

SKKA IDT ALERT

28/2022 dt 30th August,2022

WEEKLY UPDATES

KEY HIGHLIGHTS:

1. Instruction No. 02/2022-23-[GST-INV]: Guidelines for arrest and bail in relation to offences punishable under the CGST Act, 2017.
2. The above instruction has specified the Conditions to be fulfilled for arrest, Procedure for arrest and Post arrest formalities.
3. Instruction No. 03/2022-23-[GST-INV]: Guidelines on issuance of summons under section 70 of the CGST Act, 2017.
4. The Board issues the above-mentioned instruction after noticing that summons under Section 70 of the CGST Act, 2017 are being issued by the field formations to the top senior officials of the companies in a routine manner to call for material evidence or documents.

INTRODUCTION

The GST entrance throughout the course of recent months has seen a few changes and updates. All the new updates are rolled out on a regular basis to help and assist the taxpayers in smooth and effective documentation of their GST returns.

Our Team at SKKA brings forth you weekly updates to ensure your business remains tax compliant.

GUIDELINES FOR ARREST AND BAIL IN RELATION TO OFFENCES PUNISHABLE UNDER CGST ACT, 2017 [INSTRUCTION NO.02/2022-23]

The concept of taxation is based on the foundation of the welfare of citizens. While the primary focus of indirect tax legislation is on revenue recovery and monetary penalties, indirect tax authorities can also take actions including arrests in disciplining those who misuse the provisions of such legislations. Under GST, a commissioner may arrest or authorize arrest if he or she has sufficient 'reason to believe' that the person concerned has committed an offence

Let us first study the legal Provisions of CGST Act 2017 in brief before interpreting the above instructions:

Section 132 of CGST Act, 2017: Punishment for certain offences: The above section deals with punishment for certain offences for whoever commits or causes to commit and retain the benefits arising out of any of the offences listed.

Section 69 of CGST Act, 2017: Section 69 of CGST Act provides 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) to 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.

There have been various instances of illegal arrest of many business owners, recently the Hon'ble Supreme Court of India in its judgment dated 16th August 2021 in Criminal Appeal No. 838 of 2021 has observed that a person must be arrested during proceedings only when it is a heinous crime or there is a possibility of influencing the witnesses concerned. Arrest can cause harm to a person's reputation and hence the accused must not be arrested unless necessary or required.

Hence, the board has issued guidelines with respect to the above issue.

CONDITIONS TO BE FULFILLED FOR ARREST:

1. Before arresting a person, the legal requirements must be fulfilled i.e., compliance of Section 69 and Section 132 of CGST Act 2017. Noncompliance of the mentioned section does not imply that arrest must be made.
2. The reasons to believe to arrive at a decision to place an alleged offender under arrest must be based on credible material. Hence, the power to arrest must be exercised with caution.
3. The authorities need to verify whether: <ul style="list-style-type: none"> • the person was involved in the non bailable offence or credible information has been received. • arrest is necessary to ensure proper investigation • the person is likely to tamper with evidence or influence witnesses • the 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.
4. Approval to arrest should be granted only in cases where there is an intention to evade tax or utilization of incorrect ITC or fraudulent refund of Tax or failure to pay tax in cases where the person is guilty.
5. Arrest should not be made in cases where there is difference of opinion with regards to the interpretation of Law.

PROCEDURE FOR ARREST:

1. The Commissioner will authorize an officer of Central Tax to arrest in case the latter has sufficient reasons to believe that offence has been committed as per Section 132 of CGST Act 2017.
2. All officers must be fully familiar with the provisions of Code of Criminal Procedure, 1973.

3. Format of arrest memo has been prescribed under Board's Circular No. 128/47/2019-GST dated 23rd December 2019. The arrest memo must be in compliance with the directions of Hon'ble Supreme Court in the case of D.K Basu vs State of West Bengal i.e., the arrest memo properly defines the offences made by the accused person.
4. In cases where there are several arrests in a single case, a separate arrest memo must be provided to everyone who has been arrested.
5. Board's Circular no 122/41/2019 dated 5 th November 2019 specified that quoting and generation of DIN is mandatory on communication issued by CBIC officers to taxpayer for the purpose of investigation.
6. A woman should be arrested only by a woman officer in accordance with section 46 of Code of Criminal Procedure, 1973.
7. Medical examination of an arrested person should be conducted by a medical officer in the service of Central or State Government. In case the arrested person is a female, then 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.
8. Reasonable care of the arrested person must be taken by the person in charge of the arrested person. There should be minimal use of force and publicity.

POST ARREST FORMALITIES

OFFENCES SPECIFIED IN SECTION 132(4) OF CGST ACT 2017	<ul style="list-style-type: none"> • The Assistant or Deputy Commissioner is bound to release a person on bail against a bail bond. • The arrested person should also be allowed to talk to the nominated person. • The amount specified in the personal bail bond should not be excessive and commensurate with the financial status of arrested person. • In certain cases where conditions for bail are not fulfilled the arrested person should be produced before the Magistrate without unnecessary delay and within 24 hrs of arrest. If considered necessary, the arrested person should be handed over to the nearest police station for safety under a challan.
OFFENCES SPECIFIED IN SECTION 132(5) OF CGST ACT 2017	<ul style="list-style-type: none"> • The authorized officer must specify the grounds of arrest and produce before the Magistrate before 24 hrs exclusive of the time necessary for the journey from place of arrest to Magistrate Court. • In case the person is not produced before the Magistrate the arrested person must be handed over to the nearest police station for safe custody.

PLEASE NOTE:

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

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.

Every Commissionerate/Directorate should maintain a Bail Register containing the details of the case, arrested person, bail amount, surety amount.

REPORTS TO BE SENT:

- ✚ 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 hrs of arrest as prescribed in ANNEXURE 1.
- ✚ 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 ANNEXURE 2 by the 5th of the succeeding month.
- ✚ The monthly reports shall be complied by DGGI and sent to Commissioner by 10th of every month. Further all the reports must be sent via email and offline submission to the Board should be stopped with immediate effect.

SKKA Remarks:

The Finance Ministry has issued a set of guidelines detailing conditions for investigation, arrests and bail procedures under the Goods and Services Tax Act, 2017 (GST Act) for violating GST provisions. These guidelines state that approval for arrest under the GST Act shall be granted for cases wherein a clear intent of tax evasion or committing violation exists. The Ministry of Finance notification also stated that approval for arrest should not be granted if tax discrepancy is based on the difference of legal opinion in interpretation of the law. Issuance of the above guideline was the need of the hour; this will ensure legal compliance and avoid misuse of power by designated tax officers.

GUIDELINES ON ISSUANCE OF SUMMONS UNDER SECTION 70 OF CGST ACT, 2017 [INSTRUCTION NO.03/2022-23]

With passage of time the intricacies of GST have expanded thus has the animosity of the assessment authorities to recuperate charges from the taxpayers. Recently, many companies and their KMP have been in receipt of summons for some or the other matter. Such people summoned by the GST officials are duty bound to show up before the officials. It is important that the summons and information gathered thereafter is the most vital move towards proceedings under GST regulation. Subsequently, it becomes crucial for the taxpayers to know how to deal with such summons and be aware of their rights and duties.

Instruction No. 03/2022-23 dated 17th August 2022 is a beneficial move for all taxpayers where exercise of power to issue summon is to be done prudently and with due consideration. Few instances have been discerned by CBIC where GST authorities have been issuing summons to high-ranking officials of Companies for routine matters, calling of documentary evidence that is being readily available on the GST portal. While the GST Law gives powers to give command under Section 70 of the CGST Act, 2017, there were no rules as for something very similar.

Section 70(1) of the CGST Act, 2017 as mentioned below engages the field officers to summon any individual whose participation he considers important to get evidence, acquire documents or some other thing in any request:

“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.”

Issuance of summon is vital by the Department to get particulars or certain records to reach to the conclusion of proceedings. Nonetheless, it must be guaranteed that exercise of power must be done prudently with due thought of it. Further, the guidance shows up all the more a recommendation to the field officials to **figure out such occurrences where just a letter for demand of important records would serve the requirement.**

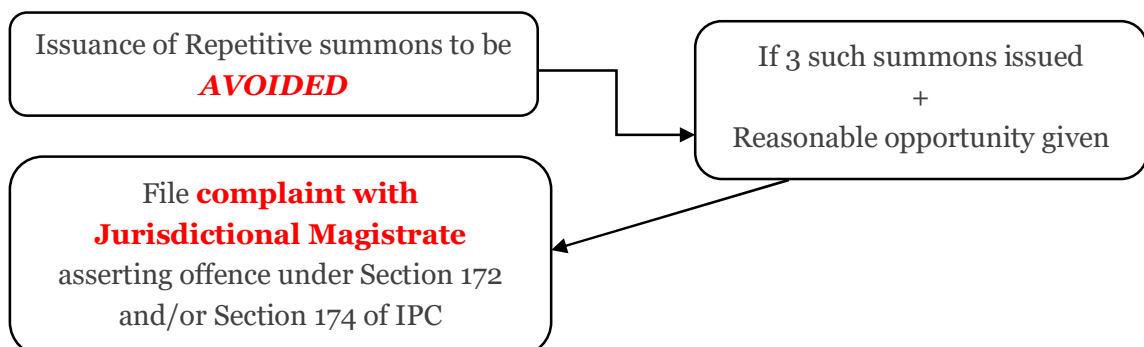
The Board has been sensitizing the officers in regard to utilization of use of power of issuance of summon diligently. Consequently, due to relating reasons, CBIC considers concocting appropriate new rules under GST regulation.

CBIC has asked the field officials to stringently adhere to the set of guidelines articulated in the mentioned instruction note, which are as per the following:

- ✚ Superintendent to issue summons only after obtaining **prior written permission** from an officer not below the rank of Assistant or Deputy Commissioner and reasons for such issuance to be mandatorily recorded in writing. If prior permission is not obtained, it should be done at the earliest opportunity.
- ✚ If such summoned person fails to appear or otherwise, his **statement should be maintained** in file records for every summon issued.

- ✚ **Name of the offender should be indicated** on the summon except it becomes detrimental to investigation process. This is to provide an understanding to summoned person whether he has been summoned as an accused, co-accused or witness.
- ✚ Summons should **not be issued** where request of information is for statutory **documents readily available on GST Portal**.
- ✚ Senior administration authorities, CMD, MD, CEO, CFO, comparable **positioning officials** ought to be summoned just when there are **clear signs of their association** in cycle of decision making that had prompted loss of income to the Government.
- ✚ **DIN to be mandatorily quoted** in the summon and such should be issued in accordance with the format prescribed by Board Circular No. 128/47/2019-GST dated 23rd December 2019.

CBIC tries to bring focus on its circular 122/41/2019 dated 5th November 2019 wherein it directed that ***no search authorization, summons, arrest memo, inspection notices and letters issued in the course of any enquiry shall be issued by any officer under the Board to a taxpayer or any other person, on or after the 8th day of November 2019 without a computer-generated Document Identification Number (DIN) being duly quoted prominently in the body of such communication.***
- ✚ **Summoning officer must be present** at the time for which summon is issued and any urgency for absenteeism must be well informed in advance to such summoned person.
- ✚ All persons summoned bound to give **personal appearance** except those privileged under Section 132 and 133 of Code of Civil Procedure, 1908.
- ✚ CBIC ensures **proper service of summons-**



Where Section 172 of Indian Penal Code (IPC) talks about punishment to person who absconds to avoid service of summons or other proceedings, section 174 propounds offence of not obeying a legal order to attend public.

This instruction puts **no bar on the number of times** summon can be issued. Nonetheless, it ought to be guaranteed that summons have been served appropriately before issuance of repetitive summons for a similar matter.

SKKA Remarks:

Trade and industry will praise this move as CBIC has taken a prompt of their portrayal and brings sigh of relief for the senior officials of Companies. Administration Authorities would now be able to focus more on their business operations as Board instructs the GST officials to exercise their powers meticulously and not misuse the powers so granted to harass the officials inexpediently. Taxpayers can hope for lucidity in the judicial proceedings and reduced instances of abuse of powers by the authorities for harassment of top administrative officials of Companies.

SKKA COMMENTS:

With provision of online compliances and payments, the framework of GST has become more accountable. The one nation, one tax system aims to improve India's competitiveness in global markets. Being GST-compliant, organizations can experience the merits of having a unified tax system and easy input credits. Notwithstanding compliance challenges, it's clear that noncompliance is vastly more expensive and far riskier to an organization.

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