of the principles of Indian Evidence Act to GST

When it comes to demanding tax, that has already been self-assessed, it is not sufficient to merely doubt its correctness and leave the taxpayer to run around to get the notices set aside. Any statement should be made responsibly. The standard of care in establishing facts cannot be anything short of the standards laid down in the Indian Evidence Act. While the rigorous rules of procedure contained in Indian Evidence Act are applicable only to matters before a Court, the Apex Court in the case of *Chuharmal, Etc. v. UoI & Ors AIR 1988 SC 1384,* has stated that since equitable principles of common law are contained in Indian Evidence Act, their applicability to taxation matters is not barred and must be admitted to establish facts for the purpose of determination of question of law which relies on established facts.

This Handbook discusses the 'due process' laid down in each provision in its strict sense because the Act contains the intent of the Legislature. In *EP Royappa v. State of TN, AIR 1974 SC 555* stated that passion to protect

interests of Revenue does not authorize bypassing the 'due process' laid down in the law.

1.8 Applicability of the principles of Administrative Law to GST

The principles of natural justice are touted all too often, but the roots of the requirement that these principles must be adhered to flow from Administrative Law. It is an uncodified law like Torts. Administrative Law contains the requirements of administrative action to meet the standards of 'equity, justice and good conscience' in any civilized society which claims that rule of law prevails.

If a Proper Officer conducts audit under section 65 of the CGST Act and takes exception to a certain tax position adopted by the registered person and issues Form GST ADT - 02 with an observation that certain amount of tax is payable, then if the same officer were to sit in judgement to adjudicate, it would be in direct violation of the first principle of natural justice (Para 1.18). It is for this reason that *CBIC Circular 31/5/2018-GST dated 9 Feb 2018 amended by Circular 169/1/2022-GST dated 12 Mar 2022, in amended Para 6* states that Officers of Audit and Intelligence Commissionerate are permitted to carry out their audit or investigations and issue show cause notice. But for purposes of adjudication, the file and the notice must be transferred to Proper Officer (subject to pecuniary limits) in the Executive Commissionerate to hear the noticee and adjudicate. This administrative segregation of audit or investigation and subsequent adjudication by Central tax administration is to ensure that the first principle of natural justice (Para 1.18) is upheld. However, State tax departments appear to ensure independence in adjudication even without this form of express segregation of functions, in view of the merged functions practiced without any objections in earlier tax regime.

The show cause notice can neither be vague nor allegations be without evidence commensurate with the severity of allegations levelled against the noticee. The SC has held in *CCE v. Brindavan Beverages (P) Ltd. (2007) 213 ELT 487* that defective notice is incurable and fatal to the demand. This principle can be found in section 75(7) of the CGST Act which states that the grounds on which an order may be passed must be the very grounds on which the notice was issued. No adjudicating authority is empowered to cure deficiencies in the notice which upholds the second principle of natural justice (stated above).

1.9 Overlook 'mistake, defect or omission' but to a limited extent

Interestingly, section 160(1) of the CGST Act permits 'mistake, defect or omission' to be overlooked but to a very limited extent. In case of any proceedings, if the communication conveys that the 'substance and effect' of what is set out to be communicated as to its 'intent, purpose and requirements' then, any mistake, defect or omission will not be fatal to the proceedings. If a notice states, "please show cause why penalty as per the law should not be demanded", then section 160(1) of the CGST Act may not be able to save this notice. However, if the notice was to state "please show cause why penalty under section 122 should not be demanded" then, penalty under section 122(2)(a) or (b) may be determined based on whether the notice is issued under section 73 or 74 of the CGST Act, respectively.

The principle of *audi alteram partem* requires that allegations be clearly stated so that the noticee is not denied justice at the threshold, as a notice with secret allegations incapacitates the noticee putting forward a reasonable defence. The noticee must be 'put at notice' in a clear, complete, and comprehensive manner about the allegations along with evidence in support of the said allegations. A notice cannot expect the noticee to 'fill in the blanks'. The SC has stated in the case of *State of Orissa v. Dr (Ms.) Binapani Dey & Ors AIR 1967 SC 1269* that even where the statute does not require specifically that the principles of natural justice are to be followed, they must be followed because when any proceeding is capable of adversely affecting the rights of any person, adherence to the principles of natural justice is imperative and absence of specific requirement to do so, does not authorise injustice in the very process of adjudication.

This Handbook discusses each ingredient stated in the law carefully and only after satisfaction of its compliance should taxpayer respond, and taxpayer's response must also be within the limits of the expectations in the respective provision in the law.

1.10 Cannot be faulted for 'active disobedience' when proceedings are invalid

Where a proceeding is found to be invalid and does not explicitly disclose the provisions of law under which it is being initiated, the taxpayer cannot legally be found at fault for disobedience in such proceedings. When any taxpayer (or other noticee) in any proceeding approaches High Court alleging violation of natural justice or abuse of power or of process, the High Court will first

examine if the Proper Officer was informed of the perceived misapplication of law and consequent injustice meted out to the taxpayer. Merely on an apprehension that justice will not be done, one cannot rush to High Court for redressal. Only after the Proper Officer is 'put at notice' that the proposed action is not in accordance with the mandate in law and in spite of this notice, the Proper Officer proceeds, then the High Court will entertain a complaint (or petition) to interfere and put a stop to such deviation. This is referred as duty of the person who seeks redressal to first 'demand justice' from the person (who is to be complained against), before making it clear that a complaint (or petition) is justified and maintainable. Very often, by demanding justice, the injustice that would have ensued by incorrect administrative actions will be readily redressed by the same person.

Where the taxpayer suffers an unjust notice (or proceeding) and submits to those proceedings, then such taxpayer cannot be seen objecting to that which has been acquiesced (or consented). *Vigilantibus non dormientibus jura subveniunt* is a latin maxim which means, the law will not help those who sleep on their rights. If a taxpayer wishes that rights, remedies, and safeguards provided by Legislature be followed, then its abuse must be actively contested not by ignoring it but by politely 'putting at notice' the Proper Officer who will be willing to reconsider the proposed action when the illegality is brought to his attention. There is no need for a taxpayer to presume that the Proper Officer is acting deliberately in a *mala fide* manner.

This Handbook discusses CBICs' instructions and the checks and balances meant to prevent miscarriage of justice.

1.11 Limited scope for arrest of taxpayer's consultant

Tax-consultant's proximity to taxpayer's affairs raises a question whether the Consultant can also be implicated in prosecution proceedings. The answer lies in a careful examination of the applicable statutory provisions.

On a perusal of the arrangement of section 122 (and later section132 too), it is observed that:

- Section 122(1) applies to 'taxable persons'
- Section 122(1A) applies to 'mastermind' of fictitious billing rackets
- Section 122(2) applies to 'registered persons'
- Section 122(3) applies to 'any person'.

The consultant, who is not taxable person or the mastermind or noticee (defending a tax / credit demand under section 73 or 74 of the CGST Act), can come within the operation of 'any person' in section 122(3) of the CGST

Act to be liable for penalty of Rs.25,000 in CGST Act (25,000 under Central GST and 25,000 under State GST).

Adverting to section 132(1), the opening words are:

- Whoever commits;
- Whoever causes to commit and retain the benefits arising out of, (and lists various offences).

In order to examine the offences, care must be taken to differentiate between the 'hands' that carry out the offence and the 'mind' that authorizes them. 'Commit' does not make reference to the hand but the mind. While the mind will be proceeded against, the hand will only be an accessory.

Unless an 'offence', as listed in clauses (a) to (d) of section 132(1) and punishable under sub-clause (i) or (ii) of section 132(1) and offences punishable under section 132(2), can be shown, action against taxpayer's consultant under section 69(1) is wholly impermissible. To 'show' a principal offender, it does not require that prosecution of such principal offender must conclude. Without a mind, the hand is doubtful. The principal offender must be named, and prosecution launched even if absconding and evading trial. Warrant issued by Commissioner cannot be used to collect evidence of (alleged) abettors of any offence; for that, powers are vested under section 70 (power to summon persons to give evidence and produce documents). To implicate a consultant, it is not sufficient to show that the consultant was aware of the mischief being carried out but to show that the consultant was complicit in the commission of the alleged offence.

One 'who commits or *causes to commit and retain the benefits arising out of*' offences listed in section 132(1) can be prosecuted. Clause (l) of section 132(1) specifically covers a person who abets the commission of any of the offences listed in section 132(1).

The consultant must not only advise taxpayers against indulging in offences but must deny extending their services and expertise to persons who persist in such misadventures.

This Handbook offers in-depth examination of the legal provisions of sections 69 and 132 and provides some background on the purpose of arrest and surveys the extant legal framework on 'bail and bond'.

1.12 'Ingredients' in statutory definition of 'offence'

Rights are those that must be enforceable in a course of law. What sort of

right would it be if anyone can infringe upon it and rob the person of that right? Enforceability is the touchstone of all rights. Likewise, everything else that entails a remedy in law requires to be legally enforceable. And to be enforceable, it must be clearly defined in the statute and not left to the common sense understanding in society which is ever changing and uncertain.

By this basic courtesy in law, offences too need to be defined for any non-compliance to be considered 'an offence'. Definition is basically a description of actions or inactions that the given law frowns upon. These are also referred as 'ingredients' of the offence as defined in the statute. Care must be taken to study offences listed in sections 122 and 132, which appear to be deceptively similar but actually have vast differences (discussed later).

It is the importance of this requirement for one to be mindful to carefully consider the 'statutory definition' of any offence. Any proceeding that calls out any offence must place on record evidence in support of the allegation which must be (i) pleaded and (ii) proved. If the offence is not 'pleaded' in the notice, the adjudicating or appellate authority cannot confirm its incidence. And the offence pleaded needs to be 'proved' in adjudication, subject to consideration in appeal, if preferred by the taxpayer.

1.13 Confession versus admission

Used as synonyms, there are several important differences that need to be considered. Without burdening this Handbook, suffice to motivate further study of the topic by pointing out that 'confession' ends further proceedings in the matter as there remains nothing more to be discovered in adjudication, and 'admission' is in respect of one or more fact which when accepted as undisputed, supplies the ingredients that make up the offence.

Confession given cannot be readily accepted. It must be examined if the party making the confession understands the statutory definition of the offence; for example, it is not made by force or for other reasons. The objective of investigation is to punish the guilty party and not just any willing party.

Admission refers to certain facts, which form the ingredients in the definition of the offence, for example, no understanding of its statutory definition is necessary because the acceptance here is not on the offence but of the ingredients in its definition. Unlike confession, admission of any given fact, its existence or absence, can be by a third-party too.

Admissions made can be due to misunderstanding. Admission must be as a matter of fact and not as a matter of opinion of the accepting party. Admissions can turn out to be incorrect or false. Other evidence may disprove the admission. Admissions may even be retracted or modified. Admissions secured forcibly lack probative value. Deep understanding of these aspects is extremely relevant to determine whether the allegations in a notice are sustainable in law.

1.14 Intention versus motive

Motive is the ultimate reason that explains a person's actions. Actions that can be traced back to its origin. Often, motive is undisclosed. Intention is knowledge and awareness of immediate consequence of actions. Although they may appear synonymous, an example may help. If a person were to rob a bank to feed poor people, the person's motive may be noble, but his intentions are bad.

Offences require 'intention' to evade tax. For example, where supply is made without issuing tax invoice, the intention is to evade tax although the ultimate motive may be to avoid payment of income-tax on profits arising from this venture. GST concerns itself with the immediate consequence of not paying output tax deliberately, even if such non- payment of output tax may not be the only goal in this (misad)venture. Again, this is not something that can be discussed in sufficient detail to do justice to the issues involved in this topic but suffice to present the distinction so as to point to deeper study in due course.

1.15 Accident versus mistake

It is very common to state that incorrect data was submitted by taxpayer 'accidentally' and expect remedy by way of opportunity to rectify as well as leniency in imposition of harsh penalties. Mistake is used interchangeably with accident. And when the expression 'error' is used, their distinction becomes even less clear.

An illustration may help. If a gun were dropped on a table and it got fired, injuring a victim in the leg, it is an accident as there was never any intention to fire the gun. But if due to incorrect identification of the person to be fired upon with the gun, the victim is injured, it is a mistake. Mistake here is that one of the ingredients of the proposal went bad. Ingredient being the identity of the person, there was a clear proposal to fire upon using the gun.

Accidental firing is less serious offence, whereas mistake is very serious, and all consequences associated with the original proposal, had it been executed as originally planned, will follow against the accused person.

Now, it becomes clear that there cannot be any 'accidental' filing of erroneous data in GST returns. There may, at best, be a mistake in filing GST returns. Read with the provisions of self-assessment under section 59, data as presented on the Common Portal is required to be presumed as correct, Revenue is welcome to act on this presumption and take necessary action. In the light of this discussion, consider the treatment under section 75(12) and then CBIC's Instruction No. 1/2022-GST dated 7 Jan 2022, with reference to the difference between tax payable as per Form GSTR-1 and Form GSTR 3B, will seem fair and reasonable.

1.16 Forced recovery or 'spot recovery' in GST

No recovery of tax can be made 'on the spot'. The due process prescribed in the law is that the taxpayer must be 'put at notice' first. Demand for tax is required to be made by issuing a notice to the taxpayer under section 73, 74 or even 76, howsoever 'open and shut' the liability may appear to be.

Recovery of 'undisputed arrears' is permitted by section 75(12) to be made under section 79 without the issuance of a notice. Although, a number of High Courts have condemned this practice, the Parliament has passed the insertion of an explanation to section 75(12), and this is likely to see a lot of resistance from taxpayers as the Revenue will rely on this amendment citing 'useless formality theory'. This theory has been entertained in other countries but in India, Courts have not allowed recovery without notice for the reason that the principles of natural justice demand that 'justice not only be done but appear to have been done'. The theory basically states that there is nothing that the noticee can say that would alter the liability. After all, section 75(12) only relies on taxpayers' own admission of liability in Form GSTR-1 which has remained undischarged in Form GSTR-3B or where taxes are discharged belatedly through Form GSTR-3B or directly via Form GST DRC-03 and interest thereon remain unpaid.

Instruction No. 01/2022-GST dated 7 Jan 2022 has clarified that not every instance where liability as per Form GSTR-1 is not discharged in Form GSTR-3B implies an 'undisputed arrear' as there are many *bona fide* reasons when these two returns may have a mismatch. When Revenue attempts to treat any liability as 'undisputed arrears', taxpayers must be prompt in placing on record that the apparent liability is not, in fact, payable and put forth the reasons to show that it is either not payable or disputed. Omission to respond to communication received in terms of this Instruction can be treated as admission, implied in taxpayer's silence.

1.17 Rule of Law stands tall in GST

The Proper Officer has to protect the interests of the Revenue in the manner intended by the Parliament and Parliament has chosen to rely on taxpayer to carry out self-assessment. Therefore, Revenue is left to adhere to this mandate in law and proceed strictly within the terms of specific provisions whereby Parliament authorizes revenue for intrusion coupled with burden to prove taxpayer's self-assessment to be incorrect. As to what is correct determination of tax liability is not left to one's opinion but to application of the GST law.

Rules of law is where all concerned – taxpayer and tax administrator – must permit the law to take centre stage and not their own convictions or compulsions. GST was introduced in 2017 but it stands tall as it is mounted on the shoulders of legislations as old as 1872, be it Indian Contract Act to explain the first principles of supply for consideration or Transfer of Property Act to explain the methodology of effecting transfer involving immovable properties and then judicial authorities under Easements Act, Indian Registration Act, Limitation Act will illuminate our understanding of the underlying first principles that will guide the treatment to be extended in GST. Awareness and application of first principles from Sale of Goods Act, Indian Partnership Act, Indian Evidence Act and Administrative law recognize the boundaries of what ought to be done and what not, when it comes to 'protecting interests of revenue'.

Section 160(2) needs special mention where Parliament saves orders traceable to invalid notices or proceedings that have been acted upon by taxpayer and even omitted to question their validity at the earliest opportunity, from the vice of being void *ab initio* and be struck down. The principle of acquiescence is baked into this provision where taxpayer's failure to question validity of any notice, order, or communication, preserves what possibly could have become an invalid proceeding.

1.18 Principles of Natural Justice

'Fair play in action' is the underlying promise in a rule-of-law and this is referred to in Common Law as principles of natural justice (although stated earlier in a different context where it was necessary), it be reiterated to the following:

- *Nemo judex in causa sua* which means, no person shall be a judge in his own cause; and

- *Audi alteram partem* which means, to hear the other Party.

It has been held in the case of *State of Orissa v. Dr (Ms) Binapani Dey & Ors. AIR 1967 SC 1267* that natural justice must be followed in every proceeding, whether judicial or administrative, where the authority is vested that can cause prejudice in the course of its exercise, even if this requirement is not super-added in the provision vesting such power.

It has been held in case of *Menaka Gandhi v. UoI AIR 1978 SC 597* that putting a party at notice is the *sine qua non* (mandatory) for any adjudicatory proceeding to ensure that justice is not only done but appears to have been done. And putting the party at notice does not mean putting forward a suspicion (a claim based on conjecture without any material to support) and allow the party to prove its innocence, in particular, certainly not in a tax regime that is founded on self-assessment which is made explicit in section 59. No provision of this law can operate in derogation of this liberty except to the extent saved by section 155 or other Common Law principle.

Chapter 2
Inspection of Premises (Section 67)

2.1 Overview of the steps involved

Based on the provisions of law, given hereunder is an overview of steps involved that one may anticipate being carried out by departmental officers and discharge their statutory duties validly and in accordance with the requirements of law:

Step 1: Any officer may gather intelligence from sources within the law or from proceedings under the law such as scrutiny or audit or from third-party sources such as persons liable to maintain and disclose transaction-level data such as CBDT, Sub-registrar, RERA, etc. which justifies inspection of the premise of (i) taxable person or (ii) other person(s).

Step 2: The officer would then file a note to the Joint Commissioner (or higher rank Officer) for the grant of authorization in Form GST INS-01 along with details of intelligence gathered. If the Joint Commissioner is satisfied after examining the material on record then for such 'reasons to believe' as are taken on record, issue authorization to inspect specified premises of the 'taxable person' or 'any (other) person'. Form GST INS-01 must be specific as to the following whether:

- Only inspection to be carried out – name of location and specific articles to be inspected. Part A or B of Form GST INS-01 is referred; or
- Both inspection and search to be carried out – suspicion about (i) goods liable to confiscation or (ii) documents, books, or things, found to be 'secreted' at specified location and duly noted on file. Part C of Form GST INS-01 is referred.

Step 3: Based on Form GST INS-01, the Authorized Officer (not below the rank of Assistant Commissioner of State or Senior Intelligence Officer of Centre) is then authorized to conduct inspection or inspection-cum-search of the identified location along with witnesses (panchas). Lady Officer to be present in case premise is a residence or such other place likely to be occupied by ladies and children.

Step 4: The Authorized Officers, on arriving at the location, must disclose their identity and offer their personal search before commencement of inspection after establishing correctness of location authorized in Form GST INS-01 with location reached by officers and obtain signature of the party on Form GST INS-01 as to these matters.

Step 5: Conduct inspection limited to the areas connected with the 'reasons to believe' specified in Form GST INS-01 without carrying away anything, not even copies of books of accounts. Inspection is permitted under section 67(1) of the CGST Act. Inspection should not be aggressive but polite and courteous. Proceedings to be commenced and concluded during working hours unless extended (discussed later).

Step 6: When 'reasons to believe' (in Form GST INS-01) are validated during inspection to the satisfaction of the Authorized Officer (conducting the inspection), he should seek further authorization in Part C (of Form GST INS-01) to extend 'inspection' to 'search' as permitted under section 67(2) of the CGST Act. It is this satisfaction that (with the 'reasons to believe') is open to judicial scrutiny later and must be carefully complied to establish this 'suspicion' that incriminating articles 'secreted' have been searched. Only the Authorized Officer (conducting the search) enjoys jurisdiction to proceed with the exercise of the power of search conferred in law.

Step 7: Search under section 67(2) must be limited to (i) goods liable for confiscation or (ii) documents, books or things, that are 'secreted' (see later discussion) at location which was inspected and searched.

Step 8: During search, if the party is not cooperating and access is denied, section 67(4) of the CGST Act permits breaking open *"any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed"*. If access can be secured from the party, these additional powers should not be exercised.

Step 9: Once 'inspection' is extended to 'search' and there is a discovery of 'secreted articles' then the Authorized Officer proceeds with 'seizure' either (i) to commence confiscation proceedings in respect of goods liable to confiscation were found to be secreted or (ii) further investigation of documents, books or things were found to be secreted. Once the Officers exit from the location, the authorization granted in Form GST INS-01 stands extinguished or exhausted. Section 67 of the CGST Act contemplates continuous proceedings until completion. Inspection is conducted during working hours but, when the Authorized Officer is satisfied that the premises is to be 'searched' then proceedings must not be stopped or interrupted.

Care must be taken to ensure that proceedings are swiftly completed. Since 'spot recovery' is not admissible, it is important that any voluntary payment in Form GST DRC-03 is suitably documented by Form GST DRC-01A (issued under section 74(5) on the Common Portal). Any involuntary payment via Form GST DRC-03 without Form GST DRC-01A leaves option open to claim refund by filing Form GST RFD-01 on Common Portal under 'other payments'.

Step 10: Order of seizure in Form GST INS-02 must be drawn up containing (i) purpose of proceedings under section 67(2) based on Form GST INS-01 (ii) details of search conducted such as date, location, persons present (both sides), duration of search and details of discovery (iii) description of discovery – suspected, secreted or accidental – including condition in which they were found and effort involved to extricate, cooperation received / not received, process of breakage carried out (physical or electronic) (iv) details of witnesses (panchas) and time of conclusion.

Step 11: Order of prohibition in Form GST INS-03 must be drawn up where goods liable for confiscation are (i) not in a position practically to be seized or (ii) lying with third parties lawfully such as job-worker or customer on-approval or warehouse-keeper, etc.

Step 12: Order of provisional release in Form GST INS-04 is permitted under rule 140 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the CGST Rules), upon execution of a bond for the value of the goods in Form GST INS-04 and furnishing of a security in the form of a bank guarantee equivalent to the amount of applicable tax, interest and penalty payable, where request is made for such release and Authorized Officer is satisfied that provisional release will not prejudicially affect the proceedings. Provisional release does not sanction appropriation by party by sale, consumption, or any other mode, but mere holding of custody with undertaking to produce the said articles whenever directed.

Step 13: Certain articles may also be disposed *ad interim* in Form GST INS-05 proceedings under rule 141; such articles are specified in *Notification No.: 27/2018-Central Tax dated 13 Jun 2018* (discussed in detail later).

Step 14: Based on the discovery during search proceedings, Officers must bring it to a conclusion either by (i) demanding tax/credit by issuing a show cause notice under section 74 or (ii) dropping proceedings. Seized articles, which are not relied upon for issue of show cause notice, must be returned

within thirty (30) days of the show cause notice and where no show cause notice is issued, within six (6) months (may be extended by further six months) from date of order of seizure.

2.2 Pre-condition to any intrusive action

There are very fundamental and essential 'ingredients' that must be shown to exist prior to grant of authorization by Joint Commissioner to any other officer, who will be empowered to discharge duties as the 'Authorized Officer' for inspection of the premises or goods. Inspection under section 67 is pre-authorized by *Circular No. 3/3/2018-GST dated 5 Jul 2017*.

Reference may be had to rule 139 where Form GST INS-01 is prescribed as the format of authorization to be granted by Joint Commissioner. This format shows the specific 'contraventions' potentially involved, that support the request for authorization.

Reasons to believe, must be about 'contraventions' listed in section 67 that apply to 'taxable person':

- 'suppressed' any transaction of supply;
- 'suppressed' stock of goods;
- claimed input tax credit 'in excess' of entitlement; and
- indulged in 'contravention to evade payment of tax'.

While allegations made later (in notice) may vary but cannot be used to raise demands in respect of matters that are not traceable to the above 'contraventions'. This is to avoid 'full scale audit' being conducted after securing authorization for one or other contravention involving 'evasion of tax'.

And those that apply to 'any person' being (i) transporter or (ii) warehouse-keeper, are:

- transporting goods which have escaped payment of tax;
- storing goods which have escaped payment of tax;
- keeping accounts or keeping goods, in a manner as is likely to cause evasion of tax payable.

A close review of the 'ingredients' in each of the instances reveals the onerous task on Joint Commissioner to give careful consideration to the facts and suspicion presented before issuing authorization to reach a conclusion that invoking powers under section 67 is justified. Mere possibility that

evasion may be involved without material facts taken on record, does not provide sufficient basis for the grant of authorization. Jurisprudence is well developed in the context of other laws such as Income-tax, Customs and Sales tax, to state that:

- suspicion is not sufficient to warrant inspection or search;
- authorization cannot be granted without 'reasons to believe' that fall within those listed in the statute;
- authorization granted must be based on material taken on record;
- file must contain notes as the nature of examination (of those records), deliberation carried out and the satisfaction reached that forms the 'reasons to believe'; and
- that except by undertaking this exercise alone which is justified and warranted, no other proceeding under the law will be equally efficacious in the facts and circumstances of the case.

2.3 Preparations prior to inspection

Owing to the significant scope available and the inherent urgency involved in these proceedings, it is possible that actions by Proper Officer and Authorized Officer are open to be called in question on the ground of administrative excess, if any, as a first step but in later proceedings (discussed later) or may even be taken up for judicial review by Courts.

CBIC Instruction 1/2020-21 (*F.No.GST/INV/DGOV Reference/20-21) dated 2 Feb 2021* may be referred to for detailed guidance about preparations and process of conducting inspection-cum-search under section 67 of the CGST Act which would *mutatis mutandis* apply to proceedings under State/UTGST Act. Some important aspects are:

- Personal search of officers be permitted before inspection;
- Acknowledgment of party on Form GST INS-01 be collected and retained on file;
- Presence of lady Officer if women and children present on location;
- Witnesses (panchas) must be independent persons;
- Spot recovery not permissible.
- Videography to be considered in case of sensitive premises.

Instructions No. 01/2020-21 issued by CBIC in this regard are contained in Annexure.

2.4 Inspection versus Search

Care must be taken in choosing the sub-section under which this authorization is given. Authorization is not a *carte blanche* permission i.e., not a full authority to inspect or search any place or premises because (i) inspection and (ii) search, are two different processes in this law.

'Inspection' is permitted under section 67(1) where 'reasons to believe' must be that of the Joint Commissioner (or higher rank Officer) who will then grant authorization to 'any other' Officer as the Authorized Officer to inspect the specific premises listed in Form GST INS-01. Inspection does not allow opening up of cupboards and so on; that is permitted only in search proceedings.

'Search' is permitted under section 67(2) where 'new or additional' reasons to believe must be or become available to the Joint Commissioner (or higher rank Officer) to 'further authorize' the (same or another) Officer, who was granted authorization under section 67(1) himself, to act as Authorized Officer and conduct search-cum-seizure proceedings under section 67(2).

Considering that seizure is permitted in only search proceedings and not in inspection proceedings, it is important to discuss whether 'reasons to believe' that provide reasons to grant authorization for 'inspection' are sufficient to conduct 'search-cum-seizure' or 'new or additional' reasons are required. Further, it is important to consider whether these new or additional reasons to authorize search-cum-seizure must also pre-exist at the time of grant of authorisation in Form GST INS-01 or whether they can be discovered during inspection to support extending the proceedings to 'search-cum-seizure'.

While 'evasion of tax' is the touchstone for 'inspection', articles being 'secreted' is the bedrock of 'search-cum-seizure'. If both these dissimilar reasons are known prior to inspection, then comprehensive Form GST INS-01 may be issued in Part-A or Part-B to conduct inspection as well as in Part-C to conduct search-cum-seizure. If not, then Form GST INS-01 in Part-A or Part-B will only be issued to conduct inspection and any discovery during inspection will then be relied upon to support reasons to issue another Form GST INS-01 in Part-C to proceed with search-cum-seizure proceedings.

On a careful reading of the two sub-sections, it appears that:

- Reasons to believe that are sufficient just to 'inspect' the place(s) of business justifies grant of authorization and this satisfaction must be ensured by Joint Commissioner (or higher rank Officer). Based on this authorization, 'any other' Officer as the Authorized Officer will execute

the authorization and report back (no format prescribed) of outcome of such inspection proceedings;

- New or additional reasons to believe must become available or be already available which are validated by discovery during inspection, to support a further authorization to 'search' all or any of the place(s) of business that were inspected and this satisfaction must also be ensured by the Joint Commissioner (or higher rank Officer).

Questions that arise are whether these 'two instances' where reasons to believe were established should pre-exist before Form GST INS-01 or only one may exist before Form GST INS-01 and another emerge out of discovery in inspection. Perusal of Form GST INS-01 brings out the following aspects:

- Form GST INS-01 is the form of authorization for 'inspection' and is also the prescribed form for authorization of 'search-cum-seizure';
- Form GST INS-01 Part A – taxable person and place(s) to be inspected; or
- Form GST INS-01 Part B – other persons and place(s) to be inspected; or
- Form GST INS-01 Part C – specified location believed to contain secreted articles;
- Authorization:
    - To another Authorized Officer to 'inspect'; or
    - To another Authorized Officer to 'search' and if offending articles (goods or documents) are found to 'seize' and produce before Joint Commissioner.

From the above it is clear that there are 'two instances' where all these reasons to believe must pre-exist at the time of authorization. As such, Form GST INS-01 must be for 'inspection only' or 'inspection and search' when it is granted to the Authorized Officer(s) and there can be two Forms GST INS-01, where one is for 'inspection only' (based on certain reasons to believe) granted to one Officer and another for 'search' (based on additional reasons to believe) granted to same or different Officer.

It is reasonable to expect 'combined authorization' for being more practical and for this reason, careful examination of these pre-existing reasons is essential to determine whether they were sufficient to support only inspection (but not search) or both inspection as well as search-cum-seizure. It may be

noted that any discovery during inspection (suspected to have already been in the knowledge of Joint Commissioner at the time of grant of authorization in Form GST INS-01) cannot be used to automatically extend inspection to search-cum-seizure proceedings if these new or additional reasons are not placed on record in Form GST INS-01 that is issued. This is key to challenge the validity of proceedings under section 67.

Search-cum-seizure is limited to 'secreted articles', that too, comprising only of the following:

- Goods liable to confiscation which are found to be 'secreted'; or
- Documents or books or things, useful or relevant to any proceedings, which are found to be 'secreted' in any place.

It is therefore important to consider whether proceedings are carried out 'under section 67(1) or under section 67(2)'. The scope and limitations of what can and cannot be done under each sub-section are laid down in those provisions and vastly differ from each other.

It is very interesting to note that the format in Form GST INS-01, inspection + search + seizure is in one Form and the selection of each Part in this Form must be carefully examined as to whether the grant of authorization is for one (inspection), two (search and seizure) or all three aspects in a manner that it will stand up to judicial scrutiny later. Considering the intricate nature of these processes that any slip in this 3-step procedure will taint the entire proceedings and legitimate discovery could be annulled due to the process adopted being tainted and bad in law.

2.5 Multiple authorizations for same investigation

Considering that Form GST INS-01 is issued at a certain time 'x' duly supported by reason to believe that such an 'inspection' is justified, it must be examined carefully if (although not impossible), that at that same time 'x', 'new or additional' reasons to believe that 'search-cum-seizure' is also justified were already available for Joint Commissioner to grant a comprehensive authorization; or

After carrying out inspection, certain new material may be discovered that was unknown at the time of grant of authorization which may now justify extending the proceedings to search-cum-seizure, but the authorization originally granted being insufficient to proceed with these extended proceedings, it will render the search-cum-seizure illegal as the necessary (new or additional) reasons to believe cannot be an 'after discovery' (that is, discovery after search was conducted).

In all such instances, it is to be examined if the Authorized Officer (i) either concluded the inspection and after making necessary notes of additional matters or (ii) continued the inspection without exiting the premises but requested the Joint Commissioner to issue another authorization in Form GST INS1-Part C to lawfully extend the proceedings to cover inspection-and-search-cum-seizure to ensure due compliance with procedures established in the law.

There is no bar in law that only one (1) authorization in Form GST INS-01 must be granted in respect of a given investigation. As such, there may be multiple Form GST INS1s issued and all reasons to believe and the material in support thereof be duly noted on the file when they are called in question in an application under section 67(10) or in judicial review by Courts, if any.

2.6 Challenge to 'reasons to believe'

'Reasons to believe' is less than 'evidence in possession' (unlike the one referred to in section 64) but more than 'suspicion' about potential tax evasion. Reasons to believe, need not be disclosed to the taxpayer in the first instance, but must be the outcome of objective examination of facts that arouse suspicion and after further consideration leads to compelling conclusion that become 'reasons to believe' sufficient to invoke exceptional powers under section 67 to gather additional evidence about the evasion of tax. For these reasons, powers under section 67 cannot be exercised routinely even if there is suspicion but one that can be regarded as 'reasons to believe' that evasion of tax has occurred. Care must be taken that (i) existence (ii) validity (iii) sufficiency and (iv) documentation of relevant material on files, in support of these reasons to believe will be called into question in the application to be filed under section 67(10) before replying to the show cause notice (discussed later).

While 'reasons to believe' are not disclosed at the outset, they are necessarily open for taxpayer to call them into question in later proceedings to challenge the validity of the exercise of these exceptional powers in section 67. Even a court may call and examine the file noting that show the material taken on record and the consideration given to them, where the exercise of these exceptional powers are questioned by a taxpayer. While a court will not substitute its own wisdom for that of the Proper Officer (in granting authorization), absence of reasons or existence of frivolous and implausible reasons, will certainly rob proceedings of lawful jurisdiction.

'Justiciable' is whether the issue can be challenged before a Court. Whether there were 'reasons to believe' that were reasonable or were whimsical is justiciable. Most recently, the Apex Court has laid down nine principles in *PDIT v. Laljibhai Kanjibhai Mandalia* [CA 4081/2022] after surveying various earlier authorities in this regard.

Just because something was discovered during inspection, does not justify grant of authorization to conduct search under section 67. It must be demonstrated that prior to discovery in inspection and on the basis of material placed on record (before inspection), 'reasons to believe' can be supported. Reasons cannot be discovered after exercising these powers. Reasons must pre-exist and pre-date the grant of authorization.

Where 'reasons to believe' justify only inspection, search is not permissible and where 'reasons to believe' justify both inspection and search then, combined authorization is permissible. If, however, reasons to believe cannot support search proceedings (without including anything discovered in inspection), authorization granted to search will be rendered unlawful and consequently taint the discovery.

Improper proceedings must be questioned by taxpayer under section 160(2) at the earliest point of time in the proceedings but if the nature of inspection and the measures that follow any discovery, do not allow an opportunity for taxpayer to question or acquiesce to the inspection proceedings then the taxpayer is free to question the existence of 'reason to believe' at any time later – up to the time of responding to show cause notice issued demanding tax under section 74 or imposing penalty under section 130.

Question about valid 'reasons to believe' touches 'jurisdiction' exercised by Joint Commissioner and all consequent actions taken by Authorized Officer in executing the authorization granted. Where there was no jurisdiction to authorize inspection, inspection will be illegal and jurisdiction to authorize inspection but not inspection-cum-search and consequent seizure, will also be illegal and any discovery from such illegal seizure will also be tainted.

Authorization issued to inspect under section 67, being extraordinary power, must be exercised with great restraint and principles of natural justice that cannot be followed 'prior' to exercise of powers in law, can be adhered to 'subsequently' as held in the case of Menaka *Gandhi v. UoI AIR 1978 SC 547*. If Joint Commissioner is unable to justify 'reasons to believe', when called into question, then no demand will sustain out of such tainted proceedings. Without jurisdiction, even if there are any legitimate dues, it cannot be exacted. In case of *Nazir Ahmad v. King Emperor AIR 1936 PC*

253, the Privy Council has stated that *"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."*

Tainted discovery cannot be acted upon, and GST allows a getaway by taxpayers' consent in section 160(2), but illegality by way of 'lack of jurisdiction' is so profound that not even section 160(2) can come to the rescue of the demand consequent to such tainted discovery. But the Apex Court has held in the case of *Pooran Mal Etc. v. DIIT, AIR 1974 SC 348* that evidence collected in illegally conducted search can still be relied upon and used in demand and prosecution proceedings; it is, therefore, imperative that taxpayer attends to only valid proceedings and objects lawfully where proceedings are illegal.

2.7 Circumstances when articles 'are secreted'

Secreted articles (not defined in the Act but referred in this discussion) refer to the two types of articles, namely, (i) goods liable to confiscation and (ii) documents, books, or things, when they are 'secreted' and discovered to be so during search, are liable to 'seizure'. In other words, unless these articles 'are secreted', they cannot be seized. The word 'secreted' not only qualifies 'documents, books or things' but also qualifies 'goods liable to confiscation' as they are placed between two 'commas' in section 67(2) and this aspect is important to appreciate that articles liable to seizure are only those that 'are secreted' and if they are 'not secreted' then, the Authorized Officer will be unable to seize them within the scope of this provision.

'Secreted' does not merely refer to the fact that certain articles were lying around but refers to those that were lying around coupled with the use of some 'device' that makes their detection impossible. And except by removing or uncovering, by employing any means of uncovering such device (designed to conceal their existence), that they would go undetected. Device for concealment or to secret these articles may not only be an undisclosed place of storage but also a method of storage that makes them undetectable. Such methods may be by employing a manner of describing them on a document that would be misleading and successful in concealing but also deliberate mis-presentation to appear to be something else including with the use of electronic methods like passwords, cloud storage, ghost files/folders, etc. and anything else that ensures their concealment.

'Secreted' includes articles openly kept but in an undisclosed location in a manner that make them go undetected, which would tantamount to being

secreted. Secreted also includes non-accounting of goods where the concealment comes not from the physical location / storage but from the omission to document their possession (receipt and holding of unaccounted stocks for making supplies).

Further, goods (capital goods and inventory) that are not liable to confiscation cannot be subject to seizure and as well as all other articles (being documents, books, or things) that are not useful or relevant in any proceedings. This is a subjective test and that too, to be determined during the rush of search proceedings. But the Authorized Officer's use of discretion in identifying secreted articles to the place under seizure must be palpable, as this exercise of determination (not mere exercise of discretion) will need to stand judicial scrutiny later.

In this Handbook:

- "secreted articles" means goods and other articles which are secreted in place of search;
- "seized articles" means secreted articles which comprise of (i) goods liable to confiscation and (ii) documents, books or things and are seized by Authorized Officer against GST INS-02; and
- "offending articles" means goods liable to confiscation, whether seized or not, including conveyance used in committing offence under the Act.

2.8 Non-secreted circumstances

Seizure of 'secreted articles' under section 67(2) is legally permissible only if the said articles are 'secreted'. In other words, if the said articles are not secreted, then proceedings under section 67 are questionable in later proceedings. In this regard, section 35(6) prescribes as under:

> *"(6) ……..where the registered person fails to account for the goods or services or both in accordance with the provisions of sub-section (1), the Proper Officer shall determine the amount of tax payable on the goods or services or both that are not accounted for, as if such goods or services or both had been supplied by such person and the provisions of section 73 or 74, as the case may be, shall, mutatis mutandis, apply for determination of such tax."*

Where articles are not secreted, revenue that can be demanded will only be limited to tax, interest and penalty under section 122. Confiscation or fine-in-lieu of confiscation under section 130(2) will require such goods (i) to be secreted and (ii) detected in search proceedings (or in-transit interception)

and these proceedings will be in addition to demand of tax, interest, and penalty under section 122. The term 'secreted' extends not only to holding stock of goods at a secret location or but also to any omission to account for goods although they may not be physically secreted or even omitting to register the place where goods are stocked (as additional place of business).

Where additional places of business are not added to the registration and business may continue at such places in plain view and openly along with display of GSTIN of the principal place of business, it would *prima facie* neither be a case coming within section 67(2) nor be liable to confiscation under any of the five (5) clauses to section 130(1). However, it is often seen that such additional places of business are 'treated' to be a secreted location along with all goods in such premises. As long as no 'device' is shown to be employed that would make their detection impossible and conduct of taxpayer is in the usual course of business, it does not amount to being 'secreted' to attract the consequences of seizure and confiscation.

2.9 Exhausted by exercise

This is a very important aspect to note that authorization to inspect or search, as the case may be, stands 'exhausted by exercise'. In other words, authorization is specific to:

- Specific officer (no sub-delegation allowed)
- At specified places (precise and exhaustive, not vague and inclusive)
- Within specified time to carry out (day and date stated on it)

Authorization must be acted upon by the Authorized Officer and inspection carried out at the specified places and in accordance with the extant instructions of CBIC / State Commissioner with respect to due process for carrying out inspection and/or search, within the specified time permitted or not at all and once it has been executed and duly conducted and Authorized Officer exits the said premises, the given authorization expires. Authorization may expire even after lapse of time (specified therein) by which the inspection could not be conducted for any reason. But one authorization granted cannot be used for multiple visits to the premises. It is for this reason that 'multiple Form GST INS-01' may be granted so that there is no failure in following 'due process' established by law.

If inspection was carried out in the first instance, unless 'new or additional' reasons to extend inspection to search proceedings pre-existed at the time of first authorization and duly recorded on the files to be able to issue Part-C of Form GST INS-01, routine extension of inspection to conduct search-cum-seizure will be illegal for want of jurisdiction and hence, unauthorized.

officers are welcome to secure another authorization by way of a second (and subsequent) Form GST INS-01s in order to validly extend the inspection into search proceedings.

2.10 No 'follow up' correspondence

Once an authorization granted in one specific Form GST INS-01 is exhausted by exercise of the powers (discussed above) and the Authorized Officers exit the premises, there is no provision in law to issue 'endorsement' or 'letters' calling for explanation from the taxable person (or other person) on any matter by way of "follow up correspondence". There is no provision in the CGST Act authorizing such interaction, whether by correspondence or in-person. Authorized Officer is free to issue summons under section 70 but that requires careful consideration of the nature of interaction to be undertaken (more on that discussed later) as summons cannot be issued in a routine manner.

Even if the taxable person were to reply to any such 'endorsement', the same is open to retraction or challenge at the time of adjudication. Section 160(2) must be taken into consideration, while responding to such endorsement. It is important to verify whether proceedings under section 67 have been discharged strictly in accordance with law and any attempt to extend the 'terms of reference' of inspection beyond 'evasion of tax' into routine matters akin to "reassessment" or "audit" are not permitted under this section.

The Authorized Officer must interpret the information contained in the seized articles (documents, books or things) and reach certain conclusions relevant for the investigation, without depending on the inputs or explanation from taxable person (or other person). If the seized articles are insufficient to reach any definitive finding of leakage of revenue, the Authorized Officer must conclude the proceedings and refer the case and the extent of evidence, if any, gathered in these proceedings to be taken up for detailed audit under section 65. But the proceedings under section 67 must be brought to a conclusion. Investigation under section 67 cannot continue indefinitely as there is a time limit in section 67(7).

2.11 Seizure is to 'secure and identify'

All secreted articles (discussed above) are liable for seizure. Seizure is to 'take physical custody' of the said documents or goods or things. Seizure is a necessary requirement to 'secure' the specific 'goods and documents, books, or things' and to 'identify' them in later proceedings. Seizure does not imply 'transfer of property' in those goods and documents, books, or things (as that

would be 'confiscation', discussed later). Seizure is a good test as to whether inspection under section 67(1) led to the discovery of any incriminating material for certain on 'new or additional' reasons to believe that justified search proceedings. If there is no seizure, inspection will be complete, and no further proceeding remains to be carried out under section 67.

Rule 139 has prescribed Form GST INS-02 as the format of order of seizure and from a careful reading of this form, it is clear that there is no requirement that the seized articles must be carried away by the Authorized Officer. After seizure, they may be handed back for safekeeping. But it is important that Form GST INS-02 must be drawn-up and two witnesses (or panchas) must attest Form GST INS-02. It is important to note that Form GST INS-02 is the basis to identify what was discovered in search proceedings and to refer in later proceedings or for their return eventually. After all, the Revenue is not interested in taking the responsibility of safe keeping of seized articles except to the extent they are relevant in raising demand in accordance with law.

2.12 Seizure not to 'prevent access' by taxpayer

Seizure is not to stop the taxpayer from accessing goods and documents, books, or things, but (as discussed earlier) to 'secure and identify' articles that vindicate the 'new' reasons to believe for invoking section 67(2) and to support demands to be raised in due course. After notice is issued or other interests of Revenue are secured, the seized articles must be returned to the person from whom they were seized and not retained by the Revenue indefinitely.

Interests of revenue being limited to collection of tax, interest, and penalty, where taxpayers come forward to either discharge or otherwise assure the interests of Revenue, the seized articles may be returned provisionally or finally (more on this in later discussions). But the principle to appreciate is that *preventing access by taxpayer to seized articles is not the objective of seizure*.

2.13 Seizure of 'cash'

Seizure being merely a requirement of the law to 'secure and identify' the documents, books or things (discussed earlier), it would not be remarkable if Authorized Officers were to seize 'cash' discovered during search proceedings.

It is important to note that even cash must be 'secreted' to qualify for seizure but, more importantly, cash is not 'goods liable to confiscation' under section 130(1) but are 'things' which are considered *"useful or relevant"* by the

Authorized Officer to carrying out *"any further proceedings"*. What, therefore, can be the 'use or relevance' of cash to be seized?

There is popular, mysterious, and erroneous understanding that 'cash' is illicit if discovered in search proceedings. Officers tend to seize cash without even ascertaining to whom it belongs. There is no presumption in law, that cash seized from premises searched belongs to the person searched, unlike in similar proceedings under The Narcotic Drugs and Psychotropic Substances Act, 1985 or Prevention of Money Laundering Act, 2002. Any presumption in GST is found in section 144 and is limited to 'documents'.

'Cash' seizure does not directly point to proceeds from unaccounted sales. That would have been easy but the Legislative wisdom is that (i) 'evasion of tax' is a must for proceedings under section 67 to be with jurisdiction and lawful and (ii) no presumption flows in favour of the Revenue, especially, when cash may be treated to be 'things' and not 'consideration from supply'. After all, 'things' seized can only be if they are *"useful or relevant"* for the Authorized Officer in carrying out *"any further proceedings"*.

Where 'cash' is sought to be seized and is properly accounted and reported in Form GST INS-02, the inspected persons need not be anxious that the cash may not be returned. It is also not permissible for this cash to be appropriated towards recovery (discussed later) of any liability determined without issuing a notice. And seized articles are liable to be returned (discussed later). Refer also to discussion later about the limited nature of the bar in section 121(b) that does not apply to release of cash seized.

2.14 Seizure process and report

Seizure is a legal process of establishing the identity of the goods or documents or things (discussed earlier). Further, seizure must be conducted in the presence of two witnesses (or panchas) whose presence establishes *bona fides* of the proceedings including protocol for search and manner of discovery of secreted articles (more on this later). Absence of panchas, taints the seizure and panchas cannot be officers of Revenue or persons themselves whose premises is subject to search proceedings.

Form GST INS-02 lays down the 'identity' of seized articles. But care must be taken to note that *'(i) goods liable to confiscation which are secreted and detected during search and (ii) documents, books or things which are also secreted and detected during search, can only seized'*. These articles are referred to in this discussion as 'secreted articles'. It is also important to

ensure that all the articles included in Form GST INS-02 must meet this standard to be subject to seizure. Section 67(2) not only confers authority to seize but also specifies the limits to the exercise of this authority.

Articles liable to confiscation are those that are listed in section 130(1) (refer Chapter-3 on confiscation) and to the extent of proceedings under section 67 refer to **'***outward or inward supplies carried out (i) in contravention of law (ii) with intent to evade payment of tax'*. It must be noted that here too, there are specific 'ingredients' listed for the article to be 'liable to confiscation'. However, the fact that 'articles discovered' were secreted and discovered during search proceedings, it raises a presumption against the taxpayer and justifies 'seizure'.

'Presumption' is about likely evasion, which is a 'rebuttable presumption' and cannot be an 'assumption' to justify any irreversible action by Revenue such as 'final confiscation' or 'disposal' without issuing show cause notice. Rebuttable presumption is also subject to the process of determination of questions of fact in accordance with due process of law by adjudication (and along with appellate remedies). That is, whether the goods were liable to confiscation, whether the secreted articles were secreted, in what manner were they secreted, what were the means employed to discover the secreted articles, could those secreted articles have been found without the use of means employed by the Authorized Officer, etc. are all matters which are open to examination in appeal or judicial review and cannot be admitted with finality based on the opinion of the Authorized Officers. There are several questions of facts to be established here, namely:

- Contravention of law; and
- Intent to evade payment of tax.

Irreversible actions such as final confiscation or disposal is not permitted straightaway because if the taxpayer were to be successful in rebutting this presumption (in appellate proceedings later), the benefit of this effort in successfully proving that search-cum-seizure ought not to have been carried out at all, would be rendered a mere 'relief on paper' if (wrongfully) seized articles are not available to be restored to the taxpayer due to premature confiscation or disposal. Since seizure secures the interests of Revenue only, seizure is permitted by law at the end of search proceedings so that the rest of the due process of law is allowed to run its course before any final action may be taken up. Care must be taken to read through Form GST INS-02 to examine if all requirements of law (discussed above) are present and complied with in these proceedings.

2.15 Right to 'seal or break'

Where the offending articles are suspected to be stored in a locked-room or in any almirah, electronic devices, box or receptacle, and access, if, not provided by person-in-charge of premises being searched then and only then (to be duly recorded in proceedings on file) that the Authorized Officer may:

- **'**seal' the door of any premises so as to prevent access by the taxpayer after access is gained to secreted articles in such premises liable for seizure; or
- **'**break open' the almirah, electronic device, box or receptacle so as to gain access and seize.

As per section 67(4), immovable property cannot be seized. Immovable property can be sealed, and the Authorized Officer can 'break' open the door to such premises where access to such premises is denied. Procedures under the Code of Criminal Procedures, 1908 (hereinafter referred to as "Cr.PC") are made applicable under section 67(10) where pre-trial disclosure of all documents and records of the investigative process is mandated with Commissioner being designated to exercise the powers vested with Magistrate under section 165(5) of Cr.PC (discussed in detail later).

Movable property such as almirah, box or receptacle may be broken open to gain access. Clearly, this authority must only be exercised if there is non-cooperation by taxpayer in allowing access to Authorized Officer. It is not possible for the Authorized Officer to vacate the premises and return on another occasion to gain access as the authorization to inspect would have expired on exiting from premises.

Breaking open to gain access (to secreted articles) must be understood suitably when considering electronic records as they are not to be physically broken but employing a commensurate technological method that is akin to breaking physically and to gain access to the contents. Again, this step is permitted here only if the taxpayer does not provide access or share passwords, etc. To this end, suitable technical experts may be involved with search party or taxpayer's staff may be directed to break open password(s) or other security protocols to access records suspected to be secreted in electronic devices.

2.16 Prohibition orders

As seizure not only refers to the process of 'taking away' secreted articles, it is possible that instead of seizing them, the Authorized Officer may place

those offending articles under an order of prohibition in Form GST INS-03 which is akin to order of seizure in Form GST INS-02 but served on third party.

In both, legal ownership remains with the taxpayer and physical custody too may be left with taxpayer. But in prohibition, physical custody is always with taxpayer. Therefore, prohibition is generally with respect of secreted articles in custody of an innocent third-party such as warehouse-keeper or common carrier or customer holding goods-on-approval or job-worker holding goods (capital goods or inputs) for job-work or other holder-in-trust. Reference may be had to the terms 'owner or custodian' in rule 139(4). Seizure may also be made from the person not being the taxpayer against whom cause-of-action lies for contravention of the law.

2.17 Provisional release

Conclusion of search proceedings is a prerequisite for provisional release because after search proceedings are concluded, Form GST INS-02 will be issued containing list of seized articles. It is to secure access to (but not use of) such seized articles; the taxpayer may apply for provisional release under section 67(6). Provisional release is against own assurance that the seized goods will be produced when called for by the Authorized Officer. As such, taxpayer cannot use (consume or dispose) seized goods provisionally released and be in a position to produce them before the Authorized Officer. No format is prescribed for seeking provisional release, taxpayers may submit a plain-paper request in writing for provisional release along with execution of bond for the value of goods in Form GST INS-04 and furnishing of a security in the form of bank guarantee equivalent to the amount of tax, interest, and penalty. Application for provisional release applies even to 'cash', if the same has been seized as 'things' discovered in search proceedings.

Considering that the interest of Revenue is to collect tax, interest and penalty including penalty by way of confiscation, it is permissible for the Authorized Officer to 'provisionally' release seized goods under section 67(6). There is hardly any reason for the Authorized Officer to turn down an application for provisional release. And this shows clearly that seizure is to 'secure and identify' details of all secreted articles and not a form of recovery of liability under the Act. Where suitable security is offered (to safeguard interests of Revenue), there is no ostensible reason to refuse provisional release. Rule 140 brings out the following 'primary requirements' for provisional release of the seized goods:

- Execution of bond for the value of goods in Form GST INS-04
- Furnishing security in the form of bank guarantee for the amount of tax, interest and penalty applicable.

If these primary requirements are not complied then the seized articles continue to remain under order of seizure in Form GST INS-02 or order of prohibition in Form GST INS-03. Form GST INS-04 brings out these 'additional requirement' applicable to seized goods which are conditions-subsequent that must be pre-agreed in order to secure provisional release, namely:

- Seized goods to be produced when called for by Authorized Officer; or
- Security given may be encashed in the event of failure by consumption or disposal so as not to be able to produce the same when called for by Authorized Officer.

From the above, it is evident that provisional release does not allow the taxpayer to continue the business with seized goods (especially capital goods and inventory) as they continue to be under the control of the Authorized Officer, even though, physically available with taxpayer.

The taxpayer (or other person from whose custody seizure has been made) is encouraged to make an application 'in writing' to the Authorized Officer to provisionally release the seized goods upon execution of bond and furnishing of security. It is also important to note that once provisional release is permitted and if the said goods are not collected within one month by the taxpayer, the provisions of rule 141 (Entry 17 to Notification No. 27/2018-*Central Tax* dated 13th June 2018) will be attracted, whereby those goods can be disposed-off. However, seized documents, books or things shall be retained by the officer only for so long as he may consider necessary for the examination and for inquiry or proceedings under the GST Act.

Leaving custody with Authorized Officer involves responsibility of adequate care and protection over those articles. However, the Authorized Officer, retaining custody of goods liable to confiscation, may be required to ensure adequate care and protection until (i) show cause notice is issued for their confiscation and (ii) taxpayer has opted in writing to pay redemption fine (discussed later) in lieu of confiscation.

Retaining other seized articles – documents, books, or things – will not involve any significant burden to revenue as there is no requirement for any unusual amount of care for their safe-keeping. However, taxpayer may still request for their release so as to deny any non-essential retention of private

records after the purposes for which they were seized have been served and the copies of 'documents' seized may be collected from Authorized Officer where a plain-paper application is made under section 67(5) including taking extracts of those documents.

2.18 Refusal of provisional release, non-appealable

Among other matters, section 121(b) makes it clear that the decision of (i) seizure and (ii) retention, are not appealable. Therefore, decision of Authorized Officer to seize books of account, register and other documents which were found to be secreted, is not appealable. Further, refusal to permit provisional release is also not appealable.

However, care must be taken that the bar in section 121 does not preclude (i) calling into question the validity of seizure itself in adjudication proceedings or (ii) in judicial review. If the seized articles were not secreted, then there is no jurisdiction to seize them and to even include them in confiscation proceedings under section 130 (discussed later). If the seized articles include books of account, register and other documents, their seizure as well as retention (meaning, refusal to grant provisional release) are not appealable.

Care must be taken that the bar in section 121(b) specifically refers to (i) books of account, (ii) register and (iii) other documents. The difference in expressions used in sections 67(2) and 121(b) are visible and distinct. Without repeating the expressions used, it suffices to state that "things" seized, do not come within the bar in section 121(b). As seen from the discussion above on seizure of cash, which may be seized for being "things", the bar in section 121(b) does not apply to "things" and for this reason, when the purpose for which cash is seized has been served, there is no occasion to refuse release of cash seized and such refusal does not operate within the bar in section 121(b) which applies only to (i) books of account, (ii) register and (iii) other documents.

2.19 Omission to seize

There is no mandate that all secreted articles must be seized although it is uncommon that some of the secreted articles may be omitted from Form GST INS-02 or Form GST INS-03. But articles that are not secreted (discussed earlier) cannot be seized and this would be a significant aspect later in questioning of jurisdiction of seizure proceedings and if offending articles (discussed later under 'confiscation') are omitted from being seized, it may impair confiscation proceedings. Whether such omission will be fatal to those proceedings or not is a different matter (discussed later) but, seizure being a factual position where tax authorities need to 'secure and identify' secreted

articles, Form GST INS-02 must contain only those articles that are offending *albeit* in the realm of suspicion but not those that do not bear any suspicion. Merely to exert undue influence, non-secreted articles, or articles unconnected with the proceedings may be placed under seizure but this would be illegal and will taint the integrity of these proceedings. For example, inspection of job-workers premises cannot result in seizure of moulds and dies issued by other principals. Capital goods belonging to job-worker cannot be seized if capital goods are not in any way involved in the suspected offence.

2.20 Seizure NOT a form of 'recovery'

Section 79 provides wide powers of recovery including but not limited to disposal of (movable and immovable) property of taxpayer-in-default and such property need not be involved in the offence in any way. While recovery is allowed in respect of all properties of the taxpayer-in-default, seizure must be limited to offending articles that are suspected to be involved in the contravention of law.

As stated earlier, immovable property cannot be seized under section 67 nor can movable property, that are not involved in the contravention of law. When these cannot be seized, they cannot even be included in confiscation proceedings.

2.21 Articles of special nature and special circumstances

The Government may notify 'class of goods' which must be disposed-off immediately after seizure. As discussed earlier, seizure is not a final determination of all questions of fact and law but the start of those proceedings. Section 67(8) empowers the Government to authorize Authorized Officer to 'dispose-off' certain class of goods (being goods liable to confiscation and discovered during search and placed under seizure) as are notified by the Government and requires a careful consideration of the nature of such goods, namely:

- Perishable or hazardous nature of goods;
- Depreciable goods;
- Constraints of storage space; or
- Any other relevant consideration.

The Government is authorized to notify such goods and those that are notified must meet the criteria in law and in order to notify them, such goods must meet any of the criteria listed above.

When goods that are notified are involved in any search proceedings (which are discovered to be secreted and placed under seizure), the Authorized Officer is required to dispose-off such goods, 'as soon as may be', after issuing Form GST INS-02 even without allowing provisional release in Form GST INS-04.

Rule 141 selects one out of the above four classes of goods listed as perishable or hazardous nature which are seized and permits taxable person to pay lower of (i) market price of said goods or (ii) tax, interest and penalty that 'may' become applicable on the said goods and on payment of said amount, such goods involved may be released. The Authorized Officer is required to pass an order in Form GST INS-05 demanding the said amount. Failure to pay this amount after it is determined vide Form GST INS-05 will authorize disposal of said goods by the Authorized Officer and apply the proceeds towards the liability of the taxpayer that 'may' arise on conclusion of adjudication (and appellate) proceedings.

Considering that these are extreme powers conferred on Authorized Officer, the same must be exercised judiciously and with care and when goods involved are notified under section 67(8), all parties involved must be aware of the extraneous nature of proceedings that could ensue. It is important to note that cooperation extended during search-cum-seizure proceedings can escalate into a demand in Form GST INS-05 if the goods seized are those listed in *Notification No. 27/2018-Central Tax dated 13 Jun 2018.*

Articles not listed in the said notification cannot be subject to Form GST INS-05 proceedings and must be entertained under section 67(6) to be released provisionally against Form GST INS-04. In other words, if the goods listed in said notification are involved in seizure proceedings, care must be taken to verify that soon after Form GST INS-02 is issued, application is quickly submitted requesting provisional release in Form GSTINS-04.

While there is no requirement as to the time by when orders in Form GST INS-05 must be passed or that option for provisional release must necessarily be rejected, if taxpayer is willing to execute bond and furnish security, even goods covered by this notification are to be released. There is no provision that compels the Authorized Officer to bypass provisional release in Form GST INS-04 to a willing taxpayer and go ahead to pass orders in Form GST INS-05. Further, when provisional release is ordered in Form GST INS-04, the taxpayer must document his willingness to take custody not later than one month to save from the rigours of orders in Form GST INS-05. Refer Entry 17 in this notification which applies to non-

perishable goods too, which have been ordered for provisional release but left uncollected with Authorized Officer.

Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs

Notification No.27/2018 – Central Tax

New Delhi, the 13th June, 2018

G.S.R….(E).- In exercise of the powers conferred by sub-section (8) of section 67 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereinafter referred to as the said Act), the Central Government hereby notifies the goods or the class of goods (hereinafter referred to as the said goods) mentioned in the Schedule below, which shall, as soon as may be after its seizure under sub-section (2) of section 67 of the said Act, be disposed of by the proper officer, having regard to the perishable or hazardous nature, depreciation in value with the passage of time, constraints of storage space or any other relevant considerations of the said goods.

Schedule

(1) Salt and hygroscopic substances
(2) Raw (wet and salted) hides and skins
(3) Newspapers and periodicals
(4) Menthol, Camphor, Saffron
(5) Re-fills for ball-point pens
(6) Lighter fuel, including lighters with gas, not having arrangement for refilling
(7) Cells, batteries and rechargeable batteries
(8) Petroleum Products
(9) Dangerous drugs and psychotropic substances
(10) Bulk drugs and chemicals falling under Section VI of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)
(11) Pharmaceutical products falling within Chapter 30 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)
(12) Fireworks
(13) Red Sander
(14) Sandalwood
(15) All taxable goods falling within Chapters 1 to 24 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)
(16) All unclaimed/abandoned goods which are liable to rapid depreciation in value on account of fast change in technology or new models etc.
(17) Any goods seized by the proper officer under section 67 of the said Act, which are to be provisionally released under sub-section (6) of section 67 of the said Act, but provisional release has not been taken by the concerned person within a period of one month from the date of execution of the bond for provisional release.

[F. No. 349/58/2017 – GST (Pt.)]

(Dr. Sreeparvathy S.L.)
Under Secretary to the Government of India

2.22 Seizure of electronic records

While section 67(2) specifies *"documents, books or things are secreted"* may be seized, section 145 provides that *"micro films, facsimile copies of*

documents and computer printouts" are to be regarded as "documents", in terms of Information Technology Act, 2000 read with Evidence Act, 1872.

"document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purposes of recording that matter.

Illustrations

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document."

""electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."

4. Legal recognition of electronic records. – Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied is such information or matter is–

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference."

These provisions read together with section 144 makes "electronic documents" not only admissible in seizure proceedings under section 67(2) but also there is a presumption raised as to the reliability of the contents of such electronic documents when they are (i) produced by any person (ii) seized from the customer of any person and (iii) have been received from any place outside India, in any proceedings under Central GST Act or any other law.

2.23 Show cause notice

After inspection and search, demand for tax, interest and penalty requires that provisions of section 74 read with section 122 and / or section 130 must follow. Detailed discussion about show cause notice is not included here

(refer ICAI handbook on 'show cause notice' for detailed discussion) but what is relevant in the context of section 67 is that show cause notice imposing penalty in respect of offending articles must be issued under section 74 (and 76) and not under section 73. Issuance of notice under section 73 after proceedings under section 67 are contradictory because proceedings under section 67 relates only to 'evasion of tax' and notice issued section 73 admits that 'no evasion' is involved in the demand.

This show cause notice not only requires all the special circumstances under section 74 to be alleged and evidence adduced to discharge burden of proof but also the special ingredients necessary to support the allegation under section 122 and / or section 130 to be brought home.

The taxpayer is not liable to prove his innocence, even if provisional release in Form GST INS-04 is secured or payment is made under proceedings in Form GST INS-05. The presumption about offending articles is a rebuttable presumption and a closer look at the list of offending articles highlights the approach taxpayer has to follow in responding to the show cause notice. As stated earlier, secreted articles refer to:

- Goods liable to confiscation which were 'secreted'; or
- Documents or books or things, useful or relevant to any proceedings which were 'secreted' in any place.

It is important to note that goods liable to confiscation involve allegation of offence against taxpayer and discussion under section 130 may be referred. Suffice to mention that the 'burden of proof' rests on Revenue although proceedings under section 67 may have been initiated based on 'reasons to believe'. Reasons to believe that existed prior to authorization of inspection may not always be confirmed after inspection to justify 'new' reasons to believe that seizure is necessary so as to initiate confiscation in respect of taxable goods included in the list of seized articles.

While there may have been sufficient reasons to believe for authorization in Form GST INS-01 to be granted by Joint Commissioner (or higher rank officer), that was examined (and recorded on the file) by Joint Commissioner, it is not beyond challenge in adjudication proceedings and unless found to be satisfactory, even legitimate demands will be tainted and fail as malicious inspection will be illegal and *void ab initio*. Failure to raise objections as to the legitimacy of Form GST INS-01 proceedings, carries with it the risk of acquiescence under section 160(2) as questions about the legality of any notice must be raised at the earliest opportunity and without this question

being satisfactorily resolved, entertaining such notices (passively by replying on merits) procures validity to such notice and belated realization cannot be agitated later in appeal or judicial review after having acquiesced already.

As regards documents, books or things secreted, it is important to refer to section 67(2) where the ones considered 'useful or relevant' in search proceedings must be included in Form GST INS-02 or be the ones that are submitted later to Revenue authorities (discussed later as 'spot seizure'). All those documents, books or things that are 'not relied upon' in the show cause notice are required to be returned to taxpayer within 30 days from date of notice. The relevance of such documents, books or things, depends on (i) extent of reliance placed on them in the notice (ii) extent of evidentiary value they carry in relation to the allegations in the notice and (iii) approach followed by taxpayer in responding to the allegation in the notice. As such, taxpayer should not rush to address questions of merits even when a show cause notice is issued since GST is a self-assessment-based tax under section 59 and except for input tax credit under section 155, burden of proof in respect of all other demands for tax or penalty under section 122 and / or section 130 remains on revenue.

The taxpayer must be allowed all the safeguards available in section 75 and that would be available only if the show cause notice were issued under sections 73 or 74. For this reason, it is clear that show cause notice cannot be directly issued under sections 122-130 as only the requirement that opportunity of hearing be granted is contained in section 122-130 but none of the safeguards such as section 75(7) or section 75(10) are available in section 122-130.

It is important to note that amendment to rule 142(1A), by replacing 'shall' with 'may', alters the requirement to undertake pre-notice consultations in all cases. Pre-notice consultations are mandatory in all cases in view of the mandate in sections 73(5) and 74(5). However, in cases involving fictitious supplies and credit racketeering, mandate in rule 142(1A) operated as a bar against proceeding with notice to persons involved in these cases. With the relaxation of the requirements in the rule, the Revenue is able to proceed with issuing notices to offenders, denying them the defence of omission to undertake pre-notice consultations. In all other cases, even when they qualify for notices to be issued under section 74, pre-notice consultations are mandatory as it flows from a large number of decisions which recognized the Government's position in the National Litigation Policy that efforts will be made to resolve potential disputes by engaging in such consultations.

Omission to follow pre-notice consultations have resulted in notices being quashed and parties relegated to pre-notice stage to undertake necessary consultations.

Where a notice is issued under section 73, it amounts to admission by the Authorized Officer that nothing in the nature of 'evasion of tax' has been unearthed in the proceedings under section 67. Where there is admission of non-evasion, proceedings under section 67 must be concluded and not continued to raise demands on routine matters which are left to the Proper Officer under sections 61 or 65 to take up. Just because some material is stumbled upon relating to, say, error in computation of credit reversal or doubts about applicability of exemption, etc. that does not permit the Authorized Officer to travel beyond the four corners of section 67(1)(a) against the taxable person or section 67(1)(b) against other person, to issue demands. That would also be lacking jurisdiction. Inspection is an exceptional power which cannot be exercised to carry out routine verification of compliance. Information so gathered may be passed on to Proper Officer for necessary action in accordance with law.

Show cause notice pursuant to proceedings under section 67 must be issued under section 74 (and / or section 76) but not under section 73, and the demand cannot travel beyond the scope of 'matters arising in inspection' (discussed later). It is not permissible for notice pursuant to proceedings under section 67 to 'also' cover matters that are not related to evasion of tax merely because Authorized Officer has accessed books. There is no such thing as comprehensive notice on all matters of GST compliance when only very specific areas of investigation were authorized.

2.24 Release of seized articles

After show cause notice is issued, all seized articles which are not relied upon for issue of such SCN, are to be released to taxpayer within thirty days from date of show cause notice as per section 67(3) and where show cause notice is not issued, within six months from date of Form GST INS-02 as per section 67(7).

Where the inquiry cannot be concluded within the time permitted, extension may be sought by the Authorized Officer for a further period not exceeding six months. There is no requirement that the entire duration allowed for extension must be allowed at once. But failure to complete inquiry within twelve months will result in frustration of the entire proceedings. The taxpayer is free to object to reasons for (seeking and grant of) extension or

fatal delay in concluding proceedings, in an application under section 67(1) and it will be open to challenge in later proceedings. Indefinite extensions are not permitted in GST.

Therefore, all proceedings initiated under section 67(1) in Form GST INS-01 and proceeded under section 67(2) resulting in seizure in Form GST INS-02 or prohibition in Form GST INS-03, must conclude in any of the following ways:

- show cause notice under section 74 read with section 122 and / or 130; or
- release of seized articles within 6 months from date of Form GST INS-02/ Form GST INS-03.

Payment in Form GST INS-05 does not authorize conclusion to proceedings under section 67. It is only an emergency provision to protect the goods and the interests of Revenue in case of perishable or hazardous articles. Notice for payment of tax, interest and penalty must still be issued in these cases and amount collected being available for appropriation against dues finally determined.

2.25 Matters arising from inspection

Inspection is permitted only in respect of matters that give rise to 'evasion of tax'. Routine matters of compliance cannot be entertained in proceedings under section 67. This is a very important issue to take note of, that is, inspection must give rise to:

- **'**suppression of stock or supplies' with intent to evade payment of tax, that is, goods available in stock on-premises without invoice or invoices available but not goods. Mismatch in description of goods between invoice and physical stock is not a new deviation but a variant of the above two deviations; or
- input tax credit claimed beyond 'entitlement', that is, when there is a complete bar on claiming input tax credit, yet it is claimed; or
- any other 'contravention' designed to 'evade tax'.

Form GST INS-01 is issued based on 'reasons to believe' that offending articles (described earlier) may be present at a specified premises and inspection is necessary to uncover the potential offence attracting confiscation under section 130(1). Care must be taken to establish the specific instances (discussed later) from section 130(1) are noted on the file and in Form GST INS-01 to enforce the authority to place such articles under

seizure. Seizure of articles that do not satisfy the ingredients of section 130(1) must be avoided and if they are seized inadvertently, then the same must be properly released back to custody of the person-in-charge of the premises. If no demand is forthcoming at the end of these proceedings, the Authorized Officer must conclude the investigation and not extend it to 'routine matters' (discussed later).

2.26 Review of routine matters not in inspection

Not every instance of non-payment of tax can be treated as 'evasion of tax'. There could be *bona fide* reasons for claim of exclusion from tax or exemption from tax. Under Central Excise, *Circular No. 1053/2/2017-CX dated 10 Mar 2017* states at Para 3.4 that demands involving 'interpretation' where the taxpayer has adopted a more advantageous interpretation, does not necessarily tantamount to 'evasion of tax'. In fact, in GST, there are numerous instances where contradictory decisions have been rendered by Courts and if the taxpayer adopts one and Revenue canvasses the other, it would not come within the ambit of section 67 and therefore, notice under section 74 would be inappropriate.

Refer the earlier discussion which states that notice under section 73 at the end of proceedings under section 67 is incompatible because notice is issued under section 74 in fraud cases involving evasion of tax. When a notice is issued under section 73, it implies that matters are (i) routine or (ii) Revenue is canvassing another interpretation; neither of these are compatible with proceedings under section 67. This may be due to regular habit that where evasion is not detected, routine matters are taken up and notices issued. Taxpayers who take comfort in the fact that relief is available under section 75(2) in respect of notices issued under section 74 on routine matters by the Authorized Officers, should note that this relief under section 75(2) implies that entire demand is liable to be dropped since it amounts to admission of non-evasion by Authorized Officer. This larger relief will become available provided it is urged by the taxpayer in adjudication or appellate proceedings.

Routine matters would include:

- Classification and applicability of exemption;
- Valuation adjustments (inclusions / exclusion);
- Admissibility (and matching) of input tax credit, blocked credits and reversal computation;

- Filing of returns including late fee and penalty.

While these areas stated to be 'routine' in nature can also be involved in cases involving 'evasion of tax', 'every non-payment of tax does not amount to evasion'; this acts as a protection against Authorized Officer exceeding the authorization to conduct audit as defined in section 2(13) and include demands in notices issued. That notice is issued under 73 *ipse dixit* points to a misapplication of powers under section 67. There are instances where the reasons for inspection are proved wrong, and yet the Authorized Officer proceeds to issue notice for matters not involving evasion of tax.

With a disclaimer that evasion may include these but these by themselves are matters not involving 'evasion' of tax to be raised in notices issued by the Authorized Officer without the peril of dismissal if the taxpayer raises objections at the earliest opportunity and carries the same without entering defence on merits:

Input tax credit:

- mismatch of Form 2A with Form 3B (since 2017-18);
- section 16(1) "not used in furtherance of business";
- section 16(4) "for time-barring of credits";
- section 17(2) reversal in case of "non-business use";
- section 17(5) of "blocked credits";
- reversal computations rules 40, 42, 43 and 44;

Interest

- unpaid arrears or arrears discharged belatedly (interest on 'gross tax');
- tax paid in belated returns (interest on 'net tax');
- debit notes issued (interest on 'gross tax');
- payments made via Form GST DRC-03 (interest on 'gross tax');

Output tax

- RCM under section 9(3) and under section 9(4) up to 12 Oct 2017;
- deemed supplies omitted by multiple -GSTIN taxpayers;
- tax on staff recoveries (credited to expense account);
- tax on other income (appearing in P&L); and
- all valuation adjustments especially discounts and subsidy.

Demands on these matters where the taxpayer responds on merits 'without prejudice' to objections on jurisdiction are likely to be saved if the Adjudicating or Appellate Authority were to reach a finding for Revenue. Notwithstanding rule 121, a taxpayer must be sure of the validity of proceedings before proceeding to respond on merits. After all, without jurisdiction, nothing remains in the said proceedings. This is a matter of opinion and each taxpayer may take counselling before embarking on the long journey ahead once a notice is issued in these proceedings (discussed later and format appended).

While the issues raised in notice may not be exactly aligned with the 'reasons to believe' that inspection is warranted, they also cannot travel so far away from these reasons as to be an 'after discovery'. That would cause trespass of proceedings under section 67 into the territory occupied by section 65. And to say that after all, it is to protect interests of Revenue, is not acceptable for the reasons stated in *Nazir Ahmed v. King Emperor (ibid)*. Allegations in the notice must touch 'reasons to believe' contained in file noting for grant of authorization. And to know this, safeguards for taxpayer are provided in section 67(10) where application as applicable under section 165(5) of Cr.PC is made appliable to proceedings under this law (discussed later).

2.27 Intelligence needed to invoke exceptional powers

Taxpayers must be mindful that intelligence (about 'evasion of tax') cannot be collected from taxpayer by issuing summons or other non-descript letters and correspondence. Taxpayer is well within the rights, remedies and safeguards provided in the law to object any communication as to its validity by calling the same into question (suggested format appended). It is important to be aware that intelligence must be gathered by Revenue to secure necessary authorization and invoke exceptional powers in section 67. Suspicion is neither sufficient nor is doubt about possible evasion. Intelligence must be gathered before invoking the powers under this section and not after invoking these powers. Lack of intelligence (about 'evasion of tax') amounts to misapplication of these exceptional powers and a 'fishing expedition' which demands active disobedience, must be duly and politely communicated.

In order that one's rights are not trampled upon it is necessary that such person 'demands justice' from the person alleged to be trampling upon those rights. Law anticipates that in case of any inadvertent trampling of others' rights, a demand for justice, will alert the person and bring about speedy

resolution. Often taxpayers anticipate misapplication of law and rush to High Courts. To demand justice is a duty before alleging denial of justice. In *CIT v. Scindia Steam Navigation Co. Ltd.* (1962) 1 SCR 788, the Apex Court has held *"…it is well settled that no mandamus will be issued unless the applicant had made a distinct demand on the appropriate authorities for the very relief which he seeks to enforce by mandamus and that had been refused."*.

Now a question may arise as to how would the Revenue gather this intelligence without conducting detailed examination of accounts and records of the taxpayer? When the Legislature has stated that GST is a self-assessment-based tax regime, all other provisions of the law must be interpreted and administered in harmony with section 59 and not in derogation of it. Therefore, 'intelligence gathering' must be in a non-intrusive manner. Hence the traditional approach of calling for books of accounts and verification of bills, vouchers and contracts, is no longer acceptable in GST and analytical and insightful approach must be followed by the Revenue. The Parliament believes that it is possible now in this connected world where nearly no transaction escapes without leaving an online trail that can be picked up to expose potential evasion. Use of data analytics, validation with third-party data and other methods are available for Revenue to gather necessary intelligence before reaching out to the taxpayer, exercising these exceptional powers. Taxpayers must understand the boundaries of 'active disobedience' that is required in law against exercise of non-existence powers albeit in the interests of Revenue.

Following are few illustrative instances that fit the requirements of evasion under section 67(1)(a):

- Suppression of stock or supplies – where taxpayer with multiple GSTINs has declared nil turnover in Table-5D of Form GSTR-9C or where auditors have reported a major fire accident in the factory involving destruction of stocks but Form GSTR-3B in the given months' reports show NIL turnover and credit reversal;
- Credit claimed beyond entitlement – where a taxpayer engaged in RREP projects has discharged output tax at 5% or a travel agent paying tax at 5%, but Table - 6A in their Form GSTR-9 shows claim of input tax credit;
- Contravention to evade tax – where a taxpayer has filed Form GSTR-3B for entire year with NIL turnover, but TDS credits appear on the Common Portal against this taxpayer's GSTIN.

While it is not possible to list a very elaborate number of illustrations it is suffice to state that proceedings under section 67 cannot trespass into

routine matters of 'verification of correctness' of compliances as expressed in section 2(13) for purposes of audit under section 65.

It is also important to note that during inspection, even if other routine matters come to light, Authorized Officer is barred from expanding scope of proceedings unless these matters (i) tantamount to evasion of tax and (ii) contained within the authorization granted. In these early years since introduction of GST, it is noted that investigations initiated are not concluded when evasion of tax is not detected but expanded to cover routine matters (discussed earlier) in order to have some finding and issue some notice. Equally so, taxpayers fail to object to 'inquiry' becoming an 'enquiry' into these routine areas by failing to question the validity of proceedings that are otherwise invalid for want of jurisdiction. This is referred as 'acquiescence' by taxpayer.

2.28 Duty of Magistrate to be exercised by Commissioner

Not only the taxable person is entitled to collect (i) copies of seized articles under section 67(5) or (ii) secure their release provisionally under section 67(6), but he must be furnished with copies of all (i) authorizations granted in the said proceedings (ii) copies of file noting and (iii) any other related records, which form the basis of the show cause notice in terms of a short but significant reference made in section 67(10). This sub-section refers to section 165 of Cr.PC and the Commissioner is substituted for Magistrate under Cr.PC. As required in Cr.PC, the taxpayer who is served with a notice under section 74, 76 or 130, at the end of proceedings under section 67 must consider making an application to the 'Commissioner' to discharge duties cast on a Magistrate under section 165(5) of Cr.PC (suggested format is given in Chapter 8). This application cannot be denied merely because show cause notice is already issued. After all, in terms of CBIC Circular No. 31/05/2018-GST *dated 9 Feb 2018 amended by Circular No. 169/01/2022-GST dated 12 Mar 2022, in amended Para-6* states that Officers of Audit and Intelligence Commissionerate are permitted to carry out their audit or investigations and issue show cause notice. But for purposes of adjudication, the file and the notice must be transferred to Proper Officer (subject to pecuniary limits) in the Executive Commissionerate to hear the noticee and adjudicate. In keeping with this requirement, documents must be kept ready in order to prevent any allegation of denial of justice in adjudication proceedings. This provision is for taxpayer safeguard and to ensure justice is done. Decisions of the Apex Court that are relevant are:

(i) *State of Rajasthan v. Rahman AIR 1960 SC 210* which held that:

"The power of search given under this chapter is incidental to the conduct of investigation the police officer is authorized by law to make. Under section 165 four conditions are imposed: (i) the police officer must have reasonable ground for believing that anything necessary for the purposes of an investigation of an offence cannot, in his opinion, be obtained otherwise than by making a search, without undue delay; (ii) he should record in writing is to be made; (iii) be must conduct the search, if practicable, in person; and (iv) if it is not practicable to make the search himself, he must record in writing the reasons for not himself making the search and shall authorize a subordinate officer to make the search after specifying in writing the place to be searched, and, so far as possible, the thing for which search is to be made, as search is a process exceedingly arbitrary in character, stringent statutory conditions are imposed on the exercise of the power."

(ii) *RS Jhaver & Ors AIR 1968 SC 59* which held that:

"We are therefore of opinion that safeguards provided in section165 also apply to searches made under sub-section (2). These safeguards are – (i) the empowered officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within the jurisdiction, (ii) he must be of the opinion that such thing cannot be otherwise got without undue delay, (iii) he (sic) *must record in writing the grounds of his belief, and (iv) he must specify in writing so far as possible the thing for which search is to be made. After he has done these things, he can make the search. These safeguards, which in our opinion apply (to, sic) searches under sub-section (2) also clearly show that the power to search under sub-section (2) is not arbitrary."*

2.29 Special procedure 1 – 'spot seizure' of documents produced

During the course of any proceeding before the Authorized Officer, where any accounts, registers or documents ('records') have been produced and he has 'reasons to believe' that taxpayer has evaded or attempting to evade payment of tax, such Proper Officer may seize such records 'on the spot' and record reasons in writing and issue acknowledgement.

Records so seized are not to be pre-authorized in Form GST INS-01 or seized in Form GST INS-02. This is a special procedure contained in section 67(11) of the CGST Act, where for certain 'reasons' to be recorded in writing (which must be carried on the file and would be subject to challenge in later proceedings) that those records are necessary to be immediately seized for purposes of inquiring into any past (or ongoing) evasion apparent from those records, such records may be immediately seized without any prior authorization and acknowledgement will be issued (akin to Form GST INS-02) due to the exceptional nature of the circumstances necessitating seizure of those records . Natural justice demands that these 'reasons' (for effecting such 'spot seizure') be disclosed at the time of seizure.

Records so seized may be retained without any time limit to return and may be relied upon for purposes of any proceedings under the Act. It is important to note that the expression 'prosecution' used in section 67(11) is not prosecution of offences under section 132. It is an expression of common English, which refers to the 'taking a course of action' and understood in the context of its usage. This is the correct legal expression for 'carrying out any appropriate proceeding' under the Act. When records so seized are relied upon in later proceedings where a show cause notice is issued, then those 'reasons' recorded in writing that evasion may have been resorted to, may be called into question. Taxpayer needs to be mindful that the Proper Officer must document proceedings along with reasons on the file. Refer earlier discussions about reasons to believe and challenge that they will be exposed to for a reappreciation of the emphasis to the exercise of this emergency authority by Proper Officer without any prior approval or oversight.

2.30 Special procedure 2 – 'test purchase' to check for invoices

Section 67(12) permits the Commissioner or any officer authorized (say, Specified Officer who is not the Authorized Officer conducting inspection), to pretend to be a customer and attempt to purchase goods or services or both from the business premises of a taxpayer only to check whether practice of issuing invoice is followed or not. In other words, while surprise nature of this 'test purchase' is another emergency power but one that cannot be exercised by jurisdictional Proper Officer or any other Officer in a routine manner even if there is suspicion that supplies are being made without invoice being issued, unless specific authorization is issued by the Commissioner or any Officer delegated with the power to issue such authorization.

It is incumbent that Commissioner or any officer authorized, must authorize any Specified Officer to make such test purchase under section 67(12) of Central GST Act. While no format of this authorization is prescribed in the Rules (for the reason that it is not to be produced to the taxpayer at the time of making such purchase), it is certainly an authorization that must be recorded on the files and, if required, be produced in proceedings under section 122 or 125 or 130 initiated based on observations in such test purchase.

As discussed earlier, the taxpayer exposed to a non-compliance when test purchase is made under section 67(12), will call into question, authorization by Commissioner, failing which, the entire proceedings will be tainted and any legitimate discovery of non-compliance will not result in any action against the taxpayer. Without a format being prescribed, Form GST INS-01 will not apply but authorization on the file will need to exist and be produced in adjudication (or appellate) proceedings.

It is seen that taxpayer's word against the Specified Officer's word comes up for scrutiny in adjudication or appeal when penalty is levied. The taxpayer must issue tax invoice where supply is made. And where discussion at the time of making test purchase indicated intention to make a sale-on-approval, then no obligation to issue tax invoice arises. The taxpayer must be clear as to the discussions leading to the test purchase and reason for not issuing tax invoice in this instance when it is issued in all other instances.

2.31 Test purchase versus Sampling

Section 154 permits "drawing samples" by Commissioner or any Authorized Officer, of goods, for any purpose, such as verification of provisional assessment under section 60 or determination of classification by conducting tests and verify correctness of classification or to investigate any possible liability under section 63 or any other purpose.

The authority to 'draw samples' is not to be equated with the authority of 'test purchase' under section 67(12). Test purchase under section 67(12) is exclusive to test one thing – whether invoice is being issued or not – which is not the purpose in section 154.

2.32 No power to question persons

There is nothing in section 67 that empowers 'questioning' persons present at the places of inspection or search. Power to question any person resides in section 70. Taxpayers must extend full cooperation and support in the discharge of duties by the Authorized Officer. Any objections regarding

validity, purpose and manner of discharge of duties by Authorized Officer must not be raised during inspection if Form GST INS-01 has been shown by the Authorized Officer. Objections, if any, may be raised after issuance but before replying to notice issued on conclusion of these proceedings.

Questions posed and replies submitted may be retracted and doubted in later proceedings and the Authorized Officer will not be able to rely on such information secured. Section 67 as well as rule 139 state precious little by way of 'duties and responsibilities of persons' during inspection or search proceedings. Any requirement to question any person requires proceedings to be initiated under section 70 by issuing summons (discussed later).

2.33 Places NOT to be inspected

Access to 'place of business' under section 71 does not apply to inspection or search under section 67. That is, the places to be accessed under section 71 are limited to places of business of 'registered person' but section 67 travels beyond places of business of taxable person and extends to the places of transport or storage of goods or accounts or any other place are also permitted to be inspected, unlike section 71 (discussed later).

Places specified in Form GST INS-01 alone may be inspected. This authorization should not be vague like 'at Mumbai or in Maharashtra' or inclusive like 'all known places of business activity'. Authorized Officer will not travel beyond the places specified in Form GST INS-01 for the reason that inspection of unauthorized places renders any real discovery at such unauthorized places to be considered illegal and the inspection without jurisdiction if the same is objected in later proceedings [see discussion about section 67(10) application].

Time (date or dates) to inspect must also be specified in Form GST INS-01 and not issued without an 'end date' for it to be completed or expire (by lapse of date and time mentioned to commence and conclude inspection in Form GST INS-01). Since authorization is exhausted by exercise or Authorized Officer exiting the place of inspection or even by lapse of time (date or dates) permitted, care must be taken to verify the actual date or dates of inspection to confirm the validity of inspection carried out.

2.34 Provisional attachment under section 83 (during section 67)

Attachment of property (including bank account), when interests of Revenue is at risk, is permitted under section 83 which include proceedings under

section 67. On a careful consideration of the proceedings under section 67, it is clear that after Form GST INS-02 but before Form GST INS-04, there is a small time gap when 'interests of revenue' may be considered to be at risk. If offending articles have been seized then, there is no risk to the interests of Revenue as custody of the seized articles are available with the Revenue. If the offending articles have not been seized then, it implies that there are no offending goods liable to confiscation or available for seizure and confiscation under section 130. Here also, no risk to the interests of Revenue exists and no action under section 130 is possible. Provisional attachment under section 83 must not be inter-changed with seizure of goods or other articles under section 67(2). And provisional attachment under section 83 is not a substitute for recovery under section 79. Also, provisional attachment under section 83 is not equivalent of confiscation under section 130. Each of these are discussed at appropriate places in this Handbook.

Care must be taken to (i) examine the jurisdiction to invoke section 83 (ii) continued risk to the interests of Revenue that is not redressed by seizure and (iii) risk of flight (taxpayer absconding without discharging liability when the same is finally determined). Artificial, imaginary or improbable risks cannot form the basis for this apprehension and permit provisional attachment. Provisional attachment powers may appear to be invoked as a 'quasi' recovery measure but within the time limit (of one year) allowed under section 83(2), the existence of these risks must be such that they will not continue beyond this time limit.

Therefore, the only occasion where section 83 can be pressed into service in the context of section 67 (other provisions when section 83 can be invoked not discussed here) is to attach (i) movable and immovable property of the particular taxpayer or (ii) money in bank account of particular taxpayer, which could legitimately provide security to recover revenue. 'Secreted articles' which are liable to seizure under section 67(2) are not the same as 'property' which is open to provisional attachment under section 83.

Provisional attachment does not require or involve seizure. Any property of particular taxpayer may be provisionally attached, even if they are not offending articles. They may not even be secreted articles liable to seizure. Non-offending articles such as capital goods, inventory and other property may be provisionally attached. Distinction between property that can be provisionally attached, and offending articles must be appreciated.

In this Handbook:

- The term "secreted articles" means goods and other articles which are secreted in place of search;

- The term "seized articles" means secreted articles which comprise of (i) goods liable to confiscation and (ii) documents, books etc. that are seized by Authorized Officer in Form GST INS-02; and
- The term "offending articles" means goods liable to confiscation, whether seized or not, including conveyance used in committing offence under the Act.

'Money' is neither goods / services in GST nor is it 'things secreted' to be considered offending articles. But money available in the bank may be accessed in recovery action when demand is confirmed. Provisional attachment under section 83, when proceedings under section 67 are in progress, will find legal support provided the 'risk to interests of Revenue' can be demonstrated (in writing recorded on the files contemporaneously).

The power of provisional attachment under section 83 is now available when (i) proceedings under sections 59 to 64 (Chapter XII) or sections 67 to 72 (Chapter XIV) or sections 73 to 84 (Chapter XV) have been "initiated" and (ii) there is risk of alienation of such property (belonging to taxable person and not family or relatives), in order to prejudice recoverability of revenue (after completion of due process as per law). Interestingly, proceedings under sections 65 and 66 (Chapter XIII) relating to audit and special audit, respectively, do not enjoy the facility of provisional attachment.

Provisional attachment does not result in transfer of property to Government. Provisional attachment must not continue beyond one year and property attached must be released on expiry of this time. By that time, proceedings must be concluded, and adjudication or appellate proceedings must have been set in motion.

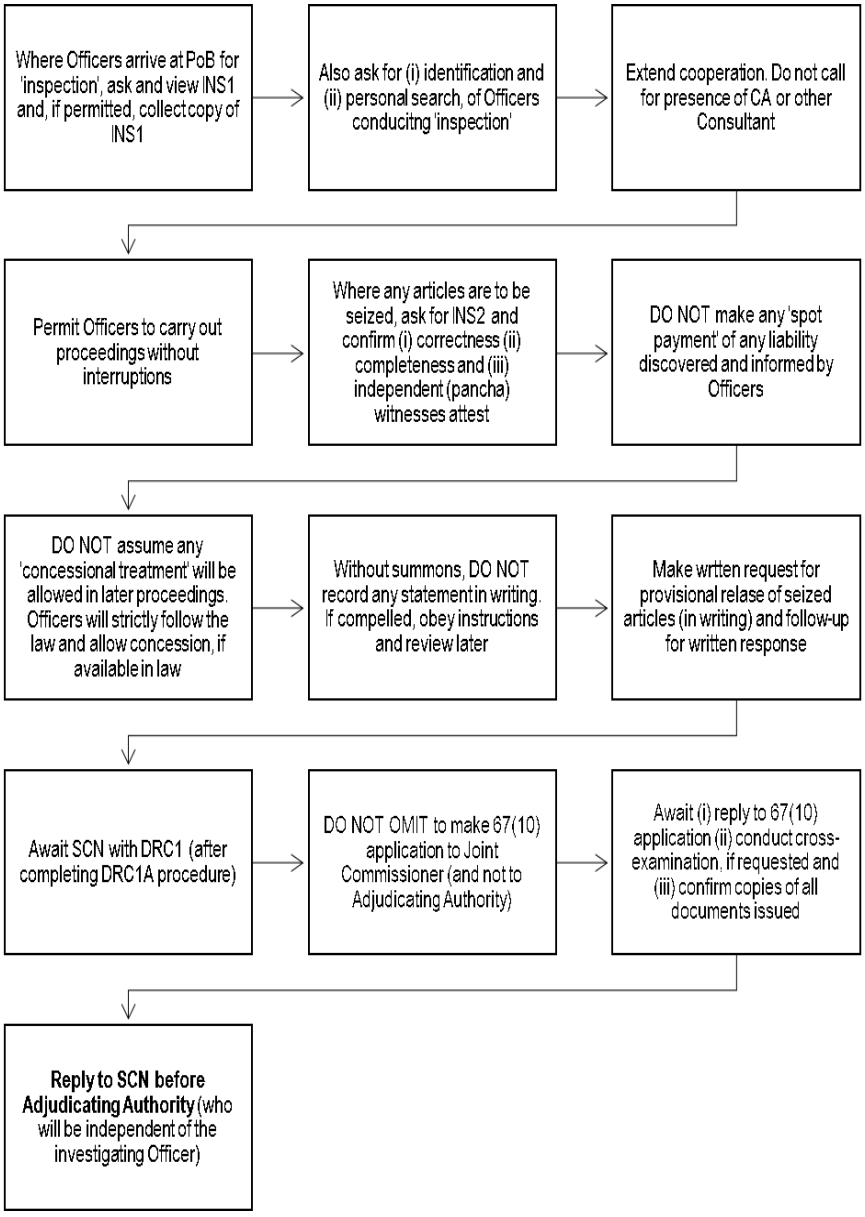
2.35 Accelerated recovery

Recovery under section 79 is permitted only when demand is crystallized by way of order of adjudication (or best judgement) and accompanied by Form GST DRC-7 (see rule 142(6)). No recovery action can be taken prematurely when investigation is commenced or even after notice is issued at the end of investigation which is accompanied by Form GST DRC-1/2 (see rule 142(1)(a) and (b)). Once adjudication is completed, section 78 bars any recovery action under section 79 for three (3) months. This time duration coincides with the normal time permitted under the section 107(1) to file appeal before the First Appellate Authority. However, proviso to section 78 lays down that if the Proper Officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, initiate recovery without waiting for the prescribed three (3) months. Therefore, in order to prevent accelerated recovery, the taxpayer must notify the Proper Officer of

his intention to file appeal or immediately make pre-deposit of the disputed tax or credit (and not of the interest or penalty demanded) under intimation to the Proper Officer of the operation of stay from any recovery action in terms of section 107(6) (suggested format is given in Chapter 8).

2.36 Taxpayer's response

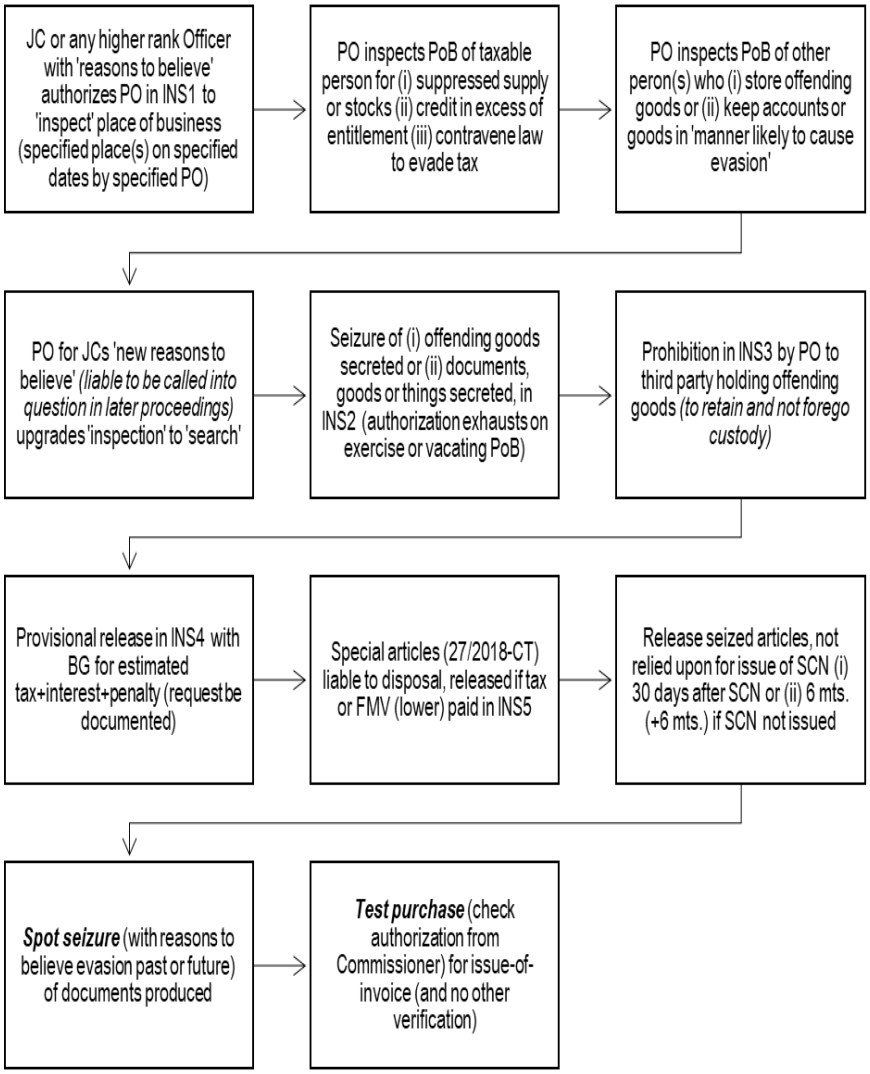
Based on experience under earlier laws and some new experience under GST law, following chart depicts the essential steps a taxpayer may consider in attending to proceedings under section 67:



2.37 Conclusion about section 67

Steps to be followed during inspection and search leading to seizure must be taken note of to understand the 'powers and obligations' bestowed on the Authorized Officer as well as the 'rights and remedies' allowed to taxpayer. A

quick overview is provided in the chart below:



Inspection is a very specific and emergency power as it contains various in-built safeguards in the form of prior authorization by Joint Commissioner (or higher rank Officer) for 'good and sufficient' reasons to believe and for other additional reasons emerging or validated after inspection to justify escalation of the proceedings from 'inspection to search'. Secreted articles discovered during search can only be seized.

Inspection is limited to transactions involving '*suppression of stock or*

supplies' or 'availment of disentitled input tax credit' or 'other contravention with intent to evade tax'. Search is an aggravated form of evasion where some device is employed by taxpayer to conceal the evasion. Exceptional misadventures demand exceptional powers. Exceptional powers need flexibility and section 67 allows flexibility but needs to be overseen by Joint Commissioner (or higher rank Officer). And proceedings initiated under section 67 must conclude with either 'no finding' or a show cause notice under section 74 read with section 130 (penalty under 122 may be in addition to it).

Chapter 3
Confiscation (Section 130)

3.1 Overview of steps involved

Based on the provisions of law, given below is an overview of the steps involved that one may anticipate being carried out by departmental Officers and discharge their statutory duties validly and in accordance with the requirements of law:

Step 1: Seizure is a pre-requirement to confiscate. Articles that are provisionally released may also be confiscated. Establishing identity of the articles which are liable to confiscation by process of seizure (in section 67) is an important step in confiscation proceedings;

NOTE: With the amendments to section 129(6) vide Finance Act, 2021 (made effective from 1 Jan 2022), the power of confiscation under section 130 has been delineated and made inapplicable to proceeding under section 129 of CGST Act.

Step 2: Option for payment of redemption fine (i) must be granted and (ii) acceptance or rejection of this option by the party must be secured and documented;

Step 3: Order of confiscation must be passed specifying the monetary amount of the penalty adjudicated along with confiscation (to recover said penalty) or by demand for payment redemption fine adjudicated (where Party accepts option to pay fine-in-lieu of confiscation);

Step 4: Order of confiscation (where redemption fine is not accepted) must result in disposal and realization of proceeds to appropriate against the amount of penalty adjudicated;

Step 5: Redemption fine adjudicated but not paid authorises disposal of goods liable to confiscation after allowing three months' time before initiating recovery action.

3.2 Nature of confiscation

Confiscation is not an emergency proceeding unlike seizure after search of premises. Show cause notice must be issued before confiscation and in order to issue such show cause notice, identity of offending articles must be

clearly established. Any article may be seized but only offending articles (liable to confiscation) can be confiscated. Confiscation by mistake is *void ab initio* in law.

Confiscation will instantly, without any prior consent of taxpayer, result in transfer of ownership (of confiscated articles) in favour of Government. For this reason, confiscation should not be the first step in cases of suspected tax evasion. It is the last step because the burden of storage, care and disposal of seized articles (which are liable to confiscation) will fall on the Proper Officer acting on behalf of the Government.

Proceedings that affect the rights of taxpayers cannot be undertaken without following the principles of natural justice (discussed earlier) as laid down in the case of *State of Orissa v. Dr (Ms) Binapani Dey & Ors (ibid)* and these instructive words have stood the test of time. For this reason, confiscation, including opportunity to pay fine-in-lieu of confiscation, cannot be determined without an adjudication order. In order to adjudicate and pass an order, it must be preceded by a show cause notice and when an adjudication order is involved, appellate remedies provided in the law cannot be by passed. Therefore, confiscation is the culmination of a due process that begins with seizure of goods liable for confiscation and ends with final order (adjudication or appeal) where questions of fact and law are finally determined and served on the taxpayer in Form GST APL -04.

Seized articles (discussed earlier) includes offending articles (taxable goods) and other articles (documents, books, or things). While all these can be seized, only offending articles can be confiscated.

3.3 Seizure MUST before confiscation

Goods (or conveyance) liable to confiscation must be physically available in order to initiate confiscation proceedings. If the custody of goods (or conveyance) is lost, then confiscation is not possible and when confiscation is not possible, no proceeding under section 130 is possible. Confiscation is of (i) taxable goods and (ii) conveyance (involved in committing offence) which are “offending articles” for purposes of confiscation proceedings under section 130. Fine-in-lieu of confiscation is on the person who opts not to forfeit the title to those offending goods.

Section 122 which appears to contain the causes-of-action which are also contained in section 130, do not overlap or cause any double jeopardy because penalty under section 122 is in respect of a person and confiscation under section 130 is in respect of the goods (or conveyance). Both are

independent and simultaneously applicable provisions and ingredients necessary in each case are separate. As such, when a single offence that attracts both section 122 and 130 are established as per due process, then the consequences under both these sections can be imposed on the taxpayer.

When custody of offending articles is lost (for any reason) but the offence can be established as per due process, penalty under section 122 may be imposed but not confiscation under 130.

3.4 Offences attracting confiscation

Every instance of non-payment of tax, even under special circumstances of section 74 do not support confiscation under section 130. Seizure of offending articles having already been discussed, the next important aspect to note is the nature of 'offence' involving goods or conveyance. An offence is committed by a 'person' but the consequences under section 130 is against the 'offending goods' (goods or conveyance) involved in the offence as a burden that is imposed on the person, independent of that under section 122 or even 132. Following are the offences that attract confiscation under section 130:

Description	Intent to evade	Tax liability
(i) Supplies in contravention (out/in)	Yes	Not paid
(ii) Omits accounting stock of goods	-	Liable but not paid
(iii) Supplies without registration	-	Liable but not paid
(iv) Any contravention	Yes	Not paid
(v) Use conveyance to transport goods	Connected to any of the above	

From the above, it appears that this list encompasses many different situations. For example, if a person under misunderstanding about eligibility to exemption, adopts a *bona fide* and beneficial interpretation and such interpretation is later determined by a Court (even in some other case) to be ineligible, then it does not come within the cause-of-action in clause (iii) of section 130(1). Any *bona fide* interpretation claimed by the taxable person must stand the test – whether a reasonable person would reach such a conclusion. Now, the question is whether Revenue has any remedy against such person to confiscate the goods (where physical custody of goods is not

with the taxable person). Clearly 'no' because consequence under section 130 is 'against goods' which have already been supplied long ago and are no longer available to be confiscated. And when goods are no longer available to be confiscated, confiscation is not possible (discussed earlier).

As in all other cases, offence cases must be carefully reviewed if all 'ingredients' to attract the incidence of penalty are brought home in the investigation and then in the show cause notice.

3.5 Distinction between 'seizure' and 'confiscation'

It is important to note the distinction between these two seemingly similar activities which are legally polar opposites:

Description	Seizure	Confiscation
Authority for action	Section 67(2)	Section 130(1)
Pre-condition	Authorization by JC in Form GST INS1 Part C	Seizure under section 67(2)
Object involved	Secreted articles	Offending articles
Result of action	Custody with Government	Title vests with Government
Exercise of authority	Exceptional and sudden exercise without adjudication	After issue of SCN and due adjudication
Appellate remedy	Not allowed	Allowed
Alternate remedy	Not allowed	Mandatory to allow option to pay 'redemption fine'
Release of articles	On issuance of SCN or after 6 months from date of seizure	On payment of redemption fine
Rejection of alternate remedy by Taxpayer	Not applicable	Confiscation on finality of order of adjudication

3.6 Determination of 'liable' to confiscation, by process of adjudication

Determination that any goods are 'liable' for confiscation, is an irreversible step. Such determination is not a conclusion that can be reached privately in the mind of the Proper Officer. In order to be lawfully made, it requires the full extent of 'due process' of adjudication to be employed. In other words, a notice must be issued to the right person with the allegation supported by evidence that identified goods (consignment or conveyance) are liable to confiscation by showing how the ingredients listed in any of the clauses under section 130(1) are fulfilled.

Unlike section 129(1), where either the consignor or consignee or transporter, may come forward and be subjected to the proceedings in representative capacity, proceedings under section 130 cannot be carried out against any such person. Only the person who holds title alone (and not other person acting on behalf) can be subjected to confiscation proceedings as it involves loss of title in favour of the Government. Therefore, identification of 'right person' is itself an important first step that the Proper Officer must undertake. Abruptness of action is acceptable in proceedings under section 67 or 129 but not under section 130.

For these reasons, it is important to refer back to the discussion under section 67(2) where goods cannot be routinely seized unless they are (i) liable to confiscation on *prima facie* consideration by the Proper Officer and (ii) such goods 'are secreted' and discovered during search and not left openly by taxable person. Authorized Officer may seize goods considered liable to confiscation due to the manner of secreting those goods but if the ingredients of section 130(1) are not established during adjudication (or appeal), Proper Officer must release them from seizure.

ICAI Handbook on 'Show Cause Notice' may be referred to for a detailed discussion on the due process of adjudication.

3.7 Offending articles alone liable for confiscation

Before proceeding further, it is important to explain which are the goods that come within the scope of confiscation proceedings. Goods involved in offence and conveyance (used with knowledge of offence) are offending articles and liable to confiscation proceedings. Documents, books, or things that are liable to seizure under section 67(2) but cannot be confiscated. Other goods (not being 'offending articles') of same taxpayer are also not liable to confiscation. Therefore, it is important that specific goods that are

offending be identified after seizure in order to initiate confiscation proceedings.

One of the instances where goods become liable to confiscation is where taxable goods are not accounted for by a person [clause (ii) to section 130(1)]. Say, these goods are mixed with other goods (inventory) that are accounted in the books, are all mixed up and found in an undisclosed warehouse and are seized during search proceedings under section 67(2). In this case, confiscation proceedings cannot be initiated against the entire quantify of 'seized articles' without first isolating the 'offending articles' and leaving out quantity that has been accounted for in the books. This is just to illustrate the complex nature of precise identification and record-building that is necessary to conduct valid confiscation proceedings. Lethargic record-keeping by the department would result in illegal confiscation if the taxpayer were to show that certain quantity is duly accounted for in the books. This would result in tainting the entire proceedings. Consider the same illustration where the goods are fluids (liquids or gasses) stored in a warehouse or intangible property. This illustration further shows the importance of adjudication to arrive at identify of 'offending articles' liable to confiscation. And seizure is the tool to 'secure and identify' goods liable to confiscation. Ambiguity or failure to identify 'goods liable to confiscation' can be fatal to confiscation proceedings. Goods (fluids) must also be carefully identified based on where they are stored or the unaccounted quantity within the overall quantity mixed and stored must be established properly, in order to confiscate that quantity of unaccounted goods (fluids).

3.8 Provisional release before confiscation

Since loss of custody frustrates confiscation, it is clear that seizure must precede confiscation and when seizure is carried out, even with the objective of confiscating, all the provisions of section 67 become available to taxpayer as a precursor to confiscation proceedings. Refer detailed discussions in earlier paragraphs regarding 'due process' to conduct inspection, then extend it to search (necessary to give rise to seizure), provisional release of seized articles and post-notice application for disclosure of discovery during proceedings as a measure of safeguard for taxpayer about the validity of said proceedings.

As such, the taxpayer is entitled to seek provisional release in Form GST INS-04 under section 67(6) read with rule 140. There is not a single exception or instance where the law permits Proper Officer to deny request for provisional release provided taxpayer is willing to execute bond and

furnish security. It would, therefore, be remarkable that Proper Officer (Authorized Officer) would refuse provisional release in spite of security offered in terms of rule 140.

Regardless of the quantum of liability estimated, once Form GST INS-02 is issued, the taxpayer may immediately request the Proper Officer who is enjoined with the duty to grant provisional release in Form GST INS-04. Care must be taken not to delay collection of seized articles beyond one month from approval of provisional release, after providing Form GST INS-04 to execute bond and furnish security as such failure is another situation that authorizes disposal of offending goods under rule 141 (Refer *clause 17 to Notification No. 27/2018-Central Tax dated 13 Jun 2018)*.

Provisional release of offending articles under section 67(6) does not impair confiscation proceedings in respect of those offending articles. After all, provisional release is to transfer custody to taxpayer for safekeeping, etc., but not appropriation and disposal (discussed earlier) so as to frustrate and cause prejudice to confiscation proceedings. Offending articles which are provisionally released continue to remain in custody of Authorized Officer constructively so that the Authorized Officer or another Proper Officer may continue confiscation proceedings in respect of those articles (refer discussion on redemption fine later).

3.9 Effect of amendment

The opening words in section 130(1) were amended w.e.f. 1 Jan 2022 from *"Notwithstanding anything contained in this Act, if any person"* to *"Where any person"*. Effect of this amendment can be appreciated to briefly consider the unamended provision.

Prior to this amendment, section 130 operated as a self-contained code, independent of section 67 or (unamended) section 129. In that form, there was no guidance as to how seizure was to be carried out in order to initiate confiscation proceedings. And it also created doubt if confiscation proceedings could be independently initiated on its own merit, but there were no machinery provisions which are necessary preparatory steps to initiate confiscation proceedings, without violating the bar on routine intervention by Proper Officer with the self-assessment of liability under section 59 by a registered person.

With this amendment, it becomes clear that wherever instances under other provisions of the Act, akin to any of the five situations listed in section 130(1), then the confiscation proceedings may be initiated. This makes

section 130 harmonious with other provisions of the Act which also provide the necessary machinery provisions to enable the initiation of confiscation proceedings.

3.10 Separate proceedings for goods and conveyance

All offending articles comprising of taxable goods of taxpayer forming one single offence may be included in one proceeding under section 130. But offending articles comprising of conveyance owned, operated by another person (owner of conveyance or warehouse-keeper) which are involved in the offence, must be proceeded under separate proceedings. This is to ensure each person (taxable person and owner of conveyance / warehouse-keeper) is free to advance his own defence without being fettered to each other's approach to the notice issued.

Where there are different offences or different persons, joinder of all persons in one proceeding is not permitted because the due process in section 74 read with section 130 requires each 'noticee' to be put at notice separately and allowed to independently defend his case, in the interests of justice. And each is a separate offence although in connection with the same transaction of offence.

Admissions by taxpayer could not implicate the transporter or the warehouse-keeper although such admission may have an effect against the other person or *vice versa*. Proceedings against goods and conveyance are two separate proceedings unlike proceedings under section 122 where there may be co-defendants or primary and secondary defendant.

3.11 Option to pay 'redemption fine'

All persons liable to confiscation are entitled to avoid forfeiture of title (to offending articles) due to compulsory transfer of property in the offending articles (goods or conveyance) by availing the 'option' to pay fine-in-lieu of confiscation. Such persons liable to confiscation must be allowed an opportunity to pay 'fine in-lieu of confiscation'. Offences by servants and agents also result in the consequences under section 130 to the owner of the offending articles. It is a matter of right of person charged with an offence attracting confiscation to be allowed an option to pay an amount as fine to secure release (or redemption) of the offending articles (goods or conveyance).

Now, let us say tax evaded is Rs.10 lakhs but if the value of goods is Rs.1 crore and the conveyance used to commit the offence is valued at Rs.2 crores, the option to pay redemption fine allowed will entail a fine which can

be *"up to market value of offending articles less tax chargeable*"**.** The Proper Officer is under no obligation to show lenience with regard to imposition of redemption fine. And the redemption fine can exceed the tax sought to be evaded. Use of expensive conveyance to carryout evasion of tax involving a smaller amount does not compel the Proper Officer to reduce the redemption fine but he is obliged to consider such fine that would 'meet the ends of justice' equivalent to the extent of loss that would ensue if confiscation had been ordered of that conveyance. The Proper Officer must exercise discretion based on the facts and circumstances of the case and offer redemption fine and penalty which must not be less than tax payable on the offending articles and shall not exceed their market value less tax payable thereon. If a conveyance is hired in committing the offence, then the owner of the conveyance may be permitted to redeem the conveyance on payment of fine equal to tax involved in the offending articles.

The only exception in case of confiscation of conveyance is where the offence is committed by the taxpayer, without the knowledge of the owner of the conveyance, in such a case, consequences under section 130 will not apply in so far as conveyance is concerned although the taxpayer may still be liable to all consequences in respect of goods involved in the offence. Offending articles which are provisionally released are either recalled for being confiscated or an option to pay redemption fine is extended in confiscation proceedings.

3.12 Penalty or fine

Penalty under section 122 is against the person liable for contravention of law, whereas fine-in-lieu of confiscation or redemption fine under section 130(2) is against offending articles (liable to confiscation). The difference between these two must be noted and not referred interchangeably as if causing 'double jeopardy'. They are two different 'causes of action' *albeit* arising from a single transaction. As such, both consequences can arise simultaneously but with respect to a person under section 122 and against the property under section 130. Penalty under section 122 is not the same as fine under section 130(2).

Imposing penalty under sections 122 to 129 requires due process of adjudication (with right to appeal). Imposing fine-in-lieu of confiscation under section 130 follows another proceeding (independent of the one imposing penalty) involving adjudication (with an independent right to appeal).

For this reason, the right person must be identified in order to issue the show

cause notice. Show cause notice issued to the wrong person will result in demand against that person being raised but dropped and the demand against the right person being omitted. Such errors are especially possible in case of interception of conveyance under section 68 when a representative appears before the Proper Officer. After due verification of the identity of the right person, proceedings should be addressed to such person but may still be served on such authorized person.

Even though the quantum of fine-in-lieu of confiscation (discussed earlier) and the penalty under section 122 are linked in the *second proviso* to section 130(2) to a certain 'maximum amount' to be levied as penalty, it must be kept in mind that the provision does not take away the discretion of the Proper Officer to impose any lower amount that would meet the ends of justice. Details of various penalties and fine-in-lieu of confiscation that are applicable against each person are as under:

Person	Against	Penalty	Confiscation or Redemption Fine
Taxpayer	Goods	Sections 122 to 129	Section 130
Owner or Hirer	Conveyance	Sections 122 to 129	Section 130

It is necessary to identify 'under which provision' of law a demand is being made and 'against which person'. Cause-of-action is one that must be permitted in the specific provision and the notice must bring home the allegation by discharging the burden of proof in respect of 'ingredients' laid down in the said provision that make up the contravention giving rise to the said cause-of-action.

3.13 Penalty not a 'tax'

Although provisions of section 129(1) referred to 'tax' prior to amendment w.e.f. 1 Jan 2022, it must be appreciated that it continues to remain an impost in the nature of penalty because tax can only be imposed when the taxable event under section 9 occurs. It is for this reason that the tax paid under section 129 is also listed as blocked credit under section 17(5)(i) and payment of penalty under section 129(1) referred to as 'tax' cannot be claimed as credit even if a debit note were to be erroneously issued subsequently.

The amendment w.e.f. 1 Jan 2022 sets right this anomaly by making necessary changes but interestingly the bar in section 17(5)(i) continues perhaps as a matter of abundant caution.

3.14 Final confiscation and disposal

Where payment of fine-in-lieu of confiscation is not opted either by the owner of goods or by the owner-hirer of the conveyance then, show cause notice will still be required to be issued under section 74 in conclusion of proceedings under section 67 or under section 130. Show cause notice will contain (i) all grounds to support confiscation and (ii) option allowed to pay redemption fine and written record of its exercise by each person.

Once adjudication order is passed in confiscation proceedings, it results in 'vesting of property' in the Government. Section 130(7) prescribes that after three months wait period for deposit of redemption fine (if opted), the Proper Officer may still dispose of the confiscated articles and appropriate the same against dues recorded in the adjudication order. It is interesting to note that these three months coincides with the period of three months allowed under section 107(1) to file appeal (similar to section 78 before taking recovery action under section 79) and then confiscated articles may be disposed-off and proceeds deposited with the Government. Reference may be made to rule 144 for the detailed procedure.

3.15 Procedure for disposal

Goods in custody of Proper Officer may be disposed of in accordance with rule 144 by conducting e-auction:

- Notice of restraint in Form GST DRC-16 for property not in custody;
- Notice in Form GST DRC-10 or Form GST DRC-17 indicating time and place of e-auction;
- Notice to successful bidder in Form GST DRC-11 to pay in fifteen days; and
- Certificate of transfer in Form GST DRC-12 to successful bidder on payment.

NOTE: Pursuant to amendments made vide Finance Act, 2021 (w.e.f. 1 Jan 2022), auction is prescribed within fifteen days to recover penalty ordered under section 129(3) of the CGST Act read with rule 144A of the CGST Rules.

3.16 Conclusion (Section 130)

Confiscation is a remedy against offending articles (goods and / or conveyance) that commences with establishing the ingredients that make up the offence and proceeding to finally confiscate and dispose the offending

articles or permit taxpayer to pay fine-in-lieu of such confiscation. Confiscation is meant to inflict a monetary burden on offender that not only appeases society for the offence attempted but also acts as a deterrent.

Confiscation is a procedure of delivering punishment to erring taxpayer in respect of offending articles and it is not an emergency power like section 67. And even though this may appear to be exceptional anti-avoidance powers being exercised, the courtesy of 'due process' is available even in these cases to ensure justice is not denied in confiscation proceedings under section 130.

Chapter 4
Inspection (Sections 68 & 129)

4.1 Overview of steps involved

Based on the provisions of law, given below is an overview of steps involved that one may anticipate being carried out by departmental officers and discharge their statutory duties validly and in accordance with the requirements of law:

Step 1: Intercept vehicle and verify documents.

Step 2: If verification of documents is not satisfactory, record statement of the person-in-charge of conveyance in Form GST MOV-01 about discrepancy (ies) in documentation (immediate).

Step 3: Pass orders for physical verification/inspection of consignment (goods and conveyance) in Form GST MOV-02 (immediate) and update online in Form GST EWB-03 in Part-B within 24 hours.

Step 4: Conduct physical verification/inspection within 3 days and report in Form GST MOV-04 and update the final report in Form GST EWB-03 in Part-B within 3 days.

Step 5: If required, seek extension for inspection in Form GST MOV-03.

Step 6: Repeat step 4.

Step 7: Pass orders for release in Form GST MOV-05, if no discrepancies are found.

Step 8: If detention is required, issue order of detention in Form GST MOV-06 and issue "show cause notice in Form GST MOV-07", within seven days.

Step 9: Pass Order imposing penalty in Form GST MOV-09, within further seven days, imposing penalty as per section 129(1).

Step: 10: Where request for release is sought under section 129(1)(c) along with undertaking to furnish security, permit provisional release in Form GST MOV-05 on furnishing of security equal to amount due under section 129(1)(a) or (b).

Note: Confiscation proceedings under section 130 have been delineated from proceedings under section 129 and as such issuance of second notice in Form GST *MOV-10 is not applicable w.e.f. 1 Jan 2022.*

Step 11: In case of failure to discharge penalty demanded in Form GST MOV-09, goods detained will be liable to disposal *via* e-auction within fifteen days (or lesser period if deemed necessary) to recover penalty levied.

4.2 Authority (Section 68)

Circular No. 3/3/2017-GST dated 5 Jul 2017, contains a list of Central Tax Officers empowered to intercept and inspect conveyance 'during movement'. Corresponding authorization issued by Commissioner of State Taxes need to be considered to confirm jurisdictional Proper Officer empowered to intercept conveyance. Electronic waybill ("EWB") was implemented *vide Notification No. 15/2018-Central Tax dated 23 Mar 2018* w.e.f. 1 Apr 2018.

Where the movement is completed without the documents prescribed under rule 138A and somehow the conveyance is not intercepted during movement then, authority of inspection is extinguished due to completion of movement. There is no provision in the law to inspect *post facto*, that is, by verifying that movement has been carried out without the prescribed documents but missed attention of Proper Officer(s) on all those occasions. This does not however preclude imposition of statutory minimum penalty under section 122(1)(xiv) in independent proceedings to discourage habitual non-compliance with and blatant disregard to requirements of section 68 read with rule 138A.

4.3 Verification on interception

Interception of conveyance is not to conduct reassessment of the transaction in question such as:

- Validity of movement declared to be 'other than supply';
- Correctness of 'form' of supply declared;
- Classification including correctness of exemption claimed;
- Valuation including nature of supply undertaken;
- Any other matter not relevant to the requirements of section 68 of the CGST Act read with rule 138A of the CGST Rules.

After identifying applicability of EWB under rule 138 of the CGST Rules, verification on interception of conveyance must be limited to the availability of:

- Invoice or delivery challan if movement is declared to be 'by way of supply'; or

- Delivery challan if movement is declared to be 'other than supply'; and
- EWB if consignment value* is above the prescribed limit.

** EWB will be required irrespective of consignment value where movement is to job-worker.*

EWB must contain Part A and Part B details correctly and completely. Part A corresponds to the transaction particulars of the movement and Part B corresponds to the identity of the conveyance.

Very limited role is conferred on the Proper Officer and rules 138B and 138C make it abundantly clear that matters outside this limited role are not to be taken up for examination. Similarly, there is no discretion to Proper Officer to overlook non-fatal non-compliances. Reference may be had to the *Circular No. 64/38/2018-GST dated 14 Sept 2018,* where 'minor errors' are listed, and it is stated that nominal amount of penalty may be imposed instead of declaring that penalty under section 129 will not apply to minor errors.

4.4 No preconditions for jurisdiction to intercept

This is probably the most distinguishing feature of all provisions in the law where interception does not require any preconditions, as long as interception is by a Proper Officer (duly authorized). Conveyance may be stopped for verification of documents without any suspicion or other form of intelligence being available about likely non-compliance. For this reason, taxpayer is only permitted to question whether the Proper Officer is duly authorized to intercept and inspect conveyance and consignment but not question the reasons for selecting the conveyance for interception and not any other conveyance travelling at the same time and in the same route.

Upon interception and inspection, if there is any discrepancy noted then proceedings may continue as discussed in this section. Neither can omission to intercept any specific conveyance nor selection of any specific conveyance be questioned. Jurisdiction to intercept is duly authorized, interception of 'any' conveyance in exercise of that extant jurisdiction and not an investigation or reassessment of liability.

4.5 Discrepancy and penalty

Even the slightest discrepancy will invite penalty under section 129, whether in respect of (i) goods only or (ii) both goods and conveyance which are referred to as 'detained articles'. The Proper Officer enjoys no discretion as per section 68 or rules thereunder to overlook minor discrepancies in EWB compliance, except as permitted *vide Circular 64/38/2018-GST dated 14*

Sept 2018, discussed earlier. Deviation from the requirements of rule 138A triggers imposition of penalty that are pre-defined in the law. The role of the Proper Officer is to examine 'whether discrepancy exists' or not. Quantum of penalty and manner of its imposition must follow due process in the law. And interception, detection of non-compliance and imposition of penalty are to be reported on portal in Part B of Form GST EWB-03 within 3 days from date of interception of the conveyance as per rule 138C.

The process of imposing penalty comprises of (i) interception (ii) inspection (ii) detention 'or' seizure and then (iii) penalty. Details of penalty applicable under section 129(1) are:

Section 129(1)	Taxable Goods	Exempt Goods
a) Owner of goods accepts penalty imposed	200% of tax	2% of value or Rs.25,000, whichever is lower
b) Owner of goods disputes penalty demand	50% of value or 200% of tax payable, whichever is higher	5% of value or Rs.25,000, whichever is lower
c) Either case	*Furnish equivalent security (Form GST MOV-05 + bond in Form GST MOV-08)*	

It is important to understand the nature of 'discrepancy' and the applicable course of action in the law. Here, 'time is of essence in proceedings' under section 68 and 129. Opportunity must be allowed to the person-in-charge ('PIC') or owner of the detained articles, to execute bond (with surety or bank guarantee) and release the detained articles, as the objective is not to compel payment of penalty under these emergency provisions where luxury of time is not available to avail rights and remedies available in law and with Form GST MOV-08, the interests of the Revenue are anyway well protected.

As per first proviso to section 129(6), the conveyance shall be released on payment by the transporter of penalty under section 129(3) or Rs. 1 lakh, whichever is less.

4.6 Penalty automatic or negotiable

The language of section 129 does not appear to provide any leeway for the Proper Officer to examine the *bona fides* of the taxpayer, entertain discussions as to the reasons for the non-compliance and vary the extent of penalty to be imposed in case discrepancies are detected in EWB

compliance. At the same time, not all non-compliances with the requirements in rule 138A are with the objective of perpetrating a fraud by moving taxable goods with intention not to report the transaction.

There could be several instances where there may be clerical errors in data in Part A of EWB, incomplete or incorrect data in Part B of EWB; a valid EWB may have expired or a valid EWB may been newly generated long after commencement of movement but just before interception of conveyance.

Discretion is admittedly the root cause of arbitrariness. And until *Circular no. 64/38/2018-GST dated 14 Sep 2018* came to be issued, penalty under section 129 was 'automatic'. However, with the issue of this Circular, CBIC introduced two classes of discrepancies in EWB compliance, namely (i) major discrepancy and (ii) minor discrepancy. Major discrepancies being those with a fraudulent purpose in not generating EWB. And minor discrepancies being attributable to inadvertence which is non-recurring in EWB compliance.

As such, on interception of conveyance where discrepancies are detected in EWB compliances, the taxpayer is now in a position to put forward material to show that those were not major discrepancies and explain the bona *fides* to claim complete waiver or levy of nominal penalty. After all, this circular is the Government's own interpretation of the law which is binding on the Proper Officer.

4.7 Detention on inspection

Detention does not imply seizure of consignment or conveyance as discussed in the context of section 67. And when the taxpayer 'admits penalty' imposed under section 129(1)(a) and discharges the same, proceedings will be concluded without any order of detention or seizure as per *proviso* to section 129(1). In terms of amended section 129(6), the Proper Officer is empowered to dispose of the detained articles even without first causing their title to pass to the Government.

Without express seizure, detailed articles will remain in the custody of the Proper Officer and the taxpayer will either have to discharge the penalty imposed or furnish security. It is important that custody of detailed articles be secured, in case the taxpayer chooses to contest the penalty imposed.

Omission of section 129(2) which expressly provided for provisional release under section 67(6) is not because provisional release is barred in section 129 but because provisional release is permitted inherently in section

129(1)(c) and that making section 67(6) applicable would be superfluous. Refer *Circular No. 41/15/2018-GST dated 13 Apr 2018* which prescribes the form and manner of securing provisional release of detained articles.

Immediately after inspection is completed and reported in Form GST MOV 04 and in Part B of Form GST EWB-03, release order or provisional release order must be issued in Form GST MOV 05. Necessary application in plain paper may be submitted seeking relief under section 129(1)(c) along with undertaking to furnish security for the provisional release of detained articles (suggested format is given in Chapter 8). Once detention is ordered in Form GST MOV 06, show cause notice must be issued in Form GST MOV 07. It is seen that this notice is very cryptic and even more cryptic is taxpayer's response. Some devious practices noted can be e.g., (i) undated statements forcibly collected from driver or other PIC (ii) long delays in reporting interception and detention and (iii) completely offline mode of conducting proceedings.

Taxpayers need to ensure (i) application under section 129(1)(c) is kept handy for submission (immediately on interception); and (ii) take all steps to secure release of detained articles with or without deposit of penalty imposed.

Once show cause notice is issued in Form GST MOV-07, adjudication as to the reasons for detention and extent of penalty imposed (discussed earlier about discretion now available) must be concluded by an order in Form GST MOV 09. This is an appealable order. It is common that the PIC or Owner may file an appeal under section 107 either based on temporary login allowed by Proper Officer or manually, as section 107(1) permits *"any person aggrieved by any decision or order"* to prefer appeal within 3 months from the date of communication of the order. Denying rights and remedies in law does not serve the ends of justice.

4.8 Provisional release after detention

Immediately after the discrepancy is noted in inspection report in Form GST MOV 04 and update in Part-B of Form GST EWB-03 is filed on the portal, provisional release must be requested in plain-paper application (suggested format given in Chapter 8) which will be permitted on furnishing a bond in GST MOV 08 vide provisional release order also in Form GST MOV 05.

Very often it is noted that the Proper Officer rejects the application for provisional release of detained articles under section 129(1)(c) and insists on payment of penalty imposed notwithstanding section 129(5). The First

Appellate Authority admits appeal against the order in Form GST MOV-09 (discussed in detail later) considering the amount paid under section 129(1)(a) or (b) to be a 'deposit' when it is urged and noted that option to furnish security was not entertained by Proper Officer.

4.9 Adjudication on detention

After inspection is completed and reported in Form GST MOV-04, Part-B of Form GST EWB-03 is updated; Whether detained articles are released (when no discrepancies are noted) or provisionally released (on application in all other cases), an order of release is passed in Form GST MOV-05.

Immediately, detention is ordered in Form GST MOV 06 based on the presumption that leans in favour of the Revenue in the inspection report in Form GST MOV-04 and a show cause notice is issued in Form GST MOV-07 as required under section 129(3) within 7 days. Hearing is expeditiously carried out and a speaking order is passed in Form GST MOV-09. In view of paucity of time to conclude these proceedings, Form GST MOV-07 and Form GST MOV-09 proceedings will be completed very quickly.

Taxpayers are often concerned that this urgency does not allow sufficient time to defend allegations. But the reasons for the limited time allowed for these proceedings are (i) the short point that is to be taken up for verification during inspection – are the documents prescribed in rule 138A available or not, and whether they are free of any discrepancies – or not and (ii) taxpayer having exercised option not to secure provisional release in Form GST MOV-05 even before detention order in Form GST MOV-06 is passed, there remains nothing further to be examined by the Proper Officer. Also, the concern about holding without necessary facilities for safe-keeping, detained articles would be exposed to the risk of theft or the possibility to be detained for very long. For these reasons, it appears that the swift procedure prescribed meets the ends of justice adequately.

As per section 129(5), on payment of amount of penalty imposed under section 129(1), all proceedings under this section will be concluded, subject to speedy appeal being filed under section 107(1) by taxpayer or person-in-charge (discussed later).

4.10 Insistence on payment of penalty for release of consignment

The remedy under section 129(1)(c) should be allowed by Proper Officer

intercepting consignment, when the taxpayer is confident that penalty under section 129 is not attracted and a request is made to release the consignment based on security in the manner prescribed in Form GST MOV-08. In such cases, payment of penalty should not be insisted upon.

Contrary to express words in section 129(5), a taxpayer may proceed to discharge penalty imposed and still prefer appeal. Taxpayer-appellant must ensure to challenge in appropriate cases in Form GST APL-01 that "payment of penalty was insisted prior to release of consignment and option to furnish security was not allowed". This is to ensure that the First Appellate Authority does not find the appeal not maintainable in view of the finality laid down in section 129(5). Filing a request before the intercepting Proper Officer to release the consignment under section 129(1)(c), even if the same may not be entertained as required as per extant instructions is advisable as this letter will go a long way in ensuring maintainability of appeal before the First Appellate Authority. In the case of *Hindustan Steel & Cement v. STO & Ors. W.P. 17454 of 2022, dated 20-Jul-2022,* the Hon'ble Kerala High Court held that getting goods released on payment, does not mean acceptance of the demand and opting to forego right to appeal.

In fact, there are a catena of judicial authorities wherein for technical reasons in the e-way bill etc., the goods and vehicles were detained. The petitioner paid the tax and penalty and the judicial authorities in writ petitions directed the authorities to refund the wrongfully collected amount of tax and penalty. Like in the case of *Shanu Events v. State of UP, Writ Tax No. 258 of 2022, dated 5 Aug 2022,* the Hon'ble Allahabad High Court dealt with a matter wherein the goods vehicle was detained under section 129 since the petitioner mentioned wrong PIN Code and as such the validity period of the e-way bill gets reduced. The mistake was inadvertent. The authorities demanded tax and penalty. The Court held it to be a *bona fide* mistake on the part of the petitioner and directed the authorities to refund the amount so paid by the petitioner.

4.11 Appeal against interception

Since 'any person' aggrieved by a decision or order is entitled to appeal under section 107(1), even unregistered person (whose consignment is intercepted in a State where goods were transiting) is entitled to prefer an appeal based on temporary login credentials created by the Proper Officer intercepting the consignment.

Failure to register objections in respect of show cause notice in Form GST MOV-07 will result in conclusion of detention proceedings *vide* speaking order in Form GST MOV-09 confirming penalty leviable under section 129(1). The remedy against the order in Form GST MOV-09 is an appeal before the First Appellate Authority under section 107 but failure to register objections in respect of show cause notice would operate to taxpayer's disadvantage in the appellate proceedings.

In appeals filed under section 107(1) against orders passed under section 129(3), pre-deposit of 25% of penalty is prescribed in section 107(6). In all other orders demanding penalty, pre-deposit is required only in respect of disputed tax. Where consignment is released only on payment of entire penalty, appeal may be filed without any further pre-deposit.

4.12 Inapplicability of section 125

It is also noted that when submissions are made against imposition of maximum penalty prescribed in section 129(1), taxpayers have been granted relief by way of reduction in penalty by (i) waiving penalty under section 129 and (ii) imposing penalty under section 125. This is noted in the orders of First Appellate Authority and sometimes even in Form GST MOV-09.

When the proceedings under section 129 are made a self-contained code by its opening words in sub-section (1), it would be a misapplication of law to invoke an altogether different provision in section 125 to impose an *ad hoc* amount of penalty.

These inadvertent errors are being revised in proceedings under section 108 causing administrative pile-up due to lack of jurisdiction for Proper Officer to apply section 125 to facts which are already covered exhaustively and exclusively by section 129

4.13 Inapplicability of post-verification

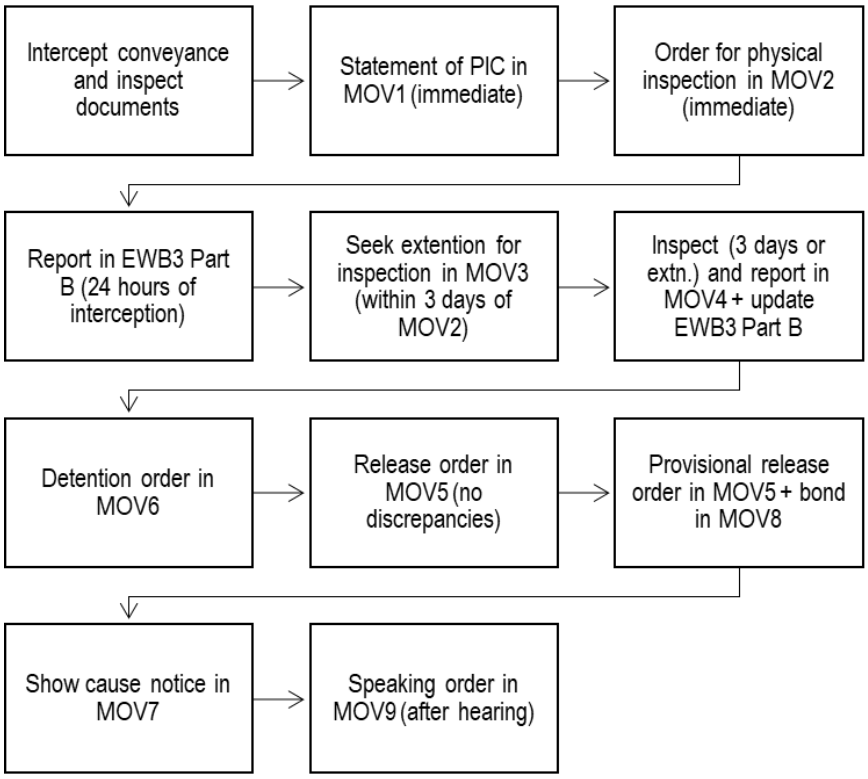
Penalty under section 129 for discrepancies in compliance with section 68 are permitted to be imposed 'only on interception'. In other words, this penalty can be imposed when non-compliance is caught 'red-handed' only. And for this reason, penalty under section 129 cannot be imposed in proceedings under section 61, 65 or 67, even if, there are clear discrepancies noted such as (i) EWBs not issued (ii) EWB data erroneous or (iii) any other discrepancy. If not caught red-handed, the taxpayer escapes consequences. However, penalty under section 122(1)(xiv) may be imposed. (discussed earlier).

4.14 Inspection process walk-through

Detailed procedure for proceedings under section 129 are contained in the following circulars:

- Circular No. 41/15/2018-GST dated 13 Apr 2018 (master Circular);
- Circular No. 49/23/2018-GST dated 21 Jun 2018 (amending); and
- Circular No. 64/38/2018-GST dated 14 Sept 2018 (also amending).

These Circulars are issued under section 168 and are binding on all intercepting Proper Officers. The workflow that is contemplated in the law and carried through in the rules is represented below in the walk-through diagram:



4.15 Conclusion (Sections 68 and 129)

Payment of penalty under section 129 concludes all proceedings. As such all amounts paid under section 129 partake the character of penalty. Non-compliance with section 68 attracts an irrefutable presumption of 'intent to

evade' payment of tax such that consequence against taxpayer for failure to comply with section 68 is attracted under section 129 as well as consequence against detained articles, whether goods or both goods and conveyance, is attracted under section 129(6), though both may be collected from taxpayer or transporter who comes forward and appears in these proceedings.

To meet the ends of justice, Government has intervened to create two classes of discrepancies in EWB compliances so that *bona fide* cases are not visited with the rigours of section 129 that are best invoked in cases of flagrant violation of the inconspicuous administrative feature in GST of using EWB to monitor tax compliances remotely.

Chapter 5
Arrest (Section 69)

5.1 Overview of steps involved

Based on the provisions of law, given below is an overview of steps involved that one may anticipate being carried out by departmental officers and discharge their statutory duties validly and in accordance with the requirements of law:

Step 1: Identify 'warrant cases', that is, cases which require Commissioner for good and sufficient 'reasons to believe' that arrest is warranted and thus, he issues an 'order' (commonly understood as 'arrest warrant') to be executed by any Authorized Officer.

Note: Offences listed under clauses (a), (b), (c) or (d) of section 132(1) and punishable under sub-clause (i) or (ii) of section 132(1) and offences punishable under section 132(2), in respect of which powers for arrest are provided under section 69(1), require Commissioner's warrant.

Step 2: Officer executing the warrant, is required to establish the identity of the person and place the said person under arrest. The Officer is then required to report execution of warrant back to Commissioner. The Officer is required to inform the detenue (or arrested person) about the grounds for arrest and then to produce before Magistrate within 24 hours to consider releasing him on bail or grant remand for further investigation.

Step 3: Remand application to be filed by the officer before Magistrate seeking custody for investigation. The Magistrate may grant remand for custodial interrogation or order judicial remand with visitation authorized to conduct interrogation of detenue (discussed later).

Step 4: All other cases which do not require Commissioner's warrant, are commonly understood as 'summons cases', that is, cases under other clauses of section 132(1) which are stated in section 132(4) to be 'non-cognizable and bailable' offences.

Step 5: Issuance of show cause notice under section 74 for offence and detention under section 69 for prosecution under section 132 may be taken up in parallel proceedings independently.

5.2 Nature of punishment (Section 132)

Section 132(1) identifies 12 causes-of-action [listed in clauses (a)-(l)] that attract 'punishment' but the power to arrest is found in section 69(1) where the Commissioner may authorize the arrest of such person(s) based on 'reasons to believe' (refer earlier discussion about reasons to believe and its challenge). Offences, with respect to punishment specified, are of two types:

- Non-cognizable and bailable offences; and
- Cognizable and non-bailable offences.

5.3 Purpose of arrest in criminal prosecution

Punishment is the sentence awarded after conclusion of trial. Arrest of persons is not the commencement of sentence but preparatory to filing of complaint under section 190(1)(a) of Cr.PC by GST Officer requesting Magistrate to take cognizance of the offence involved and direct trial.

It was held in the case of *Ramesh Chandra Mehta v. State of WB AIR 1970 SC 940*, that where Customs Officers were held not to have power to file a report under section 173(2) before the Magistrate (under section 190(1)(b)) but only a complaint under section 190(1)(a) of Cr.PC to take cognizance and proceed with commencement of trial for the offence. It is important to note that the entire legal principles relating to Customs Officers is now applicable to GST Officers. Reference may be had to the decision in the case of *Tofan Singh v. State of TN (Cr.Apl. 152 of 2013)* which came up for consideration more recently in *Vijay Madanlal Chowdhary & Ors. v. UoI & Ors (SLP (Cr.) 4634 of 2022).*

For this reason, Customs (and GST) Officers are not Police Officers. As such, limitation against 'self-incrimination' or bar on obtaining evidence in proceedings under section 24 to 30 of Indian Evidence Act, 1872 are not available to proceedings before the Customs Officers. And this position may not be too far from being followed in GST, considering that the only equivalence to Proper Officer in GST with an officer-in-charge of police station is found in section 69(3)(b) which only limits the powers to 'release on bail' and no others.

Reference may be had to section 41 of Cr.PC where Police Officer is empowered to arrest a person without an order (or warrant) from Magistrate. In GST, Commissioner's order is a must. Reference may be had to the decision of Apex Court in *Siddharth v. State of UP & Anr. (Cr.Apl.838 of 2021)* where these instructive words are extracted in *Instruction No.2/2022-23 [GST-Inv.] dated 17 Aug 2022* and reproduced:

> *"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."*

Herein lies the key elements when arrest is justified and the mitigating factors to avoid arrest:

Justification to arrest	**Mitigating Factors**
Custodial investigation is necessary	No risk of (accused) absconding
Heinous crime is involved	Obeying summons *
Possibility of influencing witness	Cooperated in investigation
Risk of (accused) absconding	

** Furnishing documents and providing clear and non-evasive replies and voluntary payment of tax.*

Note: Merely because there is a statutory right to arrest is not enough to arrest the accused unless the mitigating factors are shown to be missing.

Reference may be had to section 41B of Cr.PC where the procedure after arrest is described which is made applicable to section 69(3) stating that the Proper Officer must:

- record accurate, visible and clear identification of arrested persons;
- prepare memorandum of arrest; and
- inform the person arrested that the next of kin or friend is entitled to be informed of the arrest.

Arrest is often considered as punishment in itself, however, nothing is farther from the truth. Magistrate who takes cognizance of the offence alleged may, initially examine the complaint filed and determine the application by

Revenue for remand in terms of section 167 of Cr.PC for custodial interrogation. CBIC has advised in *Instruction No.2/2022-23 [GST-Inv.] dated 17 Aug 2022* (para 4.1) to ensure Officers are well-informed about the provisions of Cr.PC so that there is no misapplication of the law. Matters involving interpretation of law or where differences in interpretation are involved, do not justify exercise of exceptional powers of arrest is clearly reiterated in *Instruction No.2/2022-23 [GST-Inv.] dated 17 Aug 2022* (para 3.4).

5.4 Detention Process

The detenue or a person who has been arrested who is to undergo trial, will need to undergo certain legal process as listed hereunder:

a) *Admit bail (and release)*– This is the first requirement even before anything relating to allegations of offence are taken cognizance of by the Magistrate. Remand application will state the reasons why custody of detenue is required to secure cooperation in investigation and to explain transactions relating to the offence. This is custodial interrogation. If the Magistrate is not satisfied with the reasons for custodial interrogation but reasons for detention such as risk of flight or absconding or risk of destruction of incriminating evidence yet to be seized or intimidation of witnesses, etc., appear to exist, then the detenue may be remanded to judicial custody (lodged in a prison).

b) *Complaint* – This is the next step where the Magistrate examines the complaint filed by GST Officer ('complainant') under section 190(1)(a) of Cr.PC for Magistrate (para 5.3 of Instruction No.2/2022-23 [GST-Inv.] dated 17 Aug 2022) to take cognizance of the offences described in the complaint. If the Magistrate is not satisfied that a *prima facie* case has been made out to take cognizance and direct trial to be commenced, the Magistrate may direct that investigation be continued under section 156(3) of Cr.PC in order to make a *prima facie* case, failing which, the complaint will be dismissed and the detenue discharged.

c) *Trial* – Magistrate frames charges based on the *prima facie* case made out in the complaint. Once charges are framed the 'due process' of trial in Cr.PC will commence such as (i) pleading by accused (ii) leading evidence by either sides (iii) examination-in-chief, cross-

examination and re-examination (iv) arguments (v) judgement and (vi) sentencing. These are oversimplified steps to show the long path that one has to travel before conviction and not to be the background material on prosecution.

d) *Adjudication* – While Magistrate is not concerned with adjudication of the offence involving payment of tax, interest and penalty, the findings in adjudication can have a bearing on the trial. With Economic Offences (Inapplicability of Limitation) Act, 1974, there is no risk that accused may escape prosecution if the trial were deferred until conclusion of adjudication (and appeal) in the civil case under section 74 of the CGST Act. Therefore, at any time after taking cognizance, the Magistrate may post the matter for a long date so that final findings in the civil case may be produced which can be material to be taken into consideration in the trial. Considering the advanced age of accused, complainant may approach the Magistrate to take up trial pending disposal of the civil case which may be pending in appeal. Magistrate may direct that the complainant may seek early hearing of the civil case or may allow this application and take up the trial.

In the light of the above (deliberately over-simplified for ease of presentation for this discussion) steps presented, the process of prosecution in GST may be understood by contrasting the (limited) role played by arrest in relation to the (larger) process of prosecution until conclusion of trial and passing of an order sentencing the accused, if found guilty.

5.5 Offences attracting punishment under section 132

Section 132 lists 12 offences for which prosecution can be launched. The offences are given hereunder:

(a) Supply of goods or services or both without the cover of invoice with an intent to evade tax;

(b) If any person issues any invoice or bill without actual supply of goods or services or both leading to wrongful input tax credit or refund of tax;

(c) Any person who avails input tax credit using invoice referred in point (b) above or fraudulently avails input tax credit without any invoice or bill;

(d) Collection of taxes without payment to the Government for a period beyond 3 months of due date;

(e) Evasion of tax, or obtaining refund with intent of fraud where such offence is not covered in clause (a) to (d) above;

(f) Falsifying financial records or production of false records/ accounts/ documents/ information with an intent to evade tax;

(g) Obstructs or prevents any officer from doing his duties under this Act;

(h) Acquires or transports or in any other manner deals with any goods which he knows or has reasons to believe are liable for confiscation under this Act or rules made thereunder;

(i) Receives or in any way, deals with any supply of services which he knows or has reason to believe are in contravention of any provisions of this law;

(j) Tampers with or destroys any material evidence or documents;

(k) Fails to supply any information which he is required to supply under this law or supply false information;

(l) Attempts or abets the commission of any of the offences mentioned above.

This section enables institution of prosecution proceedings both against the offenders and also against those persons who are instrumental in committing such offence. Such persons who are aiding the commission of the offence are punishable only if they retain the benefits arising from the offence.

The period of imprisonment and quantum of fine varies depending on the amount of tax evaded or seriousness of the offence as listed below.

Amount of Tax evaded/ erroneous refund/ wrong ITC availed or utilized	Fine	Imprisonment
Exceeding Rs. 5 Crores	Yes	Upto 5 years
Rs. 2 Crores – Rs. 5 Crores	Yes	Upto 3 years
Rs. 1 Crores – Rs. 2 Crores	Yes	Upto 1 year
In the absence of specific/ special reasons to be recorded in the judgment of the Court, the imprisonment in the above cases will not be less than 6 months.		

If any person commits any offence specified in clause (f), (g) or (j) above, he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

Repetitive offences, without any specific/ special reasons recorded in the judgment of the Court, will entail an imprisonment term of not less than 6 months and can extend up to 5 years plus fine.

All the offences covered in section 132 are non-cognizable and bailable except the following offences which are cognizable and non-bailable:

- Offences covered in points (a) to (d) as mentioned above if the amount of tax evaded or input tax credit wrongly availed or utilized or refund wrongly taken exceeds Rs. 5 crores.

Every prosecution proceeding initiated requires prior sanction of the Commissioner. Placing a person under arrest based on Commissioner's 'order' under section 69(1) is independent of the 'sanction' by Commissioner to initiate prosecution proceedings (para 3 and 6 of Instruction No.4/2022-23 [GST-Inv.] dated 1 Sept 2022).

The explanation to this section states that "tax" includes which are levied under CGST, SGST, UTGST, and GST Compensation Cess Act. Basically, it includes the amount of tax evaded, amount of input tax credit wrongly availed or utilized or refund wrongly taken under the Act.

While arrest of persons is limited to cases covered by section 69(1), but prosecution of offences is independent and operates irrespective of whether those persons (accused) have been arrested under section 69 or not. Omission to arrest does not bar persons (accused) from being prosecuted.

Where the offence (listed in the 12 categories in section 132(1)) is made out, prosecution may be initiated at any time based on facts and circumstances of each case. In order to understand these categories of offences, there is another view (or school of thought) which interprets section 132 as under:

Primary Offences: Section 132(1) contains a list of 12 different categories of offences. It is very well established that for any person to be charged with an offence, the act or abstinence of accused must be 'described with the words listed in the law' and all the ingredients laid down in specific clauses of section 132(1) must be found to exist in the 'act or abstinence' with evidence to be considered in the trial.

Out of these 12 different categories, 'primary offence' is one where the resultant effect of any category of offences is that '(i) tax is evaded or (ii) credit is wrongly availed or utilized and (iii) refund is wrongly taken' which are liable to minimum punishment prescribed in section 132(1), if the amount involved in these primary offences are at certain levels.

There are five offences listed in clauses (a) to (e) of section 132(1) and these five offences involve one of these primary offences, that is, they result in (i) tax evasion [clause (a), (b) and (e)] (ii) fraudulent claim of credit clause (c) and (iii) failing to deposit (for certain duration) the tax collected clause (d). These three are referred as 'primary offences' and entail certain punishment when the amounts involved are at certain levels. For instance, in case of the offence relating to falsification of stock records, the consequence may be that tax is evaded but the fact of such falsification itself is the offence and not the consequent evasion of tax. As such, falsification of records would not fall within the scope of primary offence to attract the minimum punishment prescribed (provided monetary limits also exists). Falsification of records (with intent) must be punished for that offence and not due to the quantum of tax evaded due to it.

It is only in case of 'primary offences' that the minimum prescribed punishment in section 132(1) is attracted:

Amount involved	Punishment
Above Rs. 5 cr.	5 years with fine
Rs. 2 cr. to Rs. 5 cr.	3 years with fine
Below Rs.2 cr.	TBD **
** *to be determined by Magistrate after trial.*	

Here, it is important to note that 'primary offence' is traceable in clause (a) to (e) of section 132(1). *Note that clause (a) to (d) alone are referred to in section 69.* Clauses in section 132(1) that relate to primary offences must be distinguished from clauses in section 132(1) that require Commissioner's warrant under section 69(1) (discussed earlier).

Associated Offences: Having identified that 'primary offences' are traceable in clauses (a) to (e) of section 132(1), it would be safe to state that clauses (f) to (l) of section 132(1) relate to offences by association. Associated offences are those which do not involve the ingredients of the primary offence directly or proximately, namely (i) tax evaded (ii) credit wrongly availed or utilized or (iii) refund wrongly taken but are nevertheless offences as defined in section 132(1)(f) to (l).

Associated offences will still be punishable as seen from the words of section 132(1)(iii) : *"in case of **any other offence** where the amount of ……. exceeds one hundred lakhs rupees….."*. That is offences which are punishable under section 132 but those that do not come within clause (i) or (ii) of section

132(1) will not attract minimum punishment prescribed. Had this clause (iii) of section 132(1) simply stated "in case where the amount of tax……." then, it would have operated as the third slab of monetary limit for the specified punishment. But the words "any other offence" operates to the exclusion of offences listed in clause (i) and (ii) of section 132(1). For this reason, primary offences whose monetary value is below Rs. 2 cr. do not have any minimum prescribed punishment. And by this reasoning, associated offences above Rs. 2 cr. and below Rs. 1 cr. also do not have any minimum prescribed punishment and is left to the judgement of the Magistrate trying the case.

Associated offences and the punishment prescribed are:

Amount involved	Punishment
Above Rs. 2 cr.	TBD **
Rs. 1 cr. to Rs. 2 cr.	1 year with fine
Below Rs.1 cr.	TBD **
** *to be determined by Magistrate after trial.*	

Offence by association is not to be limited to abetment but all those transactions that constitute an offence under section 132(1) but without meeting the standards of primary offence under clauses (a) to (e) thereof. As regards these associated offences, it is important to recognize the nature of these offences and differentiate with primary offences.

Three specified cases where a six-month punishment is prescribed relate to:

f) Falsification of records to mislead plain understanding of a transaction, procure advantage and result in evasion. For example, job-worker charging lower rate of tax when services are supplied to unregistered principal where higher rate of tax is applicable as per job-work tariff notification;

g) Obstructs an Officer in the discharge of duties. For example, prevents an Officer to conduct search.

j) Tampers with or destroys evidence that establishes wrongdoing. For example, removes articles which were left under order of prohibition.

Repeating any of these offences although not separately listed, attracts maximum punishment [as per section 132(2)].

5.6 Offences and ingredients to offences

Having understood that offences must be (i) pleaded and (ii) proved, to

prosecute the lawbreakers under section 132 in the complaint filed before Magistrate, it is inescapable that the 'ingredients' that make up the specific offence must be precisely brought out in the complaint.

However, reference may be had to section 222 of Cr.PC where the Magistrate can convict the accused of a minor offence, not included in the charge-sheet, if its ingredients are proved during the trial. Refer also section 319 of Cr.PC where the Magistrate can arrest a witness if during examination, he appears to have committed an offence punishable even if not charged. These provisions apply to proceedings under section 132 (but not section 122) as the transaction involved in the offence is at-large before the Magistrate and GST Officer's role is limited to that of a complainant.

5.7 Invisible ingredients

The expression 'offences' is used in section 132 as well as in section 122. Care must be taken to observe subtle and invisible ingredients that differentiate offences under these two sections. While a detailed discussion about section 122 is not germane to the topic in this handbook, reference to some comparative illustration is relevant to demonstrate the subtle and invisible ingredients that are super added in section 132.

Offence described in section 132(1)	Offence described in section 122(1)
(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****;*	*(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;*

Every omission to pay tax on outward supply attracts penalty under section 122(2) but to impose penalty under section 122(1), the person must not already be a registered person but should be liable to tax. Such person will be liable to penalty under section 122(1)(a). But for this person to be liable to prosecution for offence under section 132(1)(a), not only is the existence of (i) a taxable outward supply required to be established but also (ii) that such person has undertaken this taxable outward supply with (iii) the intention to evade tax.

'Intention' is not a matter of accusation but one where the following must be established and to the satisfaction of the Magistrate, namely:

(i) Such person carried out a taxable outward supply;

(ii) With full knowledge that it is liable to output tax;

(iii) Chose not to discharge this liability; and

(iv) Employed some 'devise' as a means to conceal this transaction from being detected.

As can be seen from the above, it is not easy to establish 'intention', that too, to the satisfaction of a Magistrate who is independent and will accept only credible evidence to support the allegation and be swayed by conjecture. Intention is not a secret thought in the mind of the accused taxpayer. Intention is the visible manifestation of that secret thought. It is the immediate end of undertaking the transaction and employing means that make detection impossible (or a device) in the ordinary course.

Employing a 'device', is to create a distraction that someone viewing the transaction on the face of it is likely to miss or reach a conclusion that no liability exists. For example, omitting to issue a tax invoice itself is that device that makes detection of liability impossible. Omitting to take registration, omitting to account the outward supply or payment received, all add up to fortifying this 'device' or means of rendering a taxable outward supply undetectable. This is an invisible ingredient that must necessarily exist in order to attract section 132(1)(a) which is not required to attract section 122(1)(i). It requires fewer ingredients to attract penalty under section 122(1)(i) and much more required to attract punishment under section 132(1)(a). The degree of proof required in case of prosecution for offences under section 132 is far higher than that to impose penalty for offences under section 122 (para 3.1 of Instruction No.4/2022-23 [GST-Inv.] dated 1 Sept 2022) which emphases the need for proof to be "beyond reasonable doubt" which is far more than that required to confirm civil penalty under section 122.

Now, the phrase 'to evade tax' is used in section 74 as well as in section 132. While the result must be evasion of tax in both cases, the taxable person alone will be fastened with the burden of tax (and interest) under section 74 and penalty under section 122(2)(b), but "whoever" commits the offence (or causes and retains benefits) under section 132(1)(a).A deep study of each of the twelve clauses will bring out the subtle and invisible ingredients that are required to establish an offence under section 132.

No proceeding under section 69 may be initiated in the absence of the culpable mental state. While section 135 makes this requirement (of culpable mental state) presumable, but that will be by a Court and not at the time of

arrest. Requirement of this special ingredient cannot be bypassed or presumed while granting authorization to proceed with arrest. This is emphasised in para 3.3 of Instruction No.2/2022-23 [GST-Inv.] dated 17 Aug 2022.

5.8 Warrant 'offence' cases

Primary offences are listed in clauses (a) to (e) to section 132(1) but out of these offences, section 69(1) picks out clauses (a) to (d) and places on the Commissioner a duty to issue an 'order to arrest' (also popularly referred as 'warrant') where the monetary value involved exceeds Rs.2 cr. Offences that do not require warrant are referred as 'summons cases' in Cr.PC.

Warrant cases above Rs.5 cr. will be cognizable and non-bailable and between Rs.2 cr. to Rs.5 cr. will be non-cognizable and bailable. It is important to note that this classification (cognizable or non-cognizable) is relevant for safeguarding persons accused of offences liable to be prosecuted under section 132. Summons cases must be proceeded with even greater care as the supervisory overseeing is not applicable to restrain any over enthusiasm by Proper Officer. With the right to bail as per section 50 of Cr.PC is a protection against unlawful detention of persons accused who are still considered innocent until established otherwise in trial.

5.9 Arrest in 'warrant cases'

Section 69(1) clearly specifies that Commissioner's order (warrant) is necessary for the accused to be arrested in respect of offences (i) under clauses (a) to (d) of section 132(1) whose monetary value is above Rs. 2 cr. and (ii) section 132(2). (These are called warrant cases). This leads to the understanding that persons accused of offences (of 4 clauses) whose monetary value exceeds Rs.2 cr. or of subsequent offences of any monetary value can be arrested.

Requirement to place a person under arrest is limited to (i) offences under section 132(5), which are cognizable and non-bailable and (ii) offences under section 132(4) which are non-cognizable and bailable but are covered by section 69(1) being only offences under section 132(1)(a) to (d) and punishable under clause (ii) and offences under section 132(2). This is clear from para 5.1.1 and 5.1.2 to *Instruction No.2/2022-23 [GST-Inv.] dated 17 Aug 2022.*

5.10 Rights of Arrested Person

Constitutional guarantee of 'right to life' includes the right not to be detained before trial, subject to exceptions provided in law. Section 50 of Cr.PC provides for bail as a matter of right so as not to leave this Constitutional guarantee a mere illusion.

The arrested person has the right to be informed of the allegation and be released on bail or the Officer should inform the next of kin or friends to arrange to approach the Magistrate and secure bail. Section 57 of Cr.PC is very important provision where the arrested persons are not to be detained for more than 24 hours but swiftly be presented before a Magistrate under section 167 Cr.PC to consider the terms of release on bail or to order remand to departmental / judicial custody.

Commissioner's warrant must be executed by the Proper Officer speedily and unexecuted warrants will expire within the time specified therein unless extended. Warrants cannot remain outstanding indefinitely. Executed and lapsed warrants must be returned to the Commissioner for noting or declaration of the absconder or for further directions. Refer para 5 in *Instruction No.2/2022-23 [GST-Inv.] dated 17 Aug 2022* regarding 'post arrest' formalities.

5.11 Bail and bond

Bail is an acceptance by way of undertaking to comply with the orders of the Magistrate (or Proper Officer) releasing the detenue or arrested person to enter appearance when required in investigation or trial. Bail will be attached with a monetary value of such undertaking which can be invoked to enforce (not a substitute for) appearance of arrested person when so ordered as per section 436 of Cr.PC.

Bail without monetary security may be permitted with personal surety of other persons of repute and standing in society to be responsible to procure arrested persons appearance when so ordered.

As per section 167 of Cr.PC where the offence charged entails a maximum punishment below 10 years, the maximum period of such pre-trial remand cannot exceed 60 days ('statutory bail').

Magistrate generally grants departmental remand (for custodial inquiry) or judicial remand (all other cases) for 15 days (maximum) and determines whether further remand is justified. The accused who is remanded to

(departmental or judicial) custody, must be presented before the Magistrate every time and remand will be extended (up to a maximum of 15 days). The Magistrate may authorize judicial remand beyond 15 days, if an application is made and found satisfactory, but not beyond 60 days.

5.12 Anticipatory bail

Non-bailable cases entitle persons to seek anticipatory bail where there is a reasonable apprehension that the Proper Officer may issue a warrant to arrest; in such cases anticipatory bail under section 438 of Cr.PC may be sought from Magistrate or Appellate Court.

Where anticipatory bail is considered, bail and bond with monetary security or personal sureties along with any additional conditions such as surrender of passport, etc., may be imposed and form an integral part of the bail. Default with these conditions would vacate the bail and person may be immediately placed under arrest and produced before the Magistrate to consider remand or release on fresh bail.

Anticipatory bail may be sought before the Magistrate entitled to try the offence or directly before the jurisdictional High Court. Anticipatory bail is not barred even when offence is described as 'cognizable and non-bailable' in section 132(5) of the CGST Act.

5.13 Prosecuting offences and adjudication of SCN

Prosecuting offences under GST law will be before a First Class Judicial Magistrate as per section 134 of Cr.PC. And the decision of the Magistrate will be final as regards all matters of the trial. The Magistrate will consider the complaint filed by the Proper Officer under section 190(1)(a) of Cr.PC before taking cognizance of the alleged offence and then decide whether to permit trial or dismiss the complaint. Final determination of the allegation of tax evasion or fraudulent credit or refund and other offences are subject to adjudication and appellate process. Prosecution for the offence is a separate proceeding of law. Determination on the question of tax evasion will have a bearing on the prosecution of offence but adjudication of SCN is not a pre-condition for the commencement of trial, which is a civil proceeding involving the same or different persons which is connected with the criminal prosecution involving the accused.

Referring to the instructive words of Apex Court in Radheshyam Kejriwal v. State of WB (Cr.Apl.1097/2003), CBIC has stated in para 4 of Instruction No.4/2022-23 [GST-Inv.] dated 1 Sept 2022 that:

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

(ii) Decision in adjudication rpoceedings 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 trail 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 proceedings 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."

Adjudication proceeding by Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of article 20(2) of the Constitution or Section 300 of Code of Criminal Procedure [THIS PARA IN THE DECISION IS NOT CITED IN CBICs INSTRUCTIONS];

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 Magistrate is to form an opinion whether any prejudice will be caused to the State by non-prosecution of the offence complained against the accused until final determination (as per process in GST law) on the question of tax evasion.

Inspite of the delay of inclusion of GST laws in the Schedule to Economic Offences (Inapplicability of Limitations Act), 1974, it is common for trial to progress, pending final disposal of the SCN, so as not to render prosecution

futile due to starting the trial *in seriatim*. However, final arguments and judgement are reached but kept pending if the outcome of final disposal of SCN would have a bearing on maintainability of entire trial itself. And if the Magistrate were to keep the trial in abeyance until the entire time consumed in appellate proceedings in GST law to be exhausted, the justice *in rem* assured by section 132 will have been lost by the delay.

5.14 Conclusion (Section 69)

Any non-voluntary payment of GST through Form GST DRC-03 to avoid arrest can be immediately claimed as refund under 'others' category. In terms of section 54 read with *Circular No. 125/44/2019-GST dated 18th Nov 2019*, it is incumbent upon the Proper Officer to issue acknowledgement under rule 90 if the application is *prima facie* free from defects. Refund of any voluntary payments do not bear any reference to the underlying investigation proceedings. As such, the taxpayer will immediately receive refund of that amount.

As such, proceedings under section 69 are to set the law in motion as regards prosecuting for offences under section 132. As these are early days of GST, it is important to closely follow the development of this law in the matter of offences.

The amount of tax in default can be paid both through cash and credit ledger.

Further, to defend bail petitions, we may add one important decision of the Hon'ble Delhi High Court in the matter of *Amit Gupta v. DGGI, [2022] 141 taxmann.com 209 (Delhi) dated 29-Apr-2022,* in this case, while dealing with bail petition, the court considered the question as to whether the tax in default can be paid through credit ledger also. The Court replied the question in affirmative and decided the matter in favour of the petitioner.

Chapter 6
Summons (Section 70)

6.1 Overview of steps involved

Based on the provisions of law, given below is an overview of the steps involved that one may anticipate being carried out by departmental officers and discharge their statutory duties validly in accordance with the requirements of law:

Step 1: Proper Officer carrying out 'inquiry' proceedings is empowered by law to issue summons to 'any person' who is considered necessary to (i) give evidence or (ii) produce document or any other thing, during any investigation arising from inspection-cum-search under the provisions of GST law.

Note: No proceeding under any other provision in the CGST Act describes the discharge of duties by the Proper Officer with the expression 'inquiry'. And 'inquiry' is to investigate and 'enquiry is to ask. It is important to record on file about the nature of 'inquiry' which justifies issuance of summons;

Step 2: 'Any person' (not limited to taxable person only) may be summoned to depose which must be conducted in a courteous manner. Summons notice must be issued to a specific person, for a specific purpose, that is, to give evidence or produce document or any other thing (either or both) and on a specified date and location.

Note: Disclosure whether the summons is to (i) first party (likely offender) or (ii) third party (witness against another offender) must be disclosed.

Step 3: Where 'document or any other thing' is to be produced, the same may be acknowledged, if produced and the same must be duly noted on the files and where not so produced, that too may be noted on the file.

Step 4: Where 'evidence' is to be given, it may be in the manner deemed fit by the Proper Officer and 'question and answer' mode is common method which may be adopted (details of this method discussed later).

Step 5: After deposing, the person summoned will be permitted to exit from the said location.

6.2 Purpose of summons

Summons is an integral part of an 'inquiry' and it was held in the case of *Baleshwar Bagarti v. Bhagirathi Dass (1909) ILR 35 Cal. 701* that *"the traditional distinction between the verbs 'enquire' and 'inquire' is that enquire is to be used for general senses of 'ask',* ***while inquire is reserved for uses meaning 'make a formal investigation'"***. For this reason, summons cannot be issued during proceedings under section 61 or 65 as these provisions involve 'enquiry' and not 'inquiry'. Important to note that CBIC *Instruction No.3/2022-23 [GST-Inv.] dated 17 Aug 2022 ("Instruction No.3/2022-23")* (para 2) brings out this aspect.

Summons must be understood whether it is a (i) first Party summons, that is, person who is being investigated is summoned or (ii) third-Party summons, that is, person who is summoned is being considered as a witness in investigation against another person. Reference to 'offender(s)' in para 3(iv) of *Instruction No.3/2022-23*, makes it clear that 'inquiry' can be only in respect of offences.

During the course of any 'inquiry' under the Act, the Proper Officer is empowered to summon persons to (i) give evidence or (ii) produce a document or any other thing. It is important to note that summons is not the end of investigation but a step in the course of investigation. There is no provision that deals with 'inquiry' so it must be understood as part of every 'process of discovery' in any investigative proceeding such as 67, 129 or 130 leading to a notice under section 74 or 76 including proceedings under 132.

Offences are listed in section 122 up to 132. But then, demand under section 73 or 74 also attract penalty which is specified in section 122(2)(a) or (b). So, reference to 'offences' (in para 3(iv) above) must be traceable to those listed in section 122(1), (1A) or (3) and other sections following 122 up to 132 but not to penalty under section 122(2). Care must be taken to understanding the nature of proceedings initiated to avoid submitting to invalid proceedings as the exceptional powers vested in section 70 routinely matters (opening words in para 1 of *Instruction No.3/2022-23*). A reliable test is to look at 'who' is exercising these powers and verify if this exceptional power is being exercised by Authorized Officer under section 67 (discussed earlier) or by other Proper Officer vested with powers under section 61 to 65.

Care must be taken to ensure that summons cannot be issued in a routine manner and non-specific documents such as books of account for the FY or all invoices and receipts or input tax credit register, etc., cannot be called for

in summons proceedings and particularly documents that are available on the Common Portal (para 3(v) of *Instruction No.3/2022-23 dated 17 Aug 2022*). Section 160(2) bars taxpayers from entertaining improper notice (to appear) issued under section 70. Such summons is improper as 'roving inquiry' cannot be made under section 70.

In particular, CBIC *Instruction No.3/2022-23* states in para 2 that "Officers are also advised to explore instances when instead of resorting to summons, a letter for requisition of information may suffice". Care must be taken not to misread this provision that even when no 'inquiry' is underway, Officers may 'call for' documents or information which may fall foul of intervention by exception that is the hallmark of GST when tax liability is to be determined on self-assessment basis. Also consider that when 'evasion of tax' is involved, there are safeguards to taxpayer in the form of pre-conditions and grant of authorization before any intervention, it is inconceivable that in proceedings that are far lesser than 'evasion of tax' powers that are far wider would be sanctioned by Parliament. With these safeguards in the law that are reiterated in *Instruction No.3/2022-23*, summons in a routine manner will become a rarity in practice.

Summons must state a specific document or thing to be produced. Non-specific and vague summons with an exhaustive list of documents is also liable to be unsuccessful. Summons can also call a person to enter appearance and record a statement on oath. Statements on oath are a weak form of evidence and questions must be simple and straight-forward when posed to the deponent. Care must be taken to consider if statements being made by deponent are based on (i) personal knowledge of facts or (ii) records and documents inspected. Opinions and interpretation will not be tenable.

Seeking to quash summons is not welcomed by Courts as it is not without reason that summons is issued. Summons, being in pursuance of ongoing investigations, cannot be interfered as it will deny Government in discharging its duties. In addition to the statutory safeguards (discussed later), CBICs Instruction *No.3/2022-23 dated 17 Aug 2022* expressly bar any misapplication by functionaries. Persons must co-operate when summons are issued, and any failure will be visited with prosecution for offences under chapter X of Indian Penal Code (hereinafter referred to as "IPC").

6.3 Persons fit to be summoned

Persons expected to have knowledge pertinent to the investigation or inquiry

may be summoned. It is a matter of careful consideration as issuing summons to MD of the company may not serve the ends of the investigation as MD may not be the right person to make statements about tax payments and compliance (see para 3(vi) of *Instruction No.3/2022-23*). And equally, accountant in the company may also not be the right person. There is no rule that may be followed in this regard. It all depends on the nature of information sought to be collected in summons proceedings. Persons are not barred in law to refrain from answering after entering appearance. Self-implication cannot be enforced upon any deponent.

6.4 Summons is judicial proceeding

Summons issued by Proper Officer is a judicial proceeding within the meaning of sections 193 and 228 of IPC. Evading service of summons or failing to attend when summoned are punishable under sections 172 to 174 of IPC. Equivalence of these proceedings to a Civil Court proceeding is referred to in section 70(1) dealing with summons proceedings before a Proper Officer. However, that does not still permit the Proper Officer to arrest and punish persons summoned for these offences. A complaint under section 190(1)(a) of Cr.PC will be required in order to prosecute persons under sections 172 to 174 of the IPC. Reference to 'judicial proceeding' is not for the purposes of Cr.PC but for the purposes of the Code of Civil procedure, 1908 (hereinafter referred to as "CPC") to incorporate the 'due process' and the 'judicious nature' of the summons proceedings.

6.5 Permitted matters – 'give evidence or produce a document'

It is explicit in section 70(1) that:

- A specific natural person may be summoned to give evidence (discussed later); or
- A non-specific person or representative of a legal entity to produce a document.

Care must be taken that 'books of accounts' are not called for, by issuing summons. Summons being a very significant proceeding, it should not be resorted to in routine matters but only in matters of investigation and after much thought and consideration as to the exact information required. It is important to note that when summons calls for production of certain specific documents, it must be those that are contemporaneously available in the normal course of business. It is not harmonious with the provisions of section

70 to direct persons to 'prepare statements or reports' and submit them in summons proceedings. Reliability or probative value of such 'specially prepared' documents are lacking, to be used in supporting allegations later when notices are issued.

It would not be incorrect to decline (in writing) when documents that are not contemporaneously available in the normal course of business are being called for on the grounds that a broad and non-specific inquiry is being attempted through summons proceedings. The Proper Officer must invoke section 67 to initiate 'inquiry' and then collect books and records under section 71 instead of calling for documents under section 70.

Issuance of multiple summons is another indicator that a 'roving inquiry' without any specific area of 'evasion of tax' is under investigation. Multiple summons do not go well in adjudication or appellate proceedings, where the validity of summons is objected in an application under section 67(10) (discussed earlier). It is important to consider that statements recorded under section 70 are not perfect evidence in the light of questions about its reliability raised expressly by the deponent by filing a retraction (discussed later) or by showing them to be made involuntarily while replying to the notice.

6.6 Nature of 'question and answer' method

In order to maintain clarity and simplicity, evidence is collected in the form of a 'question and answer' format which is a common method adopted.

Summons proceeding are to be conducted without the anxiety and stress surrounding inspection and search proceedings under section 67. Question-answer approach is popular to progress from admitted facts, to transactions under investigation and culminating in admission of facts providing the ingredients to offence. Questions are usually simple and straight-forward. Questions relate to the facts such as their existence or absence. Questions will be short and to-the-point. Essay questions are not very productive in view of the tendency of the response to wander into irrelevant matters.

A logical sequence of questioning is known to be followed while being confined to 'collecting facts'. Deponent's statements which involve expressing an opinion (about any aspect) is not considered to be of much value. Statements comprising 'facts' will be relevant and valuable in furthering the inquiry.

Statements made are 'voidable' proof of the facts and merely a means of collecting information that aids the inquiry. Facts (and not statement, even if when recorded on oath) are required by a Court of law to bring home the allegation; statements on oath point in the direction of facts which can be doubted by a Court of law even when it is not retracted or altered by the deponent. Given the limited extent that statements (even when recorded on oath) are not perfect evidence, care must be taken while invoking this power which, when applied carefully, can be valuable to the inquiry.

6.7 Questions to be avoided

Complex legal questions and questions involving interpretation of law or their application to facts are not normally posed to the deponent. For example, if a question as to - what is the place of supply? – is posed, the expression 'place of supply' is a legal concept and not one that a common person would be expected to answer, that too, accurately. Where this question is answered saying – place of supply is factory at Madhya Pradesh – it clearly shows that observable information is being provided and not the interpretation expected in the given facts.

Another aspect to be observed is questions posted are not difficult to understand either by the way it is constructed (in a complicated manner) or it is long and cumbersome to be easily understood (and replied in a meaningful manner). Questions must also not be about interpretation of facts but about the existence of facts only and the interpretation will be left to the Proper Officer.

6.8 Reliability of statements on oath

Section 136 of the CGST Act specifies that any statement recorded under section 70, will be relied upon by a Court, only in the following five situations or circumstances, namely when person who has made the statement is:

- Dead
- Cannot be found
- Incapable of giving evidence
- Kept out of the way by adverse party and
- Presence cannot be obtained without an amount of delay or expense which Court considers unreasonable

In other words, if none of the above circumstances exist, the statements so recorded weaken as reliable evidence unless the said deponent can be subjected to a cross-examination.

- *In CCE, Meerut v. Parmarth Iron (P) Ltd. 2010 (260) ELT 514 (All.)* it was held thus:

  "17. We are, therefore, clearly of the opinion that there is no right, procedurally or substantively on in compliance with natural justice and fair play, to make available the witnesses whose statements were recorded, for cross examine before the reply to the show case notice is *filed and before adjudication commences. The exercise of cross-examination commences after proceedings for adjudication have commenced."*

- In State *of Kerala v. KT Shaduli AIR 1977 SC 1627* the Apex Court has held: *"It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing the truth and exposing falsehoods".*

6.9 Retraction or alteration

Incorrect and false statements are not uncommon, even at the risk of prosecution under sections 193 and 228 of IPC. Statements deposed may also be incorrect due to anxiety about the way these proceedings are conducted or that the deponent may be intimidated. Making incorrect or false statements, for any reason, requires Proper Officer to submit a complaint before a Magistrate under section 190(1)(c) of Cr.PC which may not be always feasible during the course of an ongoing inquiry. This limitation must be well known to all concerned and care must be exercised to write to the Proper Officer in case:

- Copy of statement recorded is provided to deponent, to verify in calmer circumstances (but not after unreasonable delay) if there are any misstatements which need to be clarified or improve the expressions used in statements previously made;
- Copy of statement recorded is not provided to deponent, to request that a copy be furnished to clarify if there were any misstatements inadvertently recorded during summons proceedings; or
- A complete withdrawal of the statement made with the attendant consequences.

Statements made by deponent in summons proceedings may be challenged by the taxpayer (if notice was issued based on statements recorded in summons proceedings) that they are either unreliable for any number of reasons or that they are plainly false statements.

Note: 'Deponent' here refers to a supplier or customer or employee and taxpayer refers to the person charged with the liability to additional demand.

Although delay in retracting statements made on oath, may raise presumption of reliability of those statements in favour of Revenue, it is not necessarily the case, especially when the circumstances under which statements are recorded are not intimidating to the deponent or when other evidence corroborate these statements. Where third parties are summoned, their statements are also liable to be doubted by taxpayer for reasons such as any unfriendly relations that may be attributed to the deponent and taxpayer in question.

Statements recorded are not flawless evidence but only an aid to inquiry. There may be inducement or threat at work. The person recording statement may be under a misunderstanding or committing a mistake. The person may be unfriendly to the taxpayer and finds summons to be a vindictive opportunity. There can be any of these or some other reasons that may make the statement recorded lack probative value to rely upon in the inquiry.

6.10 Evidentiary value of statements

Section 101 of the Indian Evidence Act places 'burden of proof' on the person making any assertion that is to be relied upon in any proceedings. Except in respect of input tax credit in GST, section 155 places the burden of proof as to 'eligibility to credit' on the taxpayer, the authority of self-assessment under section 59 raises a presumption in favour of correctness of taxpayer's determination of the assessment. As in other cases of presumption, it is a rebuttable presumption where the burden to unseat this presumption rests on the Revenue.

Statement on oath is admissible only when it is not disputed in terms of section 58 of the Indian Evidence Act which states that undisputed facts do not need to be proved. Documentary facts in books and accounts are also subject to challenge of their evidentiary value in terms of section 34 of the Indian Evidence Act.

Taxpayers should note that statements on oath are not *ipso facto* reliable unless there is no dispute or challenge to averments made by the deponent. It has been held in case of *State of Punjab v. Barkat Ram AIR 1962 SC 276* and again in case of *Illias v. CC AIR 1970 SC 1065* (decisions under Customs law applicable to GST proceedings as the nature of powers conferred under GST law are heavily drawn from those prevalent under Customs) that confessional statement made before a Customs officer is

admissible as evidence in a trial and its contents left to the Magistrate to rely upon having due regard to other attendant facts and circumstances. A contrary view has been expressed in case of *Raja Ram Jaiswal v. State of Bihar AIR 1964 SC 828* in the context of Orissa and Bihar Excise Act, 1915, where the powers of the investigative Officer was found to be coextensive with those of a police officer. GST has cautiously extended coextensive powers to a very limited extent such that the ratio in Barkat Ram's decision applies to GST proceedings. (See also later discussion in *Ramesh Chandra Mehta decision* and now affirmed in *Tofan Singh v. State of TN by SC in 2020 in Cr.APL 152/2013*).

6.11 Show cause notice based on statements

Summons is a process in law to call upon a person to (i) give evidence or (ii) produce a document or any other thing, that may aid in inquiry but show cause notice is an altogether different process in law. The show cause notice is to set the law in motion about a liability under the law containing charges that a specific person is called upon to answer. Evidence or document or thing secured in summons proceedings neither obligates the Revenue to act upon it and issue the said notice nor rely upon it while issuing said notice.

Where such material is secured in summons proceedings and relied upon to support the charges made in the said notice, the same must be appended and disclosed to taxpayer. Hence, material secured in summons proceedings and show cause notice do not bear any immediate or direct correlation although the same is involved in furthering the inquiry underway.

Summons is not compulsory or essential for all inquiries or for notices demanding tax. But the definition of 'suppression' in section 74 makes summons proceedings very potent if the taxpayer summoned refuses to depose or deposes and makes false statements. Such evidence (not the deposition itself) could support the special circumstances required to issue notice under section 74. Summons has an important role, as an aid to the inquiry.

Show cause notice cannot be issued on the foundation of statements recorded in summons proceedings from one or more persons. Motive of deponent, unfavourable relations with taxpayer and other factors being open to challenge, support for allegations in show cause notice may deplete unless other 'clinching evidence' led out of statements recorded, are adduced to support the allegations in show cause notice.

It is important to carefully examine the extent to which statements recorded on oath support the allegations in the notice and whether any other corroborative evidence have been brought on record or is the notice standing merely on statements of deponents. This will guide the approach to be taken in rebuttal of allegations in the notice.

6.12 Conclusion about summons

Summons is an important step in investigation and not the end of investigation. Summons must be issued with great circumspection only to corroborate results of investigation. Investigations must lead to confession in deposition. Deposition cannot dictate the course of investigations. Taxpayers must attend to summons proceedings with a sense of responsibility and cooperation to ensure that facts are made available to the Revenue and any deficient appreciation of facts are well supported so that investigations proceed in right earnest by all stakeholders.

Chapter 7
Access to premises (Section 71)

7.1 Authority to access or visit taxpayer's premises

Access to business premises under section 71 contrasted with the responsibility of self-assessment placed on registered persons under section 59, makes it abundantly clear that GST officers are *not permitted* to make routine visits to the registered person's place of business, by invoking powers under section 71. All provisions of the law operate and must be administered in harmony with each other. If section 59 states that *"every registered person shall self-assess the taxes payable under this Act"* then Proper Officer is not the Assessing Officer. And any intervention to verify the correctness of the self-assessment carried out by registered persons must be only in the manner permitted by Parliament, that is:

- Scrutiny of returns under section 61.
- Audit of books and records under section 65.
- Inspection of premises under section 67.

It is clear from the language in section 71 that *"authorized by the Proper Officer not below the rank of Joint Commissioner"* must grant prior authorization before any Authorized Officer or person gains access to the said place of business. However, where access is gained to the premises of a registered person, the further proceedings to be conducted are overlapping with sections 65, 66, 67 (discuss later). Further, the form and reasons for granting such authorization is not specified (as discussed in detail in the context of section 67) and if the power is ambiguous and without boundaries, it will be vitiated for being arbitrary.

When self-assessment is already concluded, unless there are valid reasons contained in the authorization granted, routine visits by Proper Officer will be directly in conflict with section 59 or for that matter section 65 or 67. It is interesting to note that there is no rule corresponding to section 71 and there is no Form in which such authorization is to be granted.

Where an authorization is somehow granted (by Officer of Joint Commissioner or higher rank) the 'access so gained' to the place of business will be guided by the 'provisions of law' under which such authorization is granted. It may be section 25 or section 65 or section 66 or section 67(12) or

some other provision. Therefore, 'access to premises' under section 71 is a 'subordinate provision' to such other 'primary provision' of the CGST Act as may be applicable.

To view section 71 to be substantive provision would tantamount to arbitrary, unguided and sweeping powers being left with the Authorized Officer or person, where these powers overlap with those in section 61, 65 or 67 which tantamount to mistake by Legislature in creating powers under two different provisions of the law. Such an interpretation would be contrary to all known tenets of 'construction of statutes' which require that the entire legislation be harmoniously construed without power in one provision vested with one Proper Officer trespassing or entrenching into the powers in another provision vested with another officer. Such simultaneous and overlapping jurisdiction is found only in section 6(2) which permits Central and State GST departments enjoy overlapping jurisdiction but not overlap in their investigative areas.

Without any non-obstante clause, section 71 must operate subservient to other provisions as a machinery provision. To validate this construction, consider section 65 which addresses (i) authorization to select registered persons to be audited (ii) process and timelines for carrying out the audit (iii) completion of audit and issuance of report and (iv) authority to issue notice in respect of observations made. But there is no provision in section 65 that states that Proper Officer is authorized to access business premises of the registered person who is to be audited. Similarly, section 66 addresses the (i) circumstances when Special Auditors' appointment is justified (ii) scope and timelines for such exercise and (iii) outcome of such exercise. But there is no provision in section 66 that states that Special Auditor is authorized to access the business premises of the registered person.

Since the 'form of authorization' is prescribed under sections 25, 65 and 66 (and even for section 67), it would be superfluous, if yet another Form was to be prescribed in section 71. Therefore, section 71 must be admitted as a machinery provision to aide other provisions where access to business premises is warranted and deliberately placed by Parliament perhaps to avoid repetition. Section 71 is to be read harmoniously and not in derogation of (i) section 59 and (ii) for the purposes of other provisions listed above, is a machinery provision and not a substantive provision granting yet another path to 'access' registered person and take a relook at self-assessment carried out.

7.2 Premises accessible

Places of business of 'registered person' alone can be accessed in terms of section 71. Access to premises of taxable person or any other person is permitted under section 67 [except Section 67(12) for test purchase] and access is implicit in proceedings under section 69. Therefore, the premises to be accessed under section 71 is limited to other provisions of State GST Act where such access is necessary to give effect to those proceedings.

7.3 Premises not to be accessed

Place of business is defined in section 2(85) of the CGST Act and all those places may be accessed provided such places are specified in the authorization so granted. Location of the supplier of services is defined in section 2(71) which extends to places that are not places of business. Care must be taken not to access those locations which are not within the scope of this definition of 'place of business'.

7.4 Routine visits to taxpayer's premises barred

Since 'authorization' is a pre-requisite to gain access to premises of the registered person, access in a 'routine' manner is barred in law. It must be taken note of that this truly ensures minimal physical interface with taxpayer and any interface is limited to specific provisions conferring jurisdiction to conduct specific proceedings only.

No amount of 'suspicion' is sufficient for the Proper Officer to trespass into the power of self-assessment granted by section 59. If there are 'reasons to believe' about any evasion of tax, section 67 grants exceptional powers. If there is requirement to 'verify correctness' of compliances, section 65 grants wide powers. Both these powers are left with Officers with necessary authority under section 5. But the jurisdictional Proper Officer empowered to grant registration, scrutinize returns and conduct best judgement assessment in exceptions, cannot also trespass into the domain of Audit Officers under section 65 and Intelligence / Enforcement Officers under section 67.

There is no overlapping jurisdiction granted in section 71. In fact, section 71 must be implemented without overlapping with the jurisdiction vested in section 65 or 67. This harmony is the mandate given by the Parliament and to assume overriding authority to jurisdictional Proper Officer over the same domain that is left for Audit Officers to exercise under 65 or for Intelligence / Enforcement Officers to exercise under section 67, would tantamount to exercising superior jurisdiction. This is not the scheme of the Act.

7.5 Special authorization by Joint Commissioner

What are the circumstances for grant of special authorization under section 71 by Joint Commissioner (or a higher rank Officer)?

- If there is any evasion of tax, then Joint Commissioner (or higher rank Officer) is empowered to grant authorization under section 67 and there is no need to invoke section 71 to gain access but the safeguard against misapplication of this power is contained in the need for 'reasons to believe' in evasion of tax in specific ways.
- If any detailed verification of compliances is required, then the Commissioner (or any delegate) is empowered to issue general or special order under section 65. Section 65 allows issuing such orders (to carry out audit) but it does not contain the authority to access business premises. It is here that section 71 can be pressed into service.
- If a special audit is required under section 66 and such auditor needs access to business premises, then section 66 takes care of issuing necessary directions but not the access. It is here that section 71 will come handy.

Within the overall scope and authority of jurisdictional Proper Officer, what can be the further possibility when the access to business premises be required? It seems that would be limited to physical verification of premises after grant of registration in exceptional cases.

Therefore, special authorization to be granted by Joint Commissioner cannot be beyond what is provided in other provisions of the law and such authorization cannot be 'non-specific' in the reasons for attempting to suspend the authority granted by Parliament to taxpayer under section 59.

7.6 Purpose of special authorization

Section 71 states that the Authorized Officer will have access to business premises of registered person (i) to inspect books of accounts, etc. and (ii) for the purposes of carrying out any "audit, scrutiny, verification and checks" which are:

- 'Audit' is defined in section 2(13) but be carried out by Proper Officer under section 65 and not 71
- 'Scrutiny' of returns is permitted under section 61 but without access to business premises

- 'Scrutiny' of premises is required under section 25, that does not involve inspecting books, etc
- 'Verification' of premises is required but it is akin to powers under section 65 or 66
- 'Checks' are involved in section 65 or 66 where not only business premises, but books also may be accessed.

It is clear that the broad nature of words used are guided 'what next' is permitted to be carried out once access is gained. Surely, section 71 cannot be derogatory to section 65, 66 or even 67 but only be in harmony with these provisions contained in the same law.

7.7 Effect of not prescribing 'Rule and Form' for special authorization

Government has prescribed the following rules and forms for authorization:

- Audit is authorized by internal order under section 65(1) but rule 101(2) prescribes Form GST ADT1
- Special audit is authorized by directions under rule 102(1) and prescribed in Form GST ADT3

Barring these, there is no other rule by which 'special authorization' can be issued by Joint Commissioner and without a rule and a form thereunder, and there are no limits specified regarding the circumstances when Joint Commissioner can issue special authorization but is completely open-ended.

Authority granted to a Delegate is illegal when there are no boundaries. Authority is excessive and arbitrary, not only when it is used in an arbitrary manner but also when the possibility is undeniable. For section 71 to survive without being void for arbitrariness, It must be read to the limited extent to which books of accounts, etc are to be examined for the purposes of *"audit, scrutiny, verification and checks"*.

Without a rule and without a form, section 71 to the extent it does not borrow from or overlap with the rules and forms prescribed for sections 65, 66 or 67, must be limited in its reach.

If authorization in Form GST INS1 is granted and it makes reference to inspection under section 71, it would be inappropriate and by relying on section 160(1) the 'intention, purpose and requirements' that are communicated is that the proceedings are under section 67 and therefore all the rights, remedies and safeguards available under section 67 are attracted to these proceedings. Care must be taken to seek confirmation if the

proceedings are under section 71 or under section 67 by making reference to the authorization granted in Form GST INS1.

7.8 Nature of activities permitted during access

Only when access is authorized under section 71(1), person-in-charge is obliged to extend cooperation and this cooperation required under the 'primary provision' (refer above) in terms of which the 'secondary provision' under section 71 has been invoked.

Person-in-charge, may be the taxable person or person authorized to be in-charge of location or person present and found to be in-charge of location, is obliged to make available such information that is necessary to effectively carry out the mandate in the said 'authorization'.

Items listed in section 71(2) are illustrative and not exhaustive. Care must be taken that the nature of activities that are permitted during such access to premises are not limited to the language used in section 71 but must be gathered from the language of that provision under which the 'authorization' has been granted.

7.9 Duty to 'make available', limited in operation

A registered person whose books of accounts, etc., are accessed based on authorization granted to access business premises, is not required to answer questions akin to those mandated in section 70. Where access is gained to business premises and books of accounts, etc., are produced, the following further steps are not permitted:

- Carrying away those books of accounts, etc.
- Issuing instructions to prepare reconciliations and reports
- Issuing instructions to appear before Proper Officer's later
- Explain the basis for tax treatment applied
- Making demands for 'spot payment' of (alleged) dues.

7.10 Emergency access also barred

There is no authority in law to access premises even in emergencies without 'prior authorization'. All emergencies must find place in one of the 'primary provisions' that supports the use of powers under section 71 to access a place of business.

7.11 Access to undisclosed premises of registered persons

Where any place of business is undisclosed by registered person, access to such premises is only possible under section 67 and not under section 71. For this reason, it becomes evident that section 71 operates as a 'secondary provision' laying down the statutory basis for physical interface between Proper Officer and registered person(s).

7.12 Access to unregistered persons' premises

Where the taxable person is unregistered, access to place(s) of business of such persons must be gained in terms of the authority in some other primary provision such as section 22 for grant of registration or section 67 for inspection but not under section 71 directly.

7.13 Attempt to gain unlawful access to business premises

Whether the taxpayer is registered or not, access to business premises is permitted under respective provisions of law but not under section 71 directly. In any case, attempt to gain unlawful access to business premises must be met with a written request to refrain from availing powers that are not permitted in accordance with law. All further actions will then proceed only after a proper determination is made on this written request.

One would recall that there has been a practice in VAT regime of carrying out 'survey' of the market to find any dealers liable to be registered but have failed to obtain registration and discharge VAT dues. Section 71 does not authorize any such practice as it is applicable only to 'registered persons'.

It is important to ensure that safeguards in the law will not be listed as 'safeguards' but are still available in the way exceptional powers are granted with (i) prior authorization (ii) granted in specific circumstances and (ii) to carry out specific activities. Resisting misapplication of law is as much a part of complying with the law as is seeking registration and discharging tax on self-assessment basis.

7.14 Conclusion about access to premises

It is a past practice that is no longer encouraged in GST where tax authorities visit taxpayer's premises to conduct surprise checks. Similarly, taxpayers are not permitted to visit tax office for any proceeding unless

required to do so under section 67 or section 70 or section 73, 74 and 76 or such other provisions.

Registered taxpayers must be cordial even if it is to politely decline misapplication of this provision and where valid proceedings are pursued, full cooperation must be extended in furnishing the facts as available regarding the activities. Section 71 is not the substantive provision for investigation but itself a machinery provision feeding one aspect of 'access' to Authorized Officers discharge their duties under other substantive provisions of law.

Chapter 8
Illustrative Formats of Various Letters

Various aspects have been discussed in this handbook and very often, it is stated that certain letters must be filed, or certain objections must be raised. To better explain those aspects, certain illustrations (in the form of draft letters) are provided in this Chapter, which may be referred to and pointers from these drafts may be considered while preparing letters and submissions after making necessary edits and including citation of judicial authorities to convey any point during departmental proceedings, namely:

Transportation related:

Letter A – Request to intercepting officer to permit furnishing of security to release consignment

Unspecified enquiry / demand related:

Letter B – Questioning the validity of notice or letter demanding discharge of liability

Inspection related:

Letter C – Request to disclose authorization to conduct investigation vide letter or summon

Letter D – Request to furnish the basis on which investigation is initiated under section 67

Letter E – Request for provisional release of seized goods

Letter F – Request to furnish copy of documents seized during investigation

Letter G – Request to refrain from pursuing taxpayer to deposit dues without issuing valid notice

Letter H – Application under section 67(10) before replying to SCN issued after concluding investigation

Summons related:

Letter I – Intimation of invalidity of summons issued

Letter J – Request to furnish copy of statement recorded during summons to confirm probative value

Confiscation related:

Letter K – Request to avail option to pay 'redemption fine' in confiscation proceedings

Others:

Letter L – Intimation of decision to appeal to GSTAT and request to refrain from precipitative action

Letter M – Intimation of decision to appeal to FAA and request to refrain from accelerated recovery action

Letter N – Request to rectify mistake apparent on record in the adjudication or appellate order

Letter O – Request to unblock credit illegally blocked on account of reasons beyond rule 86A

Letter P – Request to furnish the basis on which investigation is initiated under section 71.

LETTER A

REQUEST TO INTERCEPTING OFFICERS TO PERMIT FURNISHING OF SECURITY TO RELEASE CONSIGNMENT

To

The ……. of Central / State Tax

[Proper Officer Intercepting the consignment]

……..

Date:

Sub: Facility to furnish security under section 129(1)(c) – Request for

Ref: (a) Interception of conveyance on ……

(b) …..Name …….. (GSTIN……..) (Registered Person)

(c) Consignment vide Tax Invoice No…… dated …….

(d) EWB No…….. dated …….. valid upto ……..hrs.

(e) Other References, if any

This has reference to the above proceedings under section 129 of the Central GST Act, 2017, and State GST Act, 2017 or Integrated GST Act and GST (Compensation to States) Act, 2017) and Rules made thereunder. In this regard, registered person hereby confirms that:

1. No act of evasion of tax is involved or admitted and errors, if any, in documents accompanying consignment which are not in the nature of violation of requirements under section 68 of the CGST Act read with rule 138A of the CGST but are minor clerical errors and the facts can be ascertained from accompanying documents and from Common Portal;

2. Being the representative of owner of goods involved in the above consignment, facility in section 129(1)(c) to furnish security in Form GST MOV-08 as provided in Circular No. 41/15/2018-GST dated 13 Apr 2018 as amended by Circular No. 49/23/2018-GST dated 21 Jun 2018, equivalent to the amount determined under section 129(1) of the CGST Act is sought to be exercised;

3. Opportunity to explain discrepancy that appears to be noted is sought through Mr …….. (PAN / AADHAAR No.……..) who is hereby authorized to appear and represent on behalf of the registered person; and

4. Consignment does not comprise of goods listed in *Notification No.: 27/2018*-Central *Tax dated 13 Jun 2018.*

For this act of kindness, the registered person is ever so grateful and accepts to furnish security in such form and manner for the amount determined under section 129(1) of the CGST Act within seven working days from the date of approval of the said facility along with any further restrictions as may be deemed necessary.

The registered person most humbly requests that all goods involved in the above consignment, cannot get the due care and attention by the person-in-charge of the conveyance for any longer without exposing them to the risk of damage due to exposure to the elements and unattended halting of the consignment at the place of interception of conveyance.

Identified by me: For …….. Name:…… (Registered Person) GSTIN…… Address:……..	Accepted by me: Name: …… Person authorized to execute security and accept release of consignment

Further, in view of this application made before you under section 129(1)(c) penalty under section 129(1)(a) or (b) is not accepted in accordance with law and, no precipitative action under section 129(6) of the CGST Act may be initiated against us. Notice required to be issued in accordance with law may be served on the person authorized above and pre-deposit of 25 per cent of the amount of penalty will be deposited immediately in order to prefer appeal before the First Appellate Authority under section 107(1) of the CGST Act and the SGST Act. No prejudicial action that may have the effect of abrogating our right to appeal may be initiated.

Kindly acknowledge receipt of this request and facility provided in section 129(1)(c) of the CGST Act and the SGST Act made applicable to Integrated GST Act and GST (Compensation to States) Act, be granted for which we remain obliged.

For ……..

Name:…….

(Registered Person)

GSTIN…….

Address:……..

Note: Please Replace 'State' with Name of State/UT

LETTER B

QUESTIONING THE VALIDITY OF NOTICE OR LETTER DEMANDING DISCHARGE OF LIABILITY

To,

The …….. of Central Tax / State Tax

[Proper Officer Issuing the said Instructions]

…….

Date……

Sir,

Sub: Your message / email / letter dated ……. - reply to.

Ref: (a) ……..Name of Taxpayer……

(b) GSTIN ……..

(c) Your letter bearing DIN …… / NIL

We hereby acknowledge receipt of your subject communication on …….. demanding:

a)	Payment of CGST-SGST of Rs……. each
b)	Payment of IGST of Rs……
c)	Payment of Cess of Rs……..
d)	Repayment of credit of CGST-SGST of Rs……. each
e)	Repayment of credit of IGST of Rs……
f)	Repayment of credit of Cess of Rs……..
g)	Interest (not quantified); and
h)	Penalty (not quantified).

OR

We hereby acknowledge receipt of your subject communication on …….. regarding:

a) ……2A < 3B……;
b) ……1 <> 3B; and
c) ……

OR

a) Calling for books of accounts; and
b) ……

In this regard, we bring to your kind attention that the subject communication does not specify the provision of Central GST Act and State GST Act under which these proceedings are initiated. As such we submit that there is a restriction against entertaining or responding to such communication and it is incumbent on taxpayers to confirm the provisions of law under which the proceedings are undertaken. This is explicit from section 160(2) of Central GST Act and State GST Act which reads as:

> ***"160. Assessment proceedings, etc., not to be invalid on certain grounds. —***
>
> *(1) ……..*
>
> *(2) The service of **any notice, order or communication** shall not be called in question, if the notice, order or communication, as the case may be, **has already been acted upon** by the person to whom it is issued or where such service **has not been called in question** at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication."*

It is evident from the above extracts that any failure to question the nature of the proceedings results in forfeiture of the authority to call its validity into question in later proceedings. As such, we make this request for clarification regarding the nature of these proceedings.

RELIEF SOUGHT

Pending confirmation of the nature of proceedings, any amount demanded is entirely disputed and these proceedings are presumed to be adjourned *sine die*. Any further proceedings proposed, may kindly be pursued in accordance with relevant provisions of Central GST Act by putting us at notice and enable us to submit our detailed objections on law and on facts.

Request you to kindly acknowledge receipt of this letter and oblige.

For ……..

Name:…….

(Registered Person)

GSTIN…….

Address:……..

Note: Please Replace 'State' with Name of the State/UT

Copy to:

a) Joint Commissioner of Central Tax / State Tax
[Jurisdictional Supervisory Authority over the Proper Officer]
…….Insert
Address…..

LETTER C

REQUEST TO DISCLOSE AUTHORIZATION TO UNDERTAKE INVESTIGATION VIDE LETTER OR SUMMONS

To,

The ……. of Central Tax / State Tax

[Proper Officer Issuing the said Summons]

……..

Date:

Sir,

Sub: Objections to notice / letter / summons dated ……. – reg.

Ref: (a) ……..Name……(GSTIN……)('Registered Person')

(b) File No……..

(c) Inspection said to be conducted on …… (IF ANY)

This is with reference to notice / letter / summons calling for submission of books of accounts issued to M/s …….. having their place of business at …….. and holding GSTIN …… ('Registered Person') pursuant to proceedings issued under section (not specified) or section 67 of Central GST Act and State GST Act have been received by undersigned on or about……

In this regard, it is brought to your kind attention that proceedings under section 67(1)(a) of Central GST Act and State GST Act may be undertaken based on "reasons to believe" that pre-exist and pre-date the authorization granted in Form GST INS-01 (copy not available) in three specific situations, namely where the registered person:

a) Has suppressed supply or stock of taxable goods; or

b) Has claimed input tax credit beyond their entitlement; or

c) Has indulged in contravention of Act or Rules to evade tax.

Firstly, it is not forthcoming from the subject notice which of the above three situations furnishes the basis for invoking the exceptional powers contained in section 67 of Central GST Act and State GST Act. Secondly, from a perusal of the information required from the registered person in the subject notice, it appears to be routine verification which is akin to inquiry in audit under section 65 of Central GST Act and State GST Act. Thirdly, there is no provision in section 67 of Central GST Act and State GST Act that permits issuance of notice of any kind. Lastly, the authorization said to be granted in Form GST INS-01 stands extinguished by its exercise on the date when the inspection was carried out and Authorized Officers exited the said premises.

Further, from the provisions of section 67(1)(a) of Central GST Act and State GST Act, it is seen that it is not possible to routinely reach a conclusion that any of the situations listed therein are attracted. These "reasons to believe" are not mere instances where some clarity may be lacking in the documents filed or information reported by the registered person. The purpose of these "reasons to believe" is to supply jurisdiction forming the basis for invoking the powers under section 67(1) of Central GST Act and State GST Act and such powers are not to be exercised to carryout routine 'verification of correctness' of the information filed in annual returns or reconciliation statement. Reference may be had to subject notice where copies of ledgers, invoices, credit notes, etc., are being called for which are not within the terms of section 67 of Central GST Act and STATE GST Act.

For these reasons, the registered person is already prejudiced when the exceptional powers of section 67 of Central GST Act and State GST Act stand invoked when none of the situations that are necessary for the grant of authorization in Form GST INS-01 have been shown to exist. *As such, section 67(1)(a) of Central GST Act and State GST Act could not have been pressed into service unless any of the three situations listed in the statute are found to exist (i) to the satisfaction of the Proper Officer not below the rank of Joint Commissioner and (ii) such satisfaction being recorded in writing on the files, which is a public record and is open to be called for under the Right to Information Act, 2005* and for this reason, safeguards in section 165 of Cr.PC are made applicable to inspection-cum-search proceedings *vide* section 67(10) of Central GST Act and State GST Act.

Without prejudice to confidentiality of intelligence gathered that furnishes 'reasons to believe' for grant of authorization, it may kindly be confirmed that the said authorization granted was for good and sufficient reason so that where the same are called into question later before a suitable forum, no exclusion is pleaded on the ground of acquiescence. The

additional information and documents requested by the Authorized Officer are non-specific and generic which is inappropriate with proceedings under section 67.

To this end, it is respectfully submitted that the entire proceeding is questionable, and the subject notice is without authority of law. For this reason, attention is invited to section 160(2) of Central GST Act and State GST Act:

> ***"160. Assessment proceedings, etc., not to be invalid on certain grounds. —***
>
> *(1) …….*
>
> *(2) The service of **any notice, order or communication** shall not be called in question, if the notice, order, or communication, as the case may be, **has already been acted upon** by the person to whom it is issued or where such service **has not been called in question** at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication."*

Reliance is placed on the following judicial authorities in support of the above:

a) ……List case laws, if any……..

b) …… List case laws, if any ……..

RELIEF SOUGHT

It is evident from the above extracts that any failure to question the nature of the proceedings results in forfeiture of the authority to call into question its validity in later proceedings. As such, without addressing the prejudice caused to registered person by invoking powers of inspection without satisfying the preconditions listed in section 67(1)(a) of Central GST Act and State GST Act, the subject proceedings need to be adjourned *sin e die* at least if not, dropped in toto to prevent miscarriage of justice apparent in these proceedings and suffer from lack of jurisdiction.

Request you to kindly acknowledge receipt of this letter and oblige.

For ……..

Name:……

(Registered Person)

GSTIN……

Address:……..

Note: Please Replace 'State' with Name of the State/UT

Copy to:

a) Additional Commissioner of State Taxes or Additional Commissioner of Central Taxes

……..

……..

b) Commissioner of State Taxes / Principal Commissioner of Central Taxes

……..

……..

LETTER D

REQUEST TO FURNISH BASIS ON WHICH INVESTIGATION IS INITIATED UNDER SECTION 67

To,

The……of Central Tax / State Tax

……..

Date:…….

Sir,

Sub: Application for removal of anomalies and deficiencies in authorization being issued under powers vested under section 67 Central GST Act and State GST Act and to withdraw the same for want of jurisdiction – reg.

Ref: (a) …….Name of taxpayer……. ('Applicant')

(b) GSTIN……..

(c) Inspection of premises of applicant on …….

This has reference to certain authorizations being issued under section 67 of Central GST Act and State GST Act, which have come to be executed ……..by ……of Central Tax / State Tax …….. In this regard, following anomalies and deficiencies are noted which affect the validity and impair the entire proceedings for want of jurisdiction that is sought to be exercised thereby, namely:

1. Section 67(1)(a) of Central GST Act and State GST Act permits grant of authorization to conduct inspection of the place of business of taxable person where the Proper Officer, not below the rank of Joint Commissioner, has 'reasons to believe' that the said taxable person:
   a) Has suppressed supply or stock of goods; or
   b) Has claimed input tax credit beyond their entitlement; or
   c) Has indulged in contravention of Act or Rules to evade tax.
2. However, the said authorization (copy enclosed as Exhibit **…….**) does not state which of the above three specific clauses have been invoked

to support the exercise of jurisdiction under section 67 of Central GST Act and State GST Act. It may be seen that in the said authorization, all the above clauses of section 67(1)(a) of Central GST Act and State GST Act have been reproduced without stating specifically which of them are attracted or whether all of them are attracted in the instant case along with the basis thereof.

3. Further, section 67(1)(a) of Central GST Act and State GST Act requires that the Proper Officer must have 'reasons to believe' that it is necessary that the powers thereunder be invoked else the ends of justice will not be served. But in the instant case, by reciting the provisions of the law, the necessary 'reasons to believe' are assumed to exist and powers under section 67(1)(a) of Central GST Act and State GST Act are pressed into service. It is not sufficient to recite the provisions of section 67(1)(a) of Central GST Act and State GST Act which only contains the exhaustive list of instances when these powers may be exercised. Mere listing the entire provisions of section 67(1)(a) of Central GST Act and State GST Act, indicates that there are no specific 'reasons to believe' to invoke these exceptional powers.

4. Merely reproducing the entire provision of section 67(1)(a) of Central GST Act and State GST Act does not confer authority in the absence of a clear statement about the basis on which Proper Officer has reached this conclusion and to record the existence of circumstances the compel Revenue to exercise its special powers in section 67 of Central GST Act and State GST Act.

5. Unless the 'reasons to believe' show a plausible instance that a Court would find that the extreme powers of inspection have been rightly invoked, the said authorization would violate section 59 of Central GST Act and State GST Act. On a perusal of the proceedings recorded on ……by the said ……of Central Tax / State Tax ……., it is noted that routine books and records are being called for (copy enclosed as Exhibit **.....**) which are completely contrary to the scope and extent of powers authorized by section 67(1)(a) of Central GST Act and State GST Act. It is unambiguous that none of the specific clauses in section 67(1) of Central GST Act and State GST Act appear to have been attracted by the applicant. And if there were any, there would have been no reason to conceal those reasons. It may be noted that all these reasons would anyway need to be

disclosed when application under section 165 of Criminal Procedure Code would be made in due course in accordance with section 67(10) of Central GST Act and State GST Act.

6. Further, the said authorization granted invokes even more extreme powers of search and seizure in terms of section 67(2) of Central GST Act and State GST Act. It may be noted that the 'reasons to believe' that inspection is warranted are not the same as the 'reasons to believe' that search and seizure is justified. Attention is invited to the language used in section 67(2) of Central GST Act and State GST Act which states that, **either goods liable to confiscation or documents or books or things of the taxable person "are secreted in any place"**. Without any incremental reasons to justify search-cum-seizure that are far more than reasons to only justify 'inspection' must be shown to exist. From the said authorization there is no mention of the 'additional reasons to believe' that any such articles are believed by Proper Officer to be "secreted". Without any prior information that any such articles are believed to be "secreted", grant of authorization is violative of section 67(2) of Central GST Act and State GST Act. Authorizing search and seizure without 'additional reasons to believe' also suffer for want of jurisdiction and exasperate applicant's position causing serious infraction of law.

7. From the language in the said authorization, it is clear that there was no prior knowledge that any articles are "secreted":

> *"…….. I hereby authorize and require you to search the above premise with such assistance as may be necessary,* ***and if any goods or documents*** *and / or other things relevant to the proceedings under the Act* ***are found****, to seize and produce the same forthwith before me for further action under the Act and rules made thereunder."*

To irreverently inspect premises of taxable person is violative of taxpayer's rights but to extend the inspection into a search-cum-seizure authorization is not even permitted by the very section that is sought to be invoked in these proceedings.

8. A quick reference to the prescribed format of Form GST INS-01 appended to rule 139(1) of Central GST Rules and State GST Rules, it manifests that all these safeguards are clearly provided. However, the authorization issued was not in conformity with the prescribed format

which was mandatory. While issuing the above authorization, the powers under section 67(1) and 67(2) of Central GST Act and State GST Act appear to have already been exceeded and the entire proceedings are tainted.

9. As such, the above authorization cautions with the following words:

> *"Any attempt on the part of the person to mislead, tamper with the evidence,* ***refusal to answer the questions*** *relevant to inspection / search operations,* ***making of false statement or providing false evidence*** *is punishable with imprisonment….."*

These words are also contrary to section 67 and appear to borrow words from section 70 of Central GST Act and State GST Act. Investigation that requires inspection or search-cum-seizure are emergency powers that are not in the nature of routine audit of books and records under section 65 of Central GST Act and State GST Act. In so doing, the above authorization has travelled completely beyond the scope of section 67 of Central GST Act and State GST Act. The ingredients necessary to invoke these powers are so rare and exceptional that they cannot be lightly exercised as is evident in the fact that routine books of accounts and financial statements are being called for, under these proceedings. Reliance is placed on the instructive words of Privy Counsel which has laid down these instructive words in *Nazir Ahmad v. King Emperor* AIR 1936 PC 253 that:

> *"When a statute requires a thing to be done in a particular manner,* ***it must be done in that manner or not at all****."*

10. Further, the above authorization is issued to be *"valid up to ……..."* Authorization issued under section 67(1) or under section 67(2) of Central GST Act and State GST Act do not have such extended validity. And being an authorization that is granted for "a one-time use only" basis, as soon as the Officers exit from the premises, the authorization granted stands extinguished by exercise. Issuing such 'standing authorization' is also contrary to law. Further, even when *bona fide* administrative intentions are at work, it is imperative that the legislative wisdom in circumscribing exceptional powers must not be permitted to be misapplied. Reliance is placed on the decision of *Sakal Papers (P) Ltd & Ors. v. UoI* AIR 1962 SC 305 which instructs:

> *"Legitimacy of the result intended to be achieved does not necessarily imply that every means to achieve it is permissible;* ***for even if the end is desirable and permissible, the means employed must not transgress the limits laid down*** *by the Constitution…."*

11. Whatever may be the reasons, unless those reasons operate within the boundaries laid down by Legislature, they must be held to be arbitrary and for that reason must be actively disobeyed, to which the law extends its full might and protection. Reliance is placed on the following observations of the court *EP Royappa v. State of Tamil Nadu* AIR 1974 SC 555:

> *"From a positivistic point of view, equality is antithetic to arbitrariness. In fact,* ***equality and arbitrariness are sworn enemies;*** *one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.* ***Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment****. They require that State action must be based on valent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.* ***Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would: amount to mala fide exercise of power*** *and that is hit by Arts. 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact, the latter comprehends the former."*

12. Further, the documents collected by the said ……of Central Tax / State Tax…….. as well as the further information sought to be submitted suffers for want of jurisdiction on two counts:

    a) Financial statements collected are already submitted along with

Reconciliation Statement in Form GSTR9C appended to Annual Returns filed in Form GSTR-9 for the relevant years; and

b) Seeking preparation of *"……"* is beyond the mandate to maintain such trial balance under section 35 of Central GST Act and State GST Act.

Such exceptional powers appear to have been invoked without taking into consideration the necessary ingredients that must pre-exist and pre-date the grant of authorization to invoke the powers under section 67 of Central GST Act and State GST Act.

13. When the above authorization grants wide powers of inspection which appear to be without the necessary ingredients to support the exercise of such extreme powers, it is only appropriate that these anomalies and deficiencies be brought to the attention of the Proper Officer to remedy any inadvertent exercise of inapplicable provisions of the law.

14. When no appeal under section 107(1) of Central GST Act and State GST Act lies against the grant of authorization, it is but essential that the taxable person come before the very authority who has granted the above authorization to do justice and resolve the anomalies and deficiencies present.

15. However, if somehow these proceedings were permitted to continue, despite the above stated incompleteness affecting its validity, it **would render the "due process" laid down law "superfluous, unnecessary and nugatory"** and this is wholly impermissible and a gross violation of the express words of of Central GST Act and State GST Act. Clearly, for purposes of permitting intervention to check any evasion of tax, the Legislature has thought it necessary to "prescribe the process" that must not be bypassed. This "procedure prescribed" is not an empty formality but a diligent law-making effort to meets the highest standards in adhering to "principles of natural justice" enjoined in these proceedings. Where any proceeding under of Central GST Act and State GST Act proceeds in disregard to the "procedure established in law", that would be illegal and the Applicant is called upon by section 160(2) of Central GST Act and State GST Act to "refrain from entertaining" and to "call into question" the said proceeding, by raising objections at the earliest opportunity. Adverting to the said section 160(2) of Central GST Act and State GST Act, it states:

> ***"160. Assessment proceedings, etc., not to be invalid on certain grounds. — (1) ……..***
>
> *(2) The service of* ***any notice, order or communication*** *shall not be called in question, if the notice, order, or communication, as the case may be,* ***has already been acted upon*** *by the person to whom it is issued or where such service* ***has not been called in question*** *at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication."*

This provision places an embargo on the applicant from being subjected to any proceeding that are not in accordance with law and whose validity is doubtful as in the instant case where, for reasons stated above, suffers for want of jurisdiction to invoke section 67 of Central GST Act and State GST Act. Except by resolving these anomalies and deficiencies, irreparable prejudice will be caused to Applicant if current proceedings were permitted to continue.

Reliance is placed on the following judicial authorities in support of the above:

a) ……List case laws, if any……..

b) ……List case laws, if any……..

RELIEF SOUGHT

In view of the foregoing, the applicant makes this application that the anomalies and deficiencies in the above authorization granted, be addressed in accordance with law and where any material is available on record that support exercise of these exceptional powers of inspection under section 67(1)(a) of Central GST Act and State GST Act, only then is the Applicant obliged to submit documents requested, provided they are germane to the point(s) of evasion that pre-exit and pre-date the said authorization. To this end, the applicant requests that the copy of authorization in Form GST INS-01 that ought to have been granted, prior to date of inspection of business premises on ……., under section 67(1) of Central GST Act and State GST Act be furnished at the earliest to establish the validity of these proceedings and for the applicant to attend to the same immediately. And pending disposal of this application, the proceedings initiated must be treated as adjourned *sine die*.

For ……..

Name:…….

(Appellant)

GSTIN…….

Address……..

Note: Please Replace ‘State’ with name of the State/UT

Copy to:

a) Commissioner of Central Tax / STATE Tax

……

……

b) Joint Commissioner of Central Tax / STATE Tax

……

……

LETTER E

REQUEST FOR PROVISIONAL RELEASE OF SEIZED GOODS

To

The …….. of Central / State Tax

[Proper Officer Conducting Investigation]

……..

Date: …….

Sub: Provisional release of seized articles under section 67 of Central GST Act – request for.

Ref: (a) Inspection authorization in Form GST INS-01 ……. dated ……..

(b) Seizure order in Form GST INS-02 no…… dated ……..

(c) …..Name…….. (GSTIN……..)

(d) Other References, if any

This has reference to above proceedings under section 67 of Central GST Act, 2017 and State GST Act, 2017 and Rules made thereunder. In this regard, the registered person most humbly submits that:

1. Subject proceedings underway are based on mere suspicion about the likely evasion of tax or fraudulent claim of refund or involving goods liable to confiscation or secreting documents, books or things, which are not admitted by the registered person and vehemently denied without prejudice to the challenge to underlying 'reasons to believe' that these proceedings are justified.
2. The seizure order passed identifies and records all those goods and other records that are subject to seizure under impugned proceedings are such that it is no longer necessary to continue to remain under physical control and custody of the Revenue authorities.
3. Provisional release of goods and other records covered by the said seizure order will not cause any prejudice to the ongoing investigation or adversely affect the interests of Revenue.

4. Continued retention of the goods and other records covered by said seizure order will cause irreparable prejudice to the registered person.

5. Balance of convenience is in favour of grant of approval for provisional release of goods and other records covered by said seizure order and in is in accordance with law.

For the foregoing reasons, the registered person most humbly prays that "goods and other records covered by said seizure order be provisionally released" and handed over to Mr …….. (PAN / AADHAAR No……..) who is hereby authorized to accept the said provisional release on behalf of the registered person.

For this act of kindness, the registered person is ever so grateful and executes a Bond in Form GST INS-04 under rule 140 of Central GST Rules bearing no. …… and accepts to furnish bank guarantee for an amount not less than Rs…….. (Rupees …….. only) within seven working days from the date of approval for such provisional release along with any further restrictions as may be deemed necessary.

The Registered person most humbly submits a further request that no proceedings under rule 141 of Central GST Rules read with *S.No.17 of Notification No. 27/2018-Central Tax dated 13th Jun 2018* be initiated earlier than 30 days from the date of your approval for such provisional release as the same would cause irreparable loss and prejudice that this request application seeks to avoid.

Identified by me: For …….. Name:…… (Registered Person) GSTIN……. Address:……..	Accepted by me: Name: …… Person authorized to accept provisional release

Kindly acknowledge receipt of this request for provisional release and grant necessary approval at the earliest in the interests of justice, for which we remain obliged.

For ……..

Name:……

(Registered Person)

GSTIN…….

Address:……..

Note: Please Replace 'State' with Name of the State/UT

LETTER F
REQUEST TO FURNISH COPIES OF DOCUMENTS SEIZED DURING INVESTIGATION

To,

The Director General of GST Investigation (Central Taxes) / Additional Commissioner of STATE Taxes (Enforcement)

……..

Date: …….

Sub: Application to Proper Officer in terms of Section 67(5) of Central GST Act and State GST Act – reg.

Ref: (a) Inspection authorization in Form GST INS-01 No ……. dated ……..

(b) Seizure order in Form GST INS-02 No……. dated …….

(c) …..Name……. (GSTIN……..)

(d) Investigation File Ref. No……..

(e) Letter dated …….. seeking provisional release

(f) SCN dated ……. served on ……..

(g) Other References, if any

This has reference to above proceedings under section 67 of Central GST Act, 2017 and State GST Act, 2017 and Rules made thereunder. In this regard, the registered person recognizes that section 67(5) permits grant of copies of documents seized in terms of 67(2) of Central GST Act and State GST Act.

In view of the requirement to file Income-tax returns / conducting statutory audit for the Financial Year ……., there is an urgent requirement to collect copies of books and documents pursuant to the inspection conducted on ……and certain documents, books and things came to be seized vide order of seizure in Form GST INS-02 dated ……..

Kindly acknowledge receipt of this application under section 67(5) of Central GST Act and State GST Act made applicable to these proceedings and grant our request as above at the earliest in the interests of justice, for which we remain obliged.

For ……..

Name:……

(Registered Person)

GSTIN……

Address:……..

Note: Please Replace 'State' with Name of the State/UT

LETTER G

REQUEST TO REFRAIN FROM PURSUING THE TAXPAYER TO DEPOSIT DUES WITHOUT ISSUING VALID NOTICE

To,

The ……of Central Tax / State Tax

O/o Director General of GST Investigation (Central Taxes) / Additional Commissioner of State Taxes (Enforcement)

……..

Date:…….

Sir,

Sub: Confirmation of final position in the matter of ongoing investigation under S.67 of Central /State GST Act – reg.

OR

Sub: Confirmation of final position in the matter of enquiry under UNSPECIFIED section of Central /State GST Act – reg.

Ref: (a) …..Name……. (GSTIN……..) (Registered Person)

(b) Inspection authorization in Form GST INS-01 No ……. dated ……..

(c) Seizure order in Form GST INS-02 No……. dated ……

(d) Investigation File Ref. No……

(e) Letter dated …….. seeking provisional release

(f) Summons dated …….

(g) Letter of clarification dated …… in respect of statement recorded on oath on ……..in pursuance of the summons

(h) Other References, if any

This has reference to above proceedings under section 67 OR …….of Central GST Act, 2017 and State GST Act, 2017 and Rules made thereunder. In this regard, the registered person has learnt that the following matters involving liability are under investigation:

a) Output tax on forward charge payable in respect of ……..

b) Tax payable on inward supplies liable on reverse charge basis in respect of …….

c) Reversal of input tax credit availed in respect of …….

d) Repayment of refund sanctioned in respect of …….

e) Interest on above, as applicable

f) Penalty on account of above, as applicable.

In this regard, the registered person submits this letter confirming that the above liability as informed during various interactions both, in person and over telephone, are not tenable according to his understanding of the extant provisions of law. Further, any instance of final liability devolving on the registered person would be a matter of interpretation of the applicable provisions of law, rules, notification and other authoritative pronouncements of which neither the registered person nor the Officers involved in the said investigation are final authorities to make such determination and the implications of making this confirmation of final position in the matters (listed above) under investigation and the due process of law that its entails are understood by the registered person and there is no requirement to be explained further or persuade the directors, employees or other persons to accept liability in respect any or all of the said matters. The registered person acknowledges the efforts of the Officers explaining the extant legal provisions involved in the said matters and is grateful for the same.

As such, it is most respectfully submitted that without insisting to admit any liability, further proceedings in accordance with law be pursued and the registered person confirms that no director, employee or other person is authorized to accept any liability on its behalf and all authorization issued are rescinded except to the extent of furnishing factual information and providing any documents, duly requested for the purposes of the ongoing investigation. The registered person assures fullest cooperation in the matter of further proceedings that may ensue in accordance with law.

Kindly acknowledge receipt of this letter of confirmation and grant our request as above in the interests of justice, for which we remain obliged.

For ……..

Name:…….

(Registered Person)

GSTIN…….

Address:……..

Note: Please Replace 'State' with Name of the State/UT

Copy to:

a) Principal Chief Commissioner of Central Taxes

……..

…….

b) Jurisdictional Central / State GST Officer

…….Address…….

LETTER H

APPLICATION UNDER SECTION 67(10) BEFORE REPLYING TO SCN ISSUED AFTER CONCLUSION OF THE INVESTIGATION

To,

The Director General of GST Investigation (Central Taxes) / Additional Commissioner of State Taxes (Enforcement)

……..

Date:……..

Sub: Application to Commissioner in terms of S.165(5) of Cr.PC – Regarding

Ref: (a) Inspection authorization in GST INS-01 no ……. dated ……..

(b) Seizure order in Form GST INS-02 no……. dated …….

(c) …..Name……. (GSTIN……..)

(d) Investigation File Ref. No……

(e) Letter dated …….. seeking provisional release

(f) SCN dated ……. served on ……..

(g) Other references, if any

This has reference to the above stated proceedings under section 67 of Central GST Act and State GST Act and Rules made thereunder. In this regard, the registered person recognizes that section 67(10) of Central-State GST Act makes provisions of section of Cr.PC applicable to these proceedings subject to the modification in section 165(5) namely the word 'Magistrate' shall be substituted with 'Commissioner'.

In terms of proceedings bearing file reference number ……., carried out vide authorization in GST INS-01 referred above under section 67 of Central GST Act and State GST Act, the registered person makes this 'application' as required in section 165(5) of Cr.PC to get:

1. Copy of Form GST INS-01 which was not left with the registered person on the date of inspection but said to have been produced at the time of inspection containing 'reasons to believe' that pre-existed and pre-dated the said inspection on …….. It is placed on record that due to the sudden inspection and the anxiety and stress surrounding the tone and tenor of the proceedings, the registered person does not recollect having seen the said authorization much less registered the noting contained therein.
2. Confirm as to whether there were more authorizations issued in addition to the one referred to above.
3. Copy of file noting which were put up before the Proper Officer for grant of authorization under section 67(1) to conduct the said 'inspection' and thereafter escalate this inspection to 'search' under section 67(2) of Central and State GST Act.
4. Copy of seizure report in Form GST INS-02 in respect of the articles seized, duly signed by the authorized Officers and pancha witnesses to examine whether these were (i) goods liable to confiscation under section 130 of Central-STATE GST Act or (ii) documents, books or things that are considered useful in any proceedings "that were secreted" including identification of the location where these articles were found by the authorized Officers.
5. Copy of prohibition order in Form GST INS-03.
6. Copy of file noting in response to the application dated …… seeking provisional release of the seized articles.
7. Copy of all further file noting with respect to the investigation including but not limited to seeking extension of time for issuance of show cause notice which came to be issued only on …….
8. Copy of file noting in respect of authorization to initiate proceedings under section 67(8) of Central/State GST Act read with rule 141 of Central/ State GST Rules and Notification No. 27/2018-Central Tax dated 28 Jun 2018.
9. Confirmation of statement made at para…….of SCN that…….was based on facts obtained / statements made by first-party or third-party / others……

10. Confirmation of conclusion reached at para……..of SCN that……..was based on understanding of IO or first-party or third-party or others……..

11. Confirmation of basis for determining 'HSN classification' in arriving at liability of…….. Copies of relevant documents in support of this basis may be furnished.

12. Confirmation of basis for determining 'time of supply' in arriving at liability of…….. Copies of relevant documents in support of this basis may be furnished.

13. Confirmation of basis for determining 'place of supply' in arriving at liability of…….. Copies of relevant documents in support of this basis may be furnished.

14. Confirmation of basis for determining 'taxable value of supply' in arriving at liability of…….. Copies of relevant documents in support of this basis may be furnished.

15. Confirmation of basis for determining inadmissibility of input tax credit and arriving at liability of…….. Copies of relevant documents in support of this basis may be furnished.

16. Opportunity to cross-examine following persons:

    - Investigating Officer
    - Witness
    - Expert witness, if any; and

17. Others, if any ……..

The registered person hereby makes this express request for grant of opportunity to verify the documents referred to in the show cause notice dated …….. placed at Annexure …….. as 'relied upon documents' and to cross-examine the Authorized Officers who conducted the inspection-cum-search proceedings along with persons whose statements and depositions have also been cited as 'relied upon' in the show cause notice, to establish their *bona fides* which are ex facie unsubstantiated, suspect, and contrary to facts as known and understood by registered person.

Kindly acknowledge receipt of this application under section 165(5) of Cr.PC made applicable to these proceedings and grant our request as above at the earliest in the interests of justice, for which we remain obliged.

For ……..

Name:…….

(Registered Person)

GSTIN…….

Address:……..

Note: Please Replace ‘State’ with Name of the State/UT

LETTER I

INTIMATION OF INVALIDITY OF SUMMONS ISSUED

To,

The ……..of Central Tax / State Taxes

O/o ……. Commissioner of ……..

……

Date:……

Sir,

Sub: Summons ……..dated……..issued under section 70 of Central GST Act and State GST Act – objections to.

Ref: (a) ……..(Deponent)

(b) File No…….

(c) Date to enter appearance on……..

(d) Referring Assignment No. / Case No……

Undersigned is in receipt of above referred summons under section 70 of Central GST Act and State GST Act in respect of investigation said to be underway in respect of M/s …… / other persons (Not Specified). Pursuant thereto, following documents are called for:

a) Books of accounts;

b) Invoices, vouchers and ledger accounts; and

c) …….

In this regard, undersigned hastens to bring to your kind attention the requirement in section 70 of Central GST Act and State GST Act that the duty of the undersigned is to "produce a document or any other thing" and the relevant provisions are extracted:

> *"**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……."*

It is clear from the foregoing that calling for books of accounts, etc., (listed above) does not meet the situations permitted to invoke the powers vested under section 70 of Central GST Act and State GST Act. Reference to "a" document would be limited to something specific but from the perusal of the documents called for, it does not appear to be anything specific but much wider. This is not permitted in law and to do so would be to travel beyond the boundaries of section 70 of Central GST Act and State GST Act which is sought to be invoked.

Further, it may be noted that the authority to summon any person is only in a case where an "inquiry" is underway. Attention is invited to the meaning of the word's 'inquiry' compared to 'enquiry' as can be noted from the following instructive words:

> *"the traditional distinction between the verbs 'enquire' and 'inquire' is that enquire is to be used for general senses of 'ask', while* ***inquire is reserved for uses meaning 'make a formal investigation'****".*
>
> *Baleshwar Bagarti v. Bhagirathi Dass [(1909) ILR 35 Cal 701 at 713]*

Where 'investigation' is taken up, powers under section 70 of Central GST Act and State GST Act become available to assist the investigative agency or officer during the said investigation. It may be noted that:

a) The registered person is registered with Central / State administration as can be seen from the certificate of registration dated……..;

b) All returns have been submitted online in accordance with law and are up to date;

c) All admitted dues have been discharged; and

d) Any other plea……..

However, the above referred summons has been issued by your office which is neither the office of Intelligence Commissionerate of Central Taxes nor the office of Preventive / Enforcement wing of State Taxes / Central Taxes, which are empowered to invoke the powers of investigation under section 67 of Central GST and State GST Act and conduct inquiry. Proceedings under any other section of the law would be in direct conflict with section 59 of Central GST Act and State GST Act.

OR

Further, based on a careful consideration of the documents requested, the current proceedings are clearly 'inquisitorial' and appear to be in direct conflict with section 59 of Central GST Act and State GST Act. Parliament in its wisdom has extended limited authority to challenge the self-assessment made by any registered person and in case of any doubts about the correctness of such self-assessment falls within the purview of section 61 or, 65 or 67, action may be taken under section 73 or 74 of the Central GST Act and State GST Act.

As such, the current proceedings said to be underway are not in the nature of an 'inquiry' but something in the nature of 'enquiry' akin to scrutiny or verification of the compliances. Powers under section 70 of Central GST Act and State GST Act are not available to such proceedings. The undersigned begs to stand corrected should the facts, which are not clearly forthcoming from the said summons, be otherwise and will most respectfully comply in accordance with law.

If the facts as understood were rightly so, to permit these proceedings to continue, despite the above stated incompleteness affecting its validity, **would render the "due process" laid down in law "superfluous, unnecessary and nugatory**" and this is impermissible and a violation of the express provisions of the Central GST Act and State GST Act. Clearly, for the purposes of invoking these exceptional powers and including them within the operation of Code of Civil Procedure along with attaching the consequences under sections 193 and 228 of Indian Penal Code, the Legislature has devoted the wisdom and attention to "prescribe the process" that must be followed. This "procedure prescribed" is not an empty formality but a diligent law-making effort to meet the high standards of the "principles of natural justice" that need to be enjoined in these proceedings. Where any proceeding under Central GST Act and State GST Act proceeds in complete disregard to the "procedure established in law", that would be illegal.

Further, accepting that *bona fide* administrative intentions are at work, it is imperative that Legislative wisdom in circumscribing exceptional powers to summon not be permitted any misapplication. Whatever may be the reasons, unless those reasons operate within the boundaries laid down by Legislature, they must be held to be arbitrary and for that reason must be actively disobeyed, to which the law extends its full might and protection.

For these reasons, it appears that the above referred summons suffers from want of jurisdiction on two counts:

a) Documents (listed earlier) that have been called for, are beyond the scope of section 70 of Central GST Act and State GST Act; and

b) Officer calling for the said documents is not the Proper Officer empowered to exercise powers under section 70 of Central GST Act and State GST Act.

These exceptional powers may have been invoked without taking into consideration the necessary ingredients that must pre-exist to exercise the necessary authority to invoke the said powers under section 70 of Central GST Act and State GST Act.

Further, the undersigned is also barred in law from entertaining any proceedings that are invalid and this may be noted from the clear embargo placed upon the undersigned in section 160(2) of Central GST Act and State GST Act which reads as:

> ***"160. Assessment proceedings, etc., not to be invalid on certain grounds. — (1) …….***
>
> *(2) The service of* ***any notice, order or communication*** *shall not be called in question, if the notice, order or communication, as the case may be,* ***has already been acted upon*** *by the person to whom it is issued or where such service* ***has not been called in question*** *at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication."*

It is evident from the above extracts that any failure to question the nature of the proceedings results in forfeiture of the authority to call into question its validity in subsequent proceedings. As such, without addressing the prejudice caused to the registered person / deponent by invoking the powers of inspection without satisfying the preconditions stated in section 70 of Central GST Act and State GST Act, the subject proceedings are liable to be dropped in toto to prevent miscarriage of justice apparent in these proceedings which suffer from want of jurisdiction.

Request you to kindly acknowledge receipt of this letter and oblige.

For ……..

Name:…….

(Registered Person)

GSTIN…….

Address:……..

Note: Please Replace 'State' with Name of the State/UT

Copy to:

a) Additional Commissioner of Central Tax

……..

……..

b) Commissioner of Commercial Taxes

……..

……..

LETTER J

REQUEST TO FURNISH COPY OF STATEMENT RECORDED DURING SUMMONS TO AFFIRM PROBATIVE VALUE

To,

The …… ('Proper Officer')

[Proper Officer Conducting Investigation]

O/o……..insert authority……..

Date:…….

Sir,

Sub: Deposition on ……..in summons proceedings under section 70 of Central GST Act and State GST Act – request for

Ref: (a) ……. Name of the Deponent

(b) …. Name of the Registered Person

(c) ……. GSTIN……..

(d) Case file ref. no……

This is with reference to written deposition on ……. after administering oath, where this deponent was directed to appear and give evidence in the matter of some proceedings, the nature and associated details were not shared with deponent, said to be underway against above referred registered person. The deponent entered appearance before the ……. ('Proper Officer') at the time and place and on the date specified in the summons issued under section 70 of Central GST Act and State GST Act.

Documents directed to be produced for purposes of the said proceedings and listed in the summons were submitted in …… [boxes / files] to the said Proper Officer. Further, the deposition was recorded [by hand / on computer] in a question-and-answer method and lasted about …….. hours on the said date.

As the nature of these questions were not informed prior to entering appearance, the deponent was required instantly to recollect and answer

those questions, without the assistance to call and confer with any other person(s) who may have been directly connected with matters connected relating to those questions or to access concerned files and documents to refresh his memory. While answers provided are believed to be true to the best of deponent's knowledge and belief, the deponent certainly was anxious about the proceedings perhaps due to (i) language employed in the summons itself to describe the nature of these proceedings (ii) conduct of the Proper Officer and others present during proceedings (iii) location and duration of this deposition; and (iv) style of questioning suggesting serious violation of GST law by registered person and so on.

Whether all of these may be due to inexperience and mere perception of the deponent is undeniable and certainly not improbable. Now, probative value of the answers provided in deposition may greatly improve if a copy of the said deposition were provided for review and confirmation by the deponent in calmer settings and circumstances including after due verification by (i) conference with persons more directly knowledgeable, if any, with the facts (and not the conclusions or understanding of deponent) and / or (ii) by comparison with files and documents, if any, connected with those questions.

The deponent is an …… (mention qualification) ……. and is responsible for …… (mention nature of duties) …. which does not entail familiarity or understanding of the tax laws. However, several questions in these proceedings fell beyond the domain of the deponent's experience or expertise.

The deponent adds that the entire proceedings caused great anxiety and could have impaired clear thinking although Proper Officer's reassurances were impeached by line of questioning that the deponent was required to immediately recollect and respond with great certainty. After such a long and tiresome proceedings on the said date, the deponent was looking forward to seeing the end of these proceedings as early as possible, and this motivation exasperates the quality and reliability of answers provided.

As such, the deponent makes this request for a copy of the deposition recorded and duly signed on the said date to review and confirm or correct the answers provided. In the absence of this step towards confirmation of the answers deposed, the deponent is unable to assure that those answers provided may not be free from doubt, while being truthful all the same.

This request applies to the written deposition recorded on the date referred above and also summons issued earlier on ……, …….and …….

as well as other submissions taken on record on the files of the Proper Officer. This request is submitted [in person at the reception counter / by registered post] along with a copy via email from deponent's email ……. to the Proper Officer's email …….

Thanking you

……

Name of Deponent……

Copy to:

a) Principal Chief Commissioner of Central Taxes

……..

or

Commissioner of State Tax

……..

LETTER K

REQUEST TO AVAIL OPTION TO PAY 'REDEMPTION FINE' IN CONFISCATION PROCEEDINGS

To

The ……. of Central / State Tax

[Proper Officer Adjudicating SCN for Confiscation]

……..

Date:……..

Sub: Option to pay fine under section 130(2) of Central GST Act – Request for.

Ref: (a) Show cause notice in Form GST DRC-01 dated ……..

(b) Proceedings under section 67 of Central GST Act vide case no…….

or

(a) Show cause notice in Form GST MOV 10 dated ……..

(b) Proceedings under section 129(6) of Central GST Act vide Form GST MOV 9 no… dated ……

(c) …..Name…….. (GSTIN……..) ('Registered Person')

(d) Other references, if any

This has reference to the above stated proceedings under section ….. of Central GST Act, 2017 and State GST Act, 2017 or Integrated GST Act and GST (Compensation to States) Act, 2017 and Rules made thereunder. In this regard, the registered person acknowledges receipt of the show cause notice on …….

WITHOUT PREJUDICE to any other claim, reply, response or objection in respect of proceedings above referred, the registered person hereby, most humbly, submits this request that option to pay fine under section 130(2) of Central GST Act be allowed for the reasons THAT:

1. Subject proceedings underway are based on mere suspicion about likely evasion of tax involving goods liable to confiscation, which are not admitted by the registered person and vehemently denied without prejudice to the challenge to underlying 'reasons to believe' that these proceedings are justified;
2. Provisional release is requested vide letter dated ..... along with justification for the same;
3. Confiscation of goods stated to be liable to confiscation under these proceedings, will cause irreparable prejudice to the registered person; and
4. Balance of convenience is in favour of grant of option to pay penalty-in-lieu of confiscation and in is in accordance with law.

For this act of kindness, the registered person is ever so grateful. Kindly acknowledge receipt of this letter of request, for which we shall remain obliged.

For ……..

Name:……

(Registered Person)

GSTIN……

Address:……..

Note: Please Replace 'State' with Name of the State/UT

LETTER L

INTIMATION OF DECISION TO APPEAL TO GSTAT AND REQUEST TO REFRAIN FROM PRECIPITATIVE ACTION

To,

The …… of Central Tax / State Tax

……

……

Date:…….

Sir/Madam,

Sub: Intimation to abstain from any precipitative action in the matter of Order passed by First Appellate Authority / Revisionary Authority in view of the decision of the Appellant / Registered Person therein to prefer appeal before the Appellate Tribunal under section 112(1) of the Central GST Act and State GST Act – reg.

Ref: (a) …….. (Appellant)

(b) ……GSTIN……..

(c) Order of the First Appellate Authority No……dated…….passed under section 107 of Central GST Act and State GST Act

or

(c) Order of Revisionary Authority under section 108 of the Central GST Act and State GST Act

This is to inform you that in the matter of Order passed by …… and being aggrieved thereby, the Appellant / Registered Person therein has decided to prefer an appeal before the Appellate Tribunal. Attention is invited to *Removal of Difficulty Order No. 9/2019-Central Tax dated 3 Dec 2019*, whereby the time to prefer an appeal before the Appellate Tribunal under section 112(1) of three months from date of such order passed under section 107 or section 108 of Central GST Act and State GST Act stands revised as ''start of the three months period shall be

considered to be "***date of Order or date when President*** *of the Appellate* ***Tribunal enters office, whichever is later"***.

Accordingly, this intimation is submitted to abstain from taking and to keep in abeyance all precipitative action pursuant to the said order passed by the First Appellate Authority / Revisionary Authority No……..dated…… in view of the decision taken as above by the appellant / registered person to go on appeal.

By way of affirmation, pre-deposit of Rs……..being additional twenty per cent of the disputed tax as required under section 112(8) of Central GST Act and State GST Act is made *vide* debit entry ……. dated …….. in Electronic Credit / Cash Ledger and copy of extracts appended below: (delete this entire para if pre-deposit is not made)

Insert Payment Proof

Based on the above and Government's instruction contained in *Circular No.132/2/2020-GST dated 18 Mar 2020*, all further action either under section 79 or other provisions of the Central GST Act and State GST Act made applicable to demands under Integrated GST Act and GST (Compensation to States) Act stand deferred *sine die*. Request you to kindly acknowledge receipt of this intimation.

For ……..

Name:…….

(Appellant)

GSTIN……(IF ANY)

Address:……..

Note: Please Replace 'State' with Name of the State/UT

LETTER M

INTIMATION OF DECISION TO APPEAL TO FAA AND REQUEST TO REFRAIN FROM ACCELERATED RECOVERY ACTION

To,

The …… of Central Tax / State Tax

……

……

Date:…….

Sir/Madam,

Sub: Intimation of decision of Appellant / Registered Person to prefer appeal before the First Appellate Tribunal under section 107(1) of the Central GST Act and State GST Act in the matter of Order passed by ……..('Adjudicating Authority') – reg.

Ref: (a) …….. (Appellant)

(b) ……GSTIN……..

(c) Order of the Adjudicating Authority No……dated……passed under section …….of Central GST Act and State GST Act

This is to inform you that in the matter of Order passed by …… and being aggrieved thereby, the Appellant / Registered Person therein has decided to prefer an appeal before the First Appellate Tribunal. Attention is invited to the duration permitted in section 107(1) to prefer the said appeal.

Further, it is informed that the Appellant's bona fides are impeccable and there is no risk to revenue as noted from the following:

a) All periodic tax returns are filed and up-to-date;

b) Annual Returns are also filed;

c) Full cooperation has been extended during inquiry under section…….;

d) Appellant is registered on the files of……..who has carried out necessary verification of registered place of business or whose aadhaar card verification is completed of Common Portal; and

e) Financial position of Appellant is stable and sufficient to meet all present and future obligations including those arising from this Order.

In view of the above no recovery be initiated until the said appeal is filed before First Appellate Authority under section 107(1) and copy of the same will be intimated to you in due course.

OR

In view of the above and that pre-deposit vide Form GST DRC-03 challan no…….dated……..for the prescribed amount of Rs…….. has already been deposited pending filing of said appeal before First Appellate Authority under section 107(1) in due course.

Accordingly, this intimation is submitted to abstain from taking and to keep in abeyance all precipitative action pursuant to the said order passed by the Adjudicating Authority No……..dated……. and the operation of stay under section 107(7) of Central GST Act and State GST Act. Request you to kindly acknowledge receipt of this intimation.

For ……..

Name:……

(Appellant)

GSTIN……(IF ANY)

Address:……..

Note: Please Replace 'State' with Name of the State/UT

LETTER N

REQUEST TO RECTIFY MISTAKE APPARENT ON RECORD IN ADJUDICATION OR APPELLATE ORDER

To,

The ……of Central Tax / State Tax

[Proper Officer passing the Order]

……

Date:…….

Sir,

Sub: Application for rectification under S.161 of Central/State GST Act in respect of order passed under section ……. – Request for

Ref: (a) Name ……..('Registered Person')

(b) GSTIN of the registered person

(c) Order No…….. dated ……served on …….

(d) …….Reference of application / facts submitted…… dated …….

This has reference to the order of adjudication referred to above that came to be passed under section…….. of Central GST Act and State GST Act (order of adjudication) that came to be served on …….. In this regard, we beg to submit before you that there are mistakes apparent on the face of the record that deserve your urgent attention by this application for rectification under section 161 of Central GST Act and State GST Act.

Para ……. of the said order of adjudication states as follows:

"……."

Whereas facts submitted by the undersigned vide application …….. dated…….. clearly set out the following:

a) the facts as can be seen from the foregoing Para show that……. [describe in simple language the nature of the error apparent]……..,

b) ……Any other plea ……..

In view of the foregoing variance, the order of adjudication appears to be erroneous on facts and the undersigned seeks your kind intervention to rectify this mistake apparent in accordance with section 161 of the Central GST Act and State GST Act by passing such modified orders as may be deemed fit. To this end, following documents are submitted in support of the factual assertion that may be verified:

a) Application originally filed on ……

b) Submissions made during the course of proceedings ……

c) ……

Request you to kindly acknowledge receipt of this application for rectification under section 161 of Central-State GST Act and oblige.

For ……..

Name:……

(Appellant)

GSTIN……

Address:……..

Note: Please Replace 'State' with name of the State/UT

Enclosed: as above

Note: Original order which is sought to be rectified should not be returned to the adjudicating authority, please retain it. Rectified order, if any, may be reissued by the adjudicating authority (delete this para in final application).

LETTER O

REQUEST TO UNBLOCK CREDIT ILLEGALLY BLOCKED ON ACCOUNT OF REASONS BEYOND RULE 86A

To,

The……of Central Tax / State Tax

……..

Date:…….

Sir,

Sub: Application for removal of anomalies and deficiencies in authorization said to be issued under the powers vested under Rule 86A of Central GST Rules and State GST Rules and to withdraw the same for want of jurisdiction – Regarding

Ref: (a) ……Name Of Taxpayer……. ('Applicant')

(b) GSTIN……..

(c) Blocking of input tax credit vide ……..

This is with reference to input tax credit blocked under rule 86A of Central GST Rules and State GST Rules but for reasons that the amount of Rs……claimed as input tax credit is allegedly inadmissible as under:

a) Section 16(4) to the said extent of Central GST Act and STATE GST Act;

b) Section 17(2) to the said extent of Central GST Act and STATE GST Act;

c) Any other reason stated for blocking (other than rule 86A).

which was executed on Common Portal on or about ….(insert date)….. by …… of Central Tax / State Tax, …….

With reference to the above, following anomalies and deficiencies are noted which affect the validity and impair the entire proceedings for want of jurisdiction that is sought to be exercised thereby, namely:

1. Rule 86A of Central GST Rules and State GST Rules permits the Commissioner or an officer duly authorized having 'reasons to believe' that **credit of input tax available on electronic credit ledger** has been fraudulently availed or is ineligible in as much as:

   a) Invoice is issued by non-existent supplier or location;

   b) Invoice is issued without supply of goods or services;

   c) Without Depositing tax said to be charged on such invoice;

   d) Recipient of said credit, that is, this Applicant, is non-existent or the business premises is not registered location;

   e) Invoice is not prescribed document to claim said credit.

2. It is evident that only when any of the above five situations are shown to exist and any one or more of them form the 'reasons to believe' can the exceptional powers under rule 86A of Central GST Rules and State GST Rules be invoked.

3. However, it is stated that these exceptional powers are invoked on account of belated filing of returns in Form GSTR3B for the tax period(s) ……. which is beyond the time permitted for claiming input tax credit under section 16(4) of Central GST Act and State GST Act. The reasons stated for blocking credit are not listed in rule 86A of Central GST Rules and State GST Rules. This, in itself, is a misapplication of the exceptional powers and its exercise without jurisdiction.

   or

   Explain other grounds on which the credit is blocked…….

4. Further, as to whether the applicant is in violation of section 16(4) of Central GST Act and State GST Act cannot be summarily and unilaterally decided by Proper Officer but due to the civil consequences the applicant is exposed to suffer, this question cannot be decided without putting the applicant at notice in accordance with the procedures established by Central GST Act and State GST Act for demanding reversal of input tax credit. The applicant places on record that no such notice has been issued which is pending adjudication for the determination of inadmissibility of such credit.

5. Recording of 'reasons to believe' is a measure that prevents misuse of the exceptional powers. And these reasons cannot be in the mind of

the Proper Officer but be recorded on the files which are public record, accessible under Right to Information Act.

6. In admitting that credit is blocked for reasons of alleged non-compliance with requirements of section 16(4) of Central GST Act and State GST Act, is itself an admission that this proceeding to block credit is beyond the scope of rule 86A of Central GST Rules and State GST Rules. Attention is invited to section 58 of Indian Evidence Act which states that undisputed facts do not require proof. And where the admitted reasons (for blocking credit) are not the ones listed in rule 86A, the exercise of exceptional powers in this rule are rendered illegal and contrary to the mandate in law.

7. The ingredients necessary to invoke these powers are so rare and exceptional that they cannot be lightly exercised as is evident in the fact that routine books of accounts and financial statements are being called for, under these proceedings. The……..of Central Tax / State Tax ……could not have exercised these exceptional powers unilaterally and the 'reasons to believe' should have been endorsed by you as the superior officer supervising the activities of subordinate Officers within the Division. These 'reasons to believe' must be shared by you and, in fact, become your reasons for authorizing the blocking of credit which is now shown to be contrary to the scope of rule 86A of Central GST Rules and State GST Rules.

8. CBICs Guidelines for *"disallowing debit of electronic credit ledger under Rule 86A"* dated 2 Nov 2021 deal with blocking of credit as a matter of routine by Proper Officers. Present actions of the Proper Officer are certainly not malicious, but even *bona fide* actions are not permitted to be carried out bypassing the law. CBICs instructions are issued exactly for this purpose – to ensure correct implementation of the law – and action contrary to CBICs Instructions are *ex facie* illegal and contrary to the Government's own interpretation of the application of rule 86A of Central GST Rules and State GST Rules. Whatever may be the reasons for executive action, unless those reasons operate within the boundaries laid down by Legislature, they must be held to be arbitrary and for that reason must be actively disobeyed, to which the law extends its full might and protection.

9. Such summary action of blocking credit for alleged non-compliance with section 16(4) Central GST Act and State GST Act by invoking powers under rule 86A of Central GST Act and State GST Act is

clearly without necessary ingredients to support the exercise of such extreme powers, it is only appropriate that these anomalies and deficiencies be brought to attention of the Proper Officer to remedy any inadvertent exercise of inapplicable provisions of the law.

10. When no appeal under section 107(1) of Central GST Act and State GST Act lies against the arbitrary blocking of credit under rule 86A of Central GST Rules and State GST Rules, it is but essential that the taxable person comes before the very authority who has exercised the said power to do justice and resolve the anomalies and deficiencies present.

11. However, if somehow these proceedings – of continuing to keep the said amount of input tax credit blocked – were permitted to continue, despite the above stated deficiencies and anomalies affecting its validity, it would render the "due process" laid down in law "superfluous, unnecessary and nugatory" and this is wholly impermissible and a gross violation of the express words of the Central GST Act and State GST Act. Clearly, for purposes of permitting intervention to check any evasion of tax, the Legislature has thought it necessary to "prescribe the process" that must not be bypassed. This "procedure prescribed" is not an empty formality but a diligent law-making effort to meets the highest standards in adhering to "principles of natural justice" enjoined in these proceedings. Where any proceeding under Central GST Act and State GST Act proceeds in disregard to the "procedure established in law", that would be illegal and the applicant is called upon by section 160(2) of Central GST Act and State GST Act to "refrain from entertaining" and to "call into question" the said proceeding, by raising objections at the earliest opportunity. Adverting to the said section 160(2) of Central GST Act and State GST Act, it states:

> ***"160. Assessment proceedings, etc., not to be invalid on certain grounds. —(1) ……..***
>
> *(2) The service of* ***any notice, order or communication*** *shall not be called in question, if the notice, order, or communication, as the case may be,* ***has already been acted upon*** *by the person to whom it is issued or where such service* ***has not been called in question*** *at or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication."*

This provision places an embargo on the applicant from entertaining any proceeding that are not in accordance with law and whose validity is doubtful as in the instant case where, for reasons stated above, suffers for want of jurisdiction to invoke section 67 of Central GST Act and State GST Act. Except by resolving these anomalies and deficiencies, irreparable prejudice will be caused to Applicant if current proceedings were permitted to continue.

Reliance is placed on the following judicial authorities in support of the above:

a) ……List case laws, if any……

b) ……List case laws, if any……

RELIEF SOUGHT

In view of the foregoing, the applicant makes this application requesting that the anomalies and deficiencies in exercising exception powers under rule 86A of Central GST Rules and State GST Rules and blocking credit of Rs……for alleged non-compliance with section 16(4) Central GST Act and State GST Act, be addressed in accordance with law and unless any material is available on record that support exercise of these exceptional powers, the **said amount of input tax credit be unblocked immediately to remedy the irreparable prejudice caused to Applicant**. And pending disposal of this application, all further proceedings attendant to the matter of alleged non-compliance with section 16(4) Central GST Act and State GST Act be treated as adjourned *sine die*.

For …….

Name:……

(Appellant)

GSTIN……

Address:……..

Note: Please Replace 'State' with name of the State/UT

Copy to:

a) Commissioner of Central Tax / State Tax

……

……

b) Joint Commissioner of Central Tax / State Tax

……

……

LETTER P

REQUEST TO INFORM BASIS ON WHICH PROCEEDINGS ARE INITIATED UNDER SECTION 71

To,

The……of Central Tax / State Tax

……..

Date:……..

Sir,

Sub: Application for removal of anomalies and deficiencies in authorization said to be issued to initiate proceedings under section 71 of Central GST Act and State GST Act and to withdraw the same for want of jurisdiction – reg.

Ref: (a) …….Name of taxpayer…….. ('Applicant')

(b) GSTIN……..

(c) Calling for books of accounts and other records without authorization as per law dated…….

This is with reference to the above referred Notice dated ……appears to be pursuant to authorization issued under section 71 of Central GST Act and State GST Act. In this regard, Applicant submits the following for your consideration:

1. Section 71 of Central GST Act and State GST Act does not authorize by itself the issuance of any Notice, it merely lays down the "circumstances" when an authorized Officer may gain access to business premises of a registered person. As section 71 requires authorization and any authorization previously initiated under section 67 are inapplicable and insufficient to avail the powers vested in the said section 71 of Central GST Act and State GST Act;

2. Pursuant to this section 71, there is no rule prescribed to guide the Proper Officer unlike rule 139 of Central GST Rules and State GST Rules, exercise of powers under section 71 of Central GST Act and State GST Act is rendered arbitrary and for this reason illegal;

3. Without a rule and without any form prescribed, reusing Form GST INS-01 prescribed for purposes of another section 67 does not serve the ends of section 71 of Central GST Act and State GST Act and brings the two sections in direct conflict with each other. This is contrary to the very law sought to be administered;

4. Without yet another authorization being issued, above referred Notice under section 71 of Central GST Act and State GST Act is *ex facie* illegal and suffers for want of jurisdiction;

5. The regime requiring self-assessment of tax under section 59 of Central GST Act and State GST Act cannot be unsettled by invoking exceptional powers in law.

Reliance is placed on the following judicial authorities in support of the above averments :

a) .....List case laws, if any.....

b) .....List case laws, if any.....

RELIEF SOUGHT

In the absence of remedy of appeal to the applicant under section 107 of Central GST Act and State GST Act against the issuance of above referred Notice, there is an inescapable expectation that no prejudice be caused to the Applicant's rights at the threshold in these proceedings. **To this end, the applicant seeks your indulgence to prevent prejudice by invoking exceptional jurisdiction to issue notice under section 71 in the absence of any 'evasion of tax' OR authorization to carry out departmental audit or special audit as per law.** The applicant further prays that any further requirement for information or documents be initiated strictly in accordance with law.

For .....

Name:.....

(Appellant)

GSTIN.....

Address:.....

Note: Please Replace 'State' with name of the State/UT

Copy to:

a) Commissioner of Central Tax / State Tax

……

……

b) Joint Commissioner of Central Tax / State Tax

……

……

Chapter 9
Reference Instructions - CBIC

1. *Instruction No. 1/2020-21 [GST Investigation/ F. No. GST/ Inv/ DGOV Reference/ 20-21], Dated 2-2-2021* [Section 67 of the CGST Act - Inspection, Search and Seizure - Power of - Instructions/ Guidelines regarding procedure to be followed during search operation.]

2. *Instruction No. 2/2021-22 [GST-Investigation], dated 22-9-2021* [Section 73, read with section 74 of the CGST Act - 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 - issuance of show cause notice in time bound manner.]

3. Guidelines for provisional attachment of property under section 83 of the CGST Act -Reg. vide *CBEC-20/16/05/2021–GST/359*, Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing, New Delhi, dated *23rd February 2021*.

4. Guidelines for disallowing debit of electronic credit ledger under Rule 86A of the CGST Rules - Reg. *vide CBEC-20/16/05/2021-GST/1552*, Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing, New Delhi, dated *2nd November 2021*.

5. Guidelines for arrest and bail in relation to offences punishable under the CGST Act- *Instruction No.2/2022-23 [GST-Inv.]*, Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing, New Delhi, *dated 17th August 2022.*

6. Guidelines on issuance of summons under section 70 of the CGST Act *vide Instruction No.3/2022-23 [GST-Inv.]*, Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Policy Wing, New Delhi, *dated 17th August 2022*.

7. Guidelines for launching of prosecution under the CGST Act, 2017 *vide Instruction No.4/2022-23 [GST-Inv.]*, Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, GST Investigation Wing, New Delhi, *dated 1st September 2022*.

F.No. CST/INV/DGOV Reference/20-21

Ministry of Finance
Department of Revenue
Central Board of indirect Taxes and customs
GST-investigation Wing

Dated: 02.02.2021

INSTRUCTIONS NO. 01/2020-21 [GST-INVESTIGATION]

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 re-iterated for compliance by DGGI/ filed formation.

2. Section 67 of the Central Goods and Services Tax Act, 2017 contains 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 Search should be carried out only with a proper search authorization issued 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 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 he 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 Panchama.

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 to Person in the premises is not well, to 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 he 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 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 acknowledgement 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 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 case tile before returning the same 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–19 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 the DGGI 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 f0llowed in continuation to the earlier instructions.

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

(Neerai Prasad)
02.02.2021
Commissioner (GST-Inv), CBIC
Tel. No.: 011-21400623
Email id: gstinv-cbic@gov.in

To

1. Principal Director General [DGGI], New Delhi / All DGs (SNU), DGGI
2. Principal Chief Commissioner(s)/ Chief Commissioner(s) of CGST, All Zones.
3. Webmaster, CBIC (www.cbic.gov.in) for uploading on the website of CBIC under Instructions.

F. NO. GST/INV/DISPUTE RESOLUTION /03/21-22
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs
GST-Investigation Wing

Room No.01, 10h Floor,
Tower-2, 124, Jeevan Bharti Building,
Connaught Circus, New Delhi- 110001.
Dated the 22nd September, 2021

INSTRUCTION NO. 02/2021-22 GST-INVESTIGATION

SUBJECT: ISSUANCE OF SCNS IN TIME BOUND MANNER - REGARDING

A detailed analysis to pursue trends in cases of GST evasion & fraudulent ITC availment booked viz-a-viz number of SCNs issued against for the FY 2017-18 [w.e.f. July, 2017], 2018-19 & 2019-20, have been made and it is observed that in GST evasion cases booked and in the Fraudulent ITC cases booked, during the above mentioned period, SCNs have been issued only in few cases.

2.1 Apparently, cases of ITC frauds or GST evasion are covered under the provisions of Section 74 of CGST Act, 2017 [the extended period clause], However, there may be certain other situations where issuance of a notice under Section 73 of the CGST Act, 2017, is 2.1 intended.

2.2 Kind attention is invited to sub-section (2) & sub-section (10) of the Section 73 of the CGST Act, 2017, which read as under:

> *(2) The Proper Officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.*
>
> *……..*
>
> *(10) The Proper Officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.*

2.3 Attention is also invited to sub-section (2) & sub-section (10) of the Section 74 of the CGST Act, 2017, which read as under:

> *(2) The Proper Officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.*
>
> *……...*
>
> *(10) The Proper Officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.*

3. Further, the last dates of filing of the *Annual Return" under Section 44 of the CGST Act, 2017, for the Financial Years 2017-18, 2018-19 & 2019-20 are as below:

S.No.	Period	Last date to file Annual Return
1	2017-18	05th & 7th February, 2020 (Notification No. 06/2020-Central Tax) dated 03.02.2020
2	2018-19	31st December, 2020 (Notification No. 80/2020-Central Tax) dated 28.10.2020
3	2019-20	31st March, 2021 (Notification No. 04/2021- Central Tax) dated 28.02.2021

4. Board has examined the matter in the background of issuance of SCNs in meagre number of cases booked/detected as mentioned above. It may be seen that the last date for filing the Annual Returns for the FYs of 2017-18, 2018-19 & 2019-20 is already over. As a result, the time limit of three years/five years for issuance of orders under Section 73 & Section 74 of the CGST Act, 2017 has already kicked in. If the issuance of SCNs is pushed to close proximity of the end dates/last dates, it may leave very little time with the adjudicating authority to pass orders within stipulated period mentioned in sub-section (10) of Section 73/ Section 74. This might result in a situation where either the adjudicating authority is not able to pass orders within prescribed time period or quality of adjudication suffers. It is felt that the present situation warrants for extra efforts on the part of field formations and strict monitoring at supervisory level.

5. Accordingly, Board desires that Principal Director General/ Director General(s)/Principal Chief Commissioner(s)/Chief Commissioner(s) within their jurisdiction may take stock of the pending investigation cases/other cases which warrant issuance of show cause notices and take appropriate action to ensure timely completion of investigation(s) and issuance of SCNs well before the last date. The respective Pr. Chief Commissioners/Chief Commissioners may draw an action plan so that no case is pending investigation beyond one year. Needless to mention that once SCN is issued, timely adjudication must follow.

(Vijay Mohan Jain)

Commissioner (GST-Inv.), CBIC

To

1. Principal Director General [DGGI], New Delhi / All DGs (SNU), DGGI
2. Principal Chief Commissioner(s)/ Chief Commissioner(s) of CGST, All Zones.
3. Webmaster, CBIC (www.cbic.gov.in) for uploading on the website of CBIC under Instructions.

CBEC-20/ 16/05 /2021 –GST/ 359

Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs
GST Policy Wing

*****

New Delhi, dated 23rd February, 2021

To,

The Principal Chief Commissioners/Chief Commissioners/ Principal Commissioners/ Commissioners of Central Tax (All)

The Principal Director Generals/ Director Generals (All)

Madam/Sir,

SUBJECT: GUIDELINES FOR PROVISIONAL ATTACHMENT OF PROPERTY UNDER SECTION 83 OF THE CGST ACT, 2017 - REG.

I am directed to refer to the section 83 of the Central Goods and Services Tax Act, 12017 (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, if 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 sec ions mentioned in section 83 of the Act;

ii. The Commissioner must have formed the opinion that provisional attachment to 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 (DI N) 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 ta able 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 sha11 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 cred it 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 sufficie1t 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 n 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 li u 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 endeavored 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. I 908 (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 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.

(Sanjay Mangal)
Commissioner (GST)

Copy to:

1. The Joint Secretary, GST Council Secretariat, New Delhi. He may consider circulating the same to all States for information and necessary action at their end.

CBEC-20/16/05/2021-GST/ 1552

Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs
GST Policy Wing

*****

New Delhi, dated 2nd November, 2021

To,

The Principal Chief Commissioners/ Chief Commissioners/ Principal Commissioners/Commissioners of Central Tax (All)

The Principal Directors General/ Directors General (All)

Madam/Sir,

SUBJECT: GUIDELINES FOR DISALLOWING DEBIT OF ELECTRONIC CREDIT LEDGER UNDER RULE 86A OF THE CGST RULES, 2017 -REG.

Rule 86A of the Central Goods and Services Tax Rules, 20 17 (hereinafter referred to as "the Rules") provides that in ce11ain circumstances, Commissioner or an officer authorised by him, on the basis of reasonable belief that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible, may not allow debit of an amount equivalent to such credit in electronic credit ledger.

2. Doubts have been raised by the field formations on various issues pertaining to disallowing debit of input tax credit from electronic credit ledger, under rule 86A of the Rules. Further, Hon'ble High Courts in some cases have emphasized the need for laying down guidelines for the purpose of invoking rule 86A. In view of the above, the following guidelines are hereby issued with respect to exercise of power under rule 86A of the Rules:

3.1 Grounds for disallowing debit of an amount from electronic credit ledger:

3.1.1 Rule 86A of the Rules is reproduced hereunder for reference:

"86A. Conditions of use of amount available in electronic credit ledger.

(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to

believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

   i. issued by a registered person who has been found non-existent or not to be conducting any business from anyplace for which registration has been obtained; or

   ii. without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from anyplace for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2) The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

(3) Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction. "

3.1.2 Perusal of the rule makes it clear that the Commissioner, or an officer authorised by him, not below the rank of Assistant Commissioner, must have "reasons to believe" that credit of input tax available in the electronic credit ledger is either ineligible or has been fraudulently availed by the registered person, before disallowing the debit of amount from electronic credit ledger of the said registered person under rule 86A. The reasons for such belief must be based only on one or more of the following grounds:

a) The credit is availed by the registered person on the invoices or debit notes issued by a supplier, who is found to be non-existent or is found not to be conducting any business from the place declared in registration.

b) The credit is availed by the registered person on invoices or debit notes, without actually receiving any goods or services or both.

c) The credit is availed by the registered person on invoices or debit notes, the tax in respect of which has not been paid to the government.

d) The registered person claiming the credit is found to be non-existent or is found not to be conducting any business from the place declared in registration.

e) The credit is availed by the registered person without having any invoice or debit note or any other valid document for it.

3.1.3 The Commissioner, or an officer authorised by him, not below the rank of Assistant Commissioner. must form an opinion for disallowing debit of an amount from electronic credit ledger in respect of a registered person, only after proper application of mind considering all the facts of the case. including the nature of prima facie fraudulently availed or ineligible input tax credit and whether the same is covered under the grounds mentioned in sub-rule (1) of rule 86A, as discussed in para 3. 1.2 above; the amount of input tax cred it involved; and whether disallowing such debit of electronic credit ledger of a person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue.

3.1.4 It is reiterated that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine case(s) fit for exercising power under rule 86A. The remedy of disallowing debit of amount from electronic credit ledger being, by its very nature, extraordinary has to be resorted to with utmost circumspection and with maximum care and caution. It contemplates an objective determination based on intelligent care and evaluation as distinguished from a purely subjective consideration of suspicion. The reasons are to be on the basis of material evidence available or gathered in relation to fraudulent availment of

input tax credit or ineligible input tax credit availed as per the conditions/ grounds under sub-rule (I) of rule 86A.

3.2 Proper authority for the purpose of Rule 86A:

3.2.1 The Commissioner (including Principal Commissioner) is the Proper Officer for the purpose of exercising powers for disallowing the debit of amount from electronic credit ledger of a registered person under rule 86A. However, Commissioner/ Principal Commissioner can also authorize any officer subordinate to him, not below the rank of Assistant Commissioner, to be the Proper Officer for exercising such power under rule 86A. It is advised that Commissioner/ Principal Commissioner may authorize exercise of powers under rule 86A based on the following monetary limits as mentioned below:

Total amount of ineligible or fraudulently availed input tax credit	Officer to disallow debit of amount from electronic credit ledger under rule 86A
Not exceeding Rupees 1 crore	Deputy Commissioner/ Assistant Commissioner
Above Rupees 1crore but not exceeding Rs 5 crore	Additional Commissioner/ Joint Commissioner
Above Rs 5 crore	Principal Commissioner/ Commissioner

3.2.2 The Additional Director General/ Principal Additional Director General of DGGI can also exercise the powers assigned to the Commissioner under rule 86A. The monetary limits for authorization for exercise of powers under rule 86A to the officers of the rank of Assistant Director and above of DGGI by the Additional Director General/ Principal Additional Director General may be same as mentioned for equivalent rank of officers in the table in para 3.2.1 above.

3.2.3 Where during the course of Audit under section 65 or 66 of CGST Act, 20 17 it is noticed that any input tax cred it has been fraudulently availed or is ineligible as per the grounds mentioned in sub-rule (I) of rule 86A, which may require disallowing debit of electronic credit ledger under rule 86A, the concerned Commissioner/ Principal Commissioner of CGST Audit Commissionerate may refer the same to the jurisdictional CGST Commissioner for examination of the matter for exercise of power under rule 86A.

3.3 Procedure for disallowing debit of electronic credit ledger/blocking credit under Rule 86(A):

3.3.1 The amount of fraudulently availed or ineligible input tax credit availed by the registered person, as per the grounds mentioned in sub-rule (I) of rule 86A, shall be prima facie ascertained based on material evidence available or gathered on record. It is advised that the powers under rule 86A to disallow debit of the amount from electronic credit ledger of the registered person may be exercised by the Commissioner or the officer authorized by him, as per the monetary limits detailed in Para 3.2. 1 above. The officer should apply his mind as to whether there are reasons to believe that the input tax credit availed by the registered person has either been fraudulently availed or is ineligible, as per conditions/ grounds mentioned in sub-rule (1) of rule 86A and whether disallowing such debit of electronic cred it ledger of the said person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue. Such "Reasons to believe" shall be duly recorded by the concerned officer in writing on file, before he proceeds to disallow debit of amount from electronic credit ledger of the said person.

3.3.2 The amount disallowed for debit from electronic credit ledger should not be more than the amount of input tax credit which is believed to have been fraudulently availed or is ineligible, as per the conditions/ grounds mentioned in sub-rule (1) of rule 86A.

3.3.3 The action by the Commissioner or the Authorized Officer, as the case may be, to disallow debit from electronic credit ledger of a registered person, is informed on the portal to the concerned registered person, along with the details of the: officer who has disallowed such debit.

3.4 Allowing debit of disallowed/restricted credit under sub-rule (2) of Rule 86A:

3.4.1 The Commissioner or the Authorized Officer, as the case may be, either on his own or based on the submissions made by the taxpayer with material evidence thereof, may examine the matter afre5h and on being satisfied that the input tax credit, initially considered to be fraudulently availed or ineligible as per conditions of sub-rule (1) of rule 86A, is no more ineligible or wrongly availed, either partially or fully, may allow the use of the credit. so disallowed/restricted, up to the extent of eligibility, as per powers granted under sub-rule (2) of rule 86A. Reasons for al lowing the debit of electronic credit ledger, which had been earlier disallowed, shall be duly

recorded on file in writing, before allowing such debit of electronic credit ledger.

3.4.2 The restriction imposed as per sub-rule (1) of rule 86A shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction. In other words, upon expiry of one year from the date or restriction, the registered person would be able to debit input tax credit so disallowed, subject to any other action that may be taken against the registered person.

3.4.3 As the restriction on debit of electronic credit ledger under sub-rule (1) of rule 86A is resorted to protect the interests of the revenue and the said action also has bearing on the working capital of the registered person, it should be endeavoured that in all such cases, the investigation and adjudication are completed at the earliest, well within the period of restriction, so that the due liability arising out of the same can be recovered from the said taxable person and the purpose of disallowing debit from electronic credit ledger is achieved.

4. Difficulty, if any, in implementation of the above guidelines may please be brought to the notice of the Board. Hindi version would follow.

(Sanjay Mangal)
Principal Commissioner (GST)

Copy to:

I. The Joint Secretary, GST Council Secretariat, New Delhi. He may consider circulating the same to all states for information and necessary action at their end.

GST/INV/Instructions/2021-22

GST-Investigation Wing

Dated: 17th August 2022

INSTRUCTION NO. 02/2022-23 [GST – INVESTIGATION]

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 sub section

(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 mens 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 (see paragraph 35). Format of arrest memo has been prescribed under Board's Circular No. 128/47/2019-GST dated December 23, 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 November 05, 2019, which makes generation and quoting of Document Identification Number (DIN) mandatory on communication issued by officers of CBIC to taxpayers 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 100 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.

(Vijay Mohan Jain)

Encl.: As Above
Commissioner (GST-Inv.), CBIC

Tel. No.: 011-21400623
Email id: gstinv-cbic@gov.in

GST/INV/Instructions/2021-22
GST-Investigation Wing

Dated: 17th August 2022

INSTRUCTION NO. 03/2022-23 [GST – INVESTIGATION]

SUBJECT: GUIDELINES ON ISSUANCE OF SUMMONS UNDER SECTION 70 OF THE CENTRAL GOODS & 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 the 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 statements from any person to find out the evasion of the tax etc. however, it need to be ensured of such power is done judiciously and with due consideration. Officers are 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 GST.

Further, there should also be exercised caution and restraint against frivolous use of this provision. This should be used after due justification and as a measure of last resort in cases of deliberate defiance of summons. It

should not be used repeatedly as a weapon of attack upon the freedom of the taxpayer rather as a shield of protection for the law of the land.

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.

(Vijay Mohan Jain)
Commissioner
(GST-Inv.), CBIC
Tel. No.: 011-21400623

Email id: gstinv-cbic@gov.in

To

1. Principal Director General [DGGI], New Delhi / All DGs (SNU), DGGI
2. Principal Chief Commissioner(s)/ Chief Commissioner(s) of CGST, All Zones.
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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS
GST-INVESTIGATION WING
NEW DELHI

INSTRUCTION NO

04/2022-23 (GST - Investigation); Dated: September 01, 2022

SUBJECT: GUIDELINES FOR LAUNCHING OF PROSECUTION UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017-reg.

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) ELT 294 (SC)] = 2011-TIOL-19-SC-FEMA* 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 subsection (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.

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

(Vijay Mohan Jain)
Commissioner (GST-Investigation), CBIC

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 Sl. 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.

Chapter 10
Legislative Provisions

CHAPTER-XIV: INSPECTION, SEARCH, SEAZURE AND ARREST	
Sections	Title
67	Power of inspection, search and seizure
68	Inspection of goods in movement
69	Power to arrest
70	Power to summon person to give evidence and produce documents
71	Access to business premises
72	Officers to assist Proper Officers

CHAPTER-XIX: OFFENCES AND PENALTIES	
Sections	Title
129	Detention, seizure and release of goods and conveyances in transit
130	Confiscation of goods or conveyances and levy of penalty
132	Punishment for certain offences

RULES: CHAPTER-XVII: INSPECTION, SEARCH AND SEIZURE	
Rules	Title
139	Inspection, search and seizure
140	Bond and security for release of seized goods
141	Procedure in respect of seized goods

RULES: CHAPTER-XVII: INSPECTION, SEARCH AND SEIZURE	
Forms	Title
Form GST INS-01	Authorisation for inspection or search [See rule 139(1)]
Form GST INS-02	Order of seizure [See rule 139(2)]
Form GST INS-03	Order of prohibition [See rule 139(4)]
Form GST INS-04	Bond for release of goods seized [See rule 140(1)]
Form GST INS-05	Order of release of goods/ things of perishable or hazardous nature [See rule 140(1)]

Circular No.41/15/2018-GST [CBEC-2016/03/2017-GST], dated 13-4-2018. (As amended by Circular No. 49/23/2018-GST [F.No. CBEC/20/16/03/2017-GST], dated 21-6-2018, Circular No. 88/07/2019-GST [F. No. CBEC-20/16/04/2018-GST], dated 1-2-2019.) [Section 68 of the CGST Act, read with Rule 138 of the CGST Rules, goods in movement-inspection of procedure for interception of conveyances for inspection of goods in movement, and detention, release and confiscation of such goods and conveyances]	
Forms	Title
Form GST MOV-01	Statement of the owner/ driver/ person-in- charge of the goods and conveyance
Form GST MOV-02	Order for physical verification/ inspection of the conveyance, goods and documents
Form GST MOV-03	Order of extension of time for inspection beyond three working days
Form GST MOV-04	Physical verification report
Form GST MOV-05	Release order
Form GST MOV-06	Order of detention under section 129(1) of The Central Goods and Services Tax Act, 2017 and The State/ Union Territory Goods and Services Tax Act, 2017/ under section 20 of the Integrated Goods and Services Tax Act, 2017
Form GST MOV-07	Notice under section 129(3) of The Central Goods and Services Tax Act, 2017 and The State/ Union Territory Goods and Services Tax Act, 2017/ under section 20 of the Integrated Goods and Services Tax Act, 2017
Form GST MOV-08	Bond for provisional release of goods and conveyance
Form GST MOV-09	Order of demand of tax and penalty
Form GST MOV-10	Notice for confiscation of goods or conveyances and levy of penalty under section 130 of The Central Goods and Services Tax Act, 2017 read with the relevant provisions of State/ Union Territory Goods and Services Tax Act, 2017/ The Integrated Goods and Services Tax Act, 2017 and Goods and Services Tax (Compensation to States) Act, 2017
Form GST MOV-11	Order of confiscation of goods and conveyance and demand of tax, fine and penalty

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GST & Indirect Taxes Committee
The Institute of Chartered Accountants of India
ICAI Bhawan, A - 29, Sector - 62, Noida - 201 309
Phone : 0120 - 3045954
E-mail : gst@icai.in
Website : https://icai.org/, https://idtc.icai.org/