



Indirect Tax Update

Summary of Instruction issued on 17th August 2022

Key Highlights:

- ✓ Guidelines for arrest procedure.
- ✓ Guidelines for issuance of Summons.

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1. Guidelines with respect to arrest under CGST Act 2017

(Instruction no.02/2022-23 [GST-Investigation] dated 17th August 2022)

CBIC has issued guidelines based on the Supreme Court Judgement dated 16th August 2021 for arrest and bail in relation to offences punishable under the CGST Act, 2017.

It was held by SC that, the occasion to arrest an accused during an investigation arises when the custodial investigation becomes necessary. Merely because an arrest can be made because it is lawful does not mandate that an arrest must be made.

Below is the gist of the guidelines issued:

1. Conditions precedent to arrest

Legal conditions provided in Section 132 of the CGST Act to be fulfilled for placing a person under arrest. Along with the legal conditions, the Commissioner will determine other factors also which are provided below:

- If the person was concerned in a non-bailable offence
- If an arrest is necessary to ensure proper investigation of the offence.
- If the person is likely to tamper with the investigation or with evidence
- If a person is a mastermind or key operator effecting proxy/ benami transaction in the name of dummy GSTIN for passing fraudulent ITC etc.
- If his presence cannot be ensured before investigating officer unless such a person is arrested.

Thus, the relevant factors must be considered before deciding to arrest a person apart from the fulfilment of legal requirements. Also, arrests should not be made in cases of technical nature where the demand for tax is based on a difference of opinion regarding the interpretation of the law.

2. Procedure for arrest

Principal Commissioner/ Commissioner shall record on file the nature of the offence, the role of the person involved and evidence available to provide that the person has committed an offence as mentioned in Section 132 of CGST Act.

The arrest memo should indicate relevant sections of the CGST Act 2017 or other laws attracted to the case and to the arrested person. In addition to it, the following to be mentioned:

- Grounds of arrest to be noted in the arrest memo and explained to the arrested person.
- Nominated or authorized person of the arrested person should be informed immediately and the same should be provided in the arrest memo.
- Date and time of the arrest to be provided in the arrest memo.

Other factors which need to be complied with at the time of arrest and pursuant to an arrest are:

- A woman should be arrested only by a woman officer.
- Medical Examination of an arrested person should be conducted by a medical officer.
- Reasonable care of the health and safety of the arrested person needs to be taken by the person who is having custody.
- Arrest should be made with minimal use of force and publicity and without violence.

3. Post-arrest formalities

- In cases where a person is arrested under Section 69(1) of the CGST Act for an offence specified under Section 132(4) of the CGST Act 2017, the AC or DC is bound to release a person on bail against a bail bond.
- The bail conditions are to be informed in writing to the arrested person and also on the telephone to the nominated person.
- Personal bail bond to be executed and one surety of like amount to be given by a local person, to appear before the Investigating officer when required and not leaving the country without informing the officer.
- The amount of bail/bond will depend on the facts of each case and it should not be excessive and commensurate with the financial status of the arrested person.
- The arrested person will be released by the officer on fulfilment of the bail conditions and if the conditions are not fulfilled the arrested person to be produced before the appropriate Magistrate.
- In cases where a person is arrested under Section 69(1) of the CGST Act for an offence specified under Section 132(5) of the CGST Act 2017, the Authorized officer shall inform grounds of arrest to the arrested person and produce him before a Magistrate within 24 hours.
- Prosecution complaint to be filed before the competent court at the earliest preferable within 60 days of arrest where no bail is granted.

4. Reports to be sent

- Pr.DGGI/Pr. Chief Commissioner(s)/ Chief Commissioner to send a report on every arrest to Member/Zonal member within 24 hours of the arrest.
- Monthly report of all persons arrested in the Zone shall be sent by the Pr. Chief Commissioner(s)/ Chief Commissioner to the Directorate General of GST Intelligence by the 5th of the succeeding month.
- Monthly reports received will be compiled by the DGGI and compiled zone-wise reports shall be sent to the Commissioner (GST-Investigation), CBIC by the 10th of every month.

2. Guidelines on the issuance of Summons under CGST Act 2017

(Instruction no.03/2022-23 [GST-Investigation] dated 17th August 2022)

CBIC has issued guidelines for the issuance of summons by GST officers which are summarized below:

- Summons by Superintendents shall 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. Higher officers can also issue the summons.
- Oral/telephonic permission to be obtained where it is not possible to obtain permission in writing and oral permission should be reduced to writing at the earliest opportunity.
- Appearance/Non-appearance of the summoned person to be recorded in the file by the officer and a copy of the statement to be recorded in the file.
- Summons should indicate the name of the offender(s) as an accused, co-accused or as witness.
- Issuance of summons to be avoided to call upon statutory documents like GSTR-1, and GSTR-3B which are digitally available in the GST portal.
- Summons should not be issued in the first instance to senior management officials such as CMD/MD/CEO/CFO/ similar officers of any company or a PSU. They should be only summoned when there are clear indications in the investigation of their involvement in the decision-making process which led to the loss of Revenue.
- Summoning officer to be present at the time and date for which summons is issued and in case of any exigency the summoned person to be informed.
- The persons summoned are bound to appear before the officers concerned except those women who do not by tradition appear in public or privileged persons.
- Issuance of summons repeatedly without ensuring service of the summons must be avoided.
- After serving three summons at reasonable intervals, a complaint is to be filed with the jurisdictional magistrate e under Section 172 and/or Section 174 of the Penal Code.
- It must be ensured before filing the complaint that summons has adequately been served upon the intended person as per Section 169 of the CGST Act.

H&A Comments:

- Looking at the aggressive stands taken by the officers ranging from attachment of bank properties, summoning top management, to imposing arrest provisions, such kind of instructions will surely act as a beacon of light. CBIC has taken cognizance of Supreme Court's decision and the same needs to be welcomed as it will save taxpayers from unnecessary harassment.

- The process stipulated in the instructions in relation to the preparation of arrest note containing all relevant details like grounds of arrest, date and time will surely lead to transparency during the process and hopefully officer's attitude towards such stringent action of arrests will change.
- However, it is consistently experienced by the taxpayers that department tend to divert from the instructions provided. Considering the draconian provisions in relation to the arrest guidelines, it is important to quote the judgement of Hon'ble Supreme Court in ***D K Basu vs. State of West Bengal*** [(1997) AIR 1997 SC 110] in which the Hon'ble Apex Court has laid down 11 specific requirements and procedures that the agencies must follow for the arrest, detention, and interrogation of any person. However, departments never followed the same, keeping it only on paper and not in spirit.
- In the above case, Hon'ble Apex Court has stated that ***'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering***".
- Arrests can have far reaching impacts on one's personal and professional life and can demolish person's entire career. Family, business, reputation, state of mind, etc., gets disturbed and damaged by a single action and the same should be only considered as a last resort. However, in recent past, few cases were noticed wherein departmental officers were using the power of arrest to settle personal goals without understanding the consequences of such arrest.
- The same is the case with summoning top management wherein importance of summons was degraded by officers by issuing it for any nominal discrepancies impacting the entire business ecosystem.
- CBIC's move of issuing guidelines is to be appreciated, however, similar guidelines were issued in past also but were not implemented in spirit, thus merely piling up the records of the officers. Hopefully, the intention of CBIC will also be shared by departmental officers this time and their actions will bring positive changes in tax system across India.

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