
PARLIAMENT COMPETENT TO MAKE ‘CRIMINAL’ PROVISIONS IN THE CENTRAL GOODS AND SERVICES TAX ACT, 2017: DELHI HIGH COURT

Overview:

The Hon’ble Delhi High Court (“HC”) in the case of *Dhruv Krishan Maggu v. Union of India & Ors*¹ has upheld the constitutional validity of sections 69 & 132 of Central Goods and Services Tax Act, 2017 (“CGST Act”) while dismissing the Petitioner’s writ for grant of interim relief and allowing the revenue writ to vacate the interim order granting non-cancellation of bail of Petitioners. The court further directed an investigation into the revenue allegation that a tax collection mechanism has been converted into a disbursement mechanism as if it were a subsidy scheme.

Background:

Section 132(1) and (2) of the CGST Act list out certain offenses where arrest provisions become applicable-

1. A taxable person supplies any goods/services without any invoice or issues a false invoice
2. He issues any invoice or bill without supply of goods/services in violation of the provisions of CGST Act
3. He collects any GST but does not submit it to the government within 3 months.
4. Even if he collects any GST in contravention of provisions, he still has to deposit it to the government within 3 months. Failure to do so will be an offense under GST
5. He has already been convicted of an earlier u/s 132 i.e., this is his 2nd offense

If the Goods and Service Tax Commissioner has reasons to believe that a certain taxpayer has indulged in any of the abovementioned offenses, then, under section 69(1) of the CGST Act, he can authorize any central tax officer to arrest the taxpayer.

Further, clause (a) of sub-section (3) of Section 69 provides provision of default bail if a person arrested for any offence specified under sub-section (4) of Section 132 of the Central Goods and Service Tax Act, 2017. Sub-Section (4) of Section 132 reads as under:

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

So, except the offences referred in sub-section (5), all offences are bailable and non-cognizable. Sub-Section (5) of Section 132 reads as under:

¹ TS-8-HC-2021(DEL)-NT

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

Clause 5 of sub-section (1) of Section 132 clearly says that offences specified in clause (a), (b), (c) (d) and punishable under clause (i) shall be cognizable and non-bailable. As per clause (i) of Sub-Section (1) of Section 132 cases where amount of tax evaded exceeds five hundred lakh rupees are cognizable and non-bailable, except this all are bailable and non-cognizable.

Section 132(1) of CGST Act, 2017 lists out 12 different types of offences from clauses (a) to (l). The offences specified in clauses (a) to (d) of sub-Section (1) of Section 132 are declared cognizable and non-bailable under sub-Section (5) of Section 132 CGST Act, 2017. All the other offences specified in clauses (f) to (l) of sub-Section (1) of Section 132 of the CGST, 2017 Act are declared as non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act, 2017.

Under sub-Section (1) of Section 69, the power to order arrest is available only in cases where the Commissioner has reasons to believe that a person has committed any offence specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017. The offences specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017 are made cognizable and non-bailable under Section 132(5) of the CGST Act, 2017.

Facts:

The Petitioners have challenged the constitutional validity of sections 69 and 132 of the CGST Act, based on the following grounds-

- The abovementioned sections are criminal in nature. Therefore, they could not have been enacted under article 246A of the Constitution of India (“the Constitution”), as powers to arrest & prosecute are not ancillary power to levy and collect Goods and Services Tax (“GST”).
- Entry 93 of List I of the Constitution vests the Parliament of India (“the Parliament”) to make criminal laws only with respect to matters enumerated in List I and not with respect to GST.
- Chapter XII of Code of Criminal Procedure, 1973 (“Cr.P.C”), governing commencement of investigation, maintaining case diary etc., also applies to GST officers.
- The protection given under article 20(3) of the Constitution is not available to assessee. Therefore, the powers given under sections 69 and 132 are without judicial scrutiny.

Findings of the court:

- There is always a presumption in favor of constitutionality of an enactment and laws are not to be declared unconstitutional on the fanciful theory that power would be exercised in an unrealistic fashion or on the ground that there is a remote possibility of abuse of power. GST is a unique tax, inasmuch as the power as well as field of taxation is to be found in a single article, i.e., article 246A.
- The words/expression in a constitutional enactment conferring legislative power have to be construed as words of widest amplitude, content and therefore the most liberal construction has to be placed upon them. Article 246A states that Parliament and state legislatures have power to make

laws “with respect to” goods and services tax imposed by the union or by such state. Therefore, in order to give effect to the provisions of the CGST Act, the expression “with respect to” goods and service tax must be given its widest amplitude. Thus, the power to make laws with respect to GST will also include the power to enact criminal law with regard to GST.

- The offences covered under section 132, are all offences relating to GST. The power of arrest conferred by section 69 relates to all offences covered under section 132. Therefore, this power is not a general power of arrest, and is well within the ambit of article 246A.
- Under Entry 1 of List III of the Constitution of India, the process of defining a crime and providing for its punishment is termed as ‘criminal law’. Thus even if section 69 and section 132 could not have been enacted in pursuance to power under article 246A of the Constitution, the abovementioned sections are, nevertheless, well within the legislative competence of Parliament.
- Article 246 confers the exclusive power on the Parliament to make laws with respect to matters enumerated in List 1 of the Constitution of India. Further, article 246A of the Constitution provides the Parliament and state legislatures with simultaneous powers to make laws with respect to CGST. However, the powers conferred in pursuance of article 246A operate in independence of the powers conferred in pursuance of article 246A and therefore, there is no conflict between the operation of article 246A and article 246.
- When a law is challenged on the ground of being ultra vires to the powers of the legislature, the true character of the legislation as a whole has to be ascertained. When a law dealing with a subject in one list is also touching on a subject in another list, the pith and substance, or the true object of legislation has to be considered. If, on examination of the statute, it is found that the legislation is in substance on a matter assigned to the legislature enacting that statute, then it must be held valid, in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment is not prohibited. The pith and substance of the CGST Act is on GST, upon which the Parliament has plenary powers to legislate under article 246A. Therefore, the power to arrest and prosecute is ancillary and/or incidental to power to levy and collect GST.
- When any person is arrested under section 132(5), the concerned person has to be informed about grounds of arrest and produced before a Magistrate within 24 hours, which ensures judicial scrutiny. The Hon’ble Supreme Court in the case of Directorate of Enforcement vs. Deepak Mahajan [AIR 1994 SC 1775] observed that a person being interrogated during investigation under Customs Act, 1962 is not a person accused of any offence within the meaning of article 20(3) of the Constitution. Therefore, no prejudice is caused to the Petitioner during investigation under the CGST Act as he is not a person accused of any offence within the meaning of Article 20(3) of the Constitution of India.
- The Hon’ble Gujarat HC in the case of Vimal Yashwantgiri Goswami vs. State Of Gujarat [[2020] 75 GSTR 123 (Guj.)] observed that when any person is arrested by the authorized officer, in

exercise of his powers under section 69 of the CGST Act, the authorized officer effecting the arrest is not obliged in law to comply with the provisions of sections 154 to 157 of the Cr.P.C. Therefore, chapter XII of Cr.P.C, governing commencement of investigation, maintaining case diary etc., does not apply to CGST officers.

Vaish Associates Advocates Comments:

- The Hon'ble Delhi HC, while observing upon the question of applicability of Chapter XII of Cr.P.C to CGST officers has only acknowledged the stance taken by the Gujarat High Court on the question, and has neither concurred with, or differed from the same. This issue, therefore, still remains contentious.
- These are prima facie observations of the court, and are without prejudice to the final stage of the arguments in this case.

For any further information/ clarification, please feel free to write to:

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