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YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

Concepts Relevant to Taxation Law & Practice- Part 1



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INDIRECT TAXES

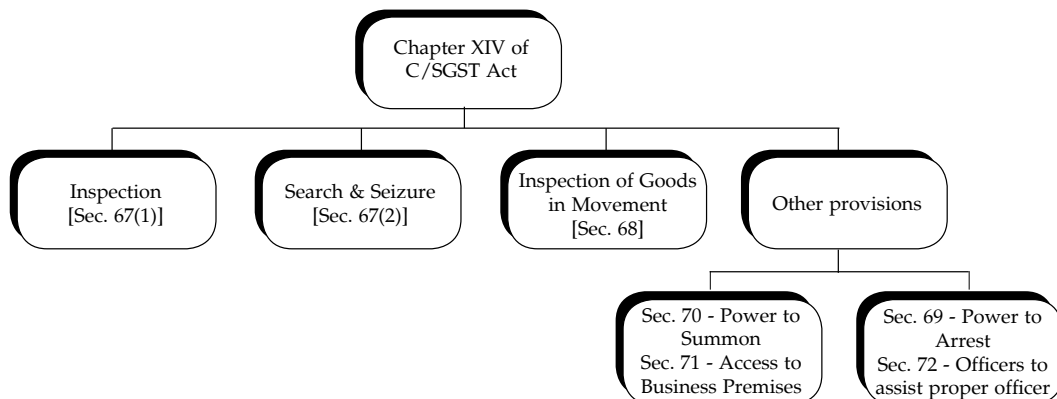
GST Gyan

Walk-through with Inspection, Search & Seizure under GST Law

A. Introduction

Inspection refers to careful examination, scrutiny or study of some document or object(s). Whereas search refers to examination of place or person with object of unearthing or discovering some information or evidences which are suspected to be hidden. Power of inspection, search and seizure are very strong investigation tool in the hands of revenue authorities, which gives enormous opportunity to gather evidences and unearth suppressed things and information so as to identify evasion of payment of tax and/ or contravention of any provisions of the law. However, such an action is having an effect of interfering into one's independence in addition to having a chances of hampering business activities to some extent, hence normally these powers are exercised as a last resort of gathering information. To safeguard interest of revenue robust powers are given to authorities under GST Law, simultaneously for protection of law abiding and honest tax payers, reasonable checks and balances are also there in place.

The provisions of Sec. 67 to 72 of the Central/ State Goods and Services Tax Act 2017, and Rule 139 to Rule 141 of C/SGST Act deals with powers and procedure of inspection, search & seizure. **This article is an attempt to compile and explain provisions of Inspection, search and seizure (other than inspection of goods in movement).** Summary of provisions is as under:



Provisions of GST law are similar but not exactly same as that of pre-GST laws. Sec. 67 provides for inspection as well as search & seizure of goods. Inspection is much softer version of search & seizure and is similar to Survey as enumerated u/s 133A of the Income-tax Act, 1961.

B. Initiation of Inspection Proceedings

Sec. 67(1) reads as under

“Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that;

- a. *a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or*
- b. *any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act,*

he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.”

Some of key aspects of above provisions are as under:

- Authorisation of inspection has to be given by the officer of the rank of Joint Commissioner or above.
- Authorising officer must have Reason to Believe about
 - o Taxable person –
 - Suppressing of any transaction; or
 - Suppressing Stock in hand; or
 - Claiming of excess Input Tax Credit; or

- Indulging in contravention of any of the provisions of the law to evade tax; or

- o transporter is keeping the goods which has escaped tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax
- o operator of warehouse or godown or any other place is keeping the goods which has escaped tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax

- Authorisation should be in writing in Form No. GST INS-01, for Inspection.

- Inspection can be of Place of Business only.

Place of Business has been defined in Sec. 2(85) to include godown or any other place where a taxable person stores his goods, maintain his books of account and place of agent. Accordingly, if books of account are being maintained or kept at residence of director or any other key managerial person the same shall be treated as place of business and inspection can be carried out there.

C. Initiation of Search & Seizure Proceedings

Sec. 67(2) reads as under

“where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things.”

Some of key aspects of above provisions are as under:

- Authorisation of Search & Seizure has to be given by the officer of the rank of Joint Commissioner or above.

- Authorising officer must have **Reason to Believe** about
 - o Goods liable for confiscation are secreted in any place
 - o Books, documents or something, which is useful or relevant for proceeding under GST law, are secreted in any place
 - Authorisation should be in writing in form GST INS-01 for Search.
 - In case of Seizure, Order of Seizure is to be issued in form GST INS-02.
- In search & seizure proceedings goods which are liable for confiscation can only be seized. As per Sec. 130(1) of the C/SGST Act, following goods are liable for confiscation, under the law:
- (i) If supply is made in contravention of any of the provisions of GST law with intention to evade payment of tax, or
 - (ii) If goods are not accounted for on which tax is liable to be paid or
 - (iii) If goods liable to tax are supplied without having applied for registration (*30 days time limit is there for applying registration, from the date person becomes liable for paying tax*).

D. Difference between Inspection & Search

Aspect	Inspection – Sec. 67(1)	Search – Sec. 67(2)
Primary Purpose	Verification of transactions of supplies, stock in hand, claim of ITC & contravention of provisions of the Act to evade tax.	Unearthing of goods liable for confiscation or secreted books, documents or things.
Scope	Inspection can be done at Place of Business only	Search can be done at Any Place including residence of tax payer and/ or employees.
Powers	Forceful action (Sealing or Break Open) cannot be adopted.	Seal or Break Open the door of any premises or break open any almirah, electronic devices, box, receptacle in which any goods accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied, can be resorted.
Seizure of Goods	Goods cannot be seized in inspection proceedings.	Goods can be seized if they are liable for confiscation. If not practically possible to seize, constructive seizure can be there.
Seizure of Books of Account/ Documents	Books/ documents cannot be seized in inspection proceeding.	Any secreted document, books or things, which may be useful or relevant to any proceedings can be seized.

E. Reason to believe

It is very well evident from the provisions of Sec. 67 that Proper Officer (JC or above) must have reason to believe before authorising any action of Search & Seizure and Inspection as well. Term 'reason to believe' is not defined under the GST law, however defined in Indian Penal Code 1860. Further the scope of the said term is more or less settled under Income Tax Law. As per sec. 26 of IPC "A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise". That means there is very less room for any doubt or ambiguity. Reason to believe refers to a positive, strong and

firm opinion based on information and evidences. It is definitely a subjective matter which may vary from case-to-case, however 'Reason to believe is not same as that of reason to suspect' (*Indian Oil Corporation – 159 ITR 956 SC*).

Hon'ble Supreme Court in the case of '*Lakhmani Mewal Das (103 ITR 437)*' has held that the reason for the formation of the belief must have rational connection with or relevant bearing on the formation of the belief. The rational connection postulates that there must be direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of this belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts.

The Hon'ble Court further held that it is no doubt true that the Court cannot go into sufficiency or adequacy of the material substitute its own opinion for that of the Income-tax officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

F. Power to Summon & Recording of Statements

As per Sec. 70 of the C/SGST Act proper officer(s) under the law have the 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. The summon can be given for giving evidence by way of statement on oath or production of any books of account, documents or other things. However, summons can be issued only during pendency of any enquiry under the law. While exercising powers to issue summons provisions of the Code of Civil Procedure, 1908 shall apply and such enquiries shall be deemed as 'Judicial Proceedings' u/s 193 & Sec. 228 of IPC. That means if anyone intentionally gives false evidence in response to summon issued u/s. 70, or fabricates false evidence for the purpose of being used in any stage of such enquiry, may be punished with imprisonment which may extend to seven years, and shall also be liable to fine.

Refreshing Memories: At the time of recording of statement, it is quite possible that a person doesn't have exact knowledge of facts and/or figures or might have forgot the same. In such a case the documents can be referred to refresh memory and statements can be given accordingly. As per sec. 59 of the Indian Evidence Act 1872, "*a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.*"

Presence of Counsel during statements: As regards to presence of advocate at the time of taking statement by tax authorities, it has been held that it is not a right of the taxpayer to have its counsel along with him. However, looking to the medical or other conditions the counsel may be allowed to attend the proceedings, however no consultation is allowed at the time of recording the statements. *Hon'ble Apex Court in the case of 'Poolpandi vs. Sup. Central Excise (60 ELT 24)'* while holding the same ratio observed as that "*The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail.*"

For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be expanded to favour exploiters engaged in tax evasion at the cost of public exchequer.”

Discipline for issue of Summons: Issue of summon in any inquiry, to witness or give evidence should be reasonable and not arbitrary. The authority issuing the summons must issue summons to a witness only when the authority considers it necessary for summoning. This necessarily implies application of mind and is guided by the principles of reasonableness in the matter of summoning of witness. Guiding force for issuing summon should be ‘necessity of witness for the purposes of inquiry’.

Hon’ble Jharkhand High Court in the case of *Sudhir Deora vs. CCE (284 ELT 326)* had observed that it is quite possible that the senior most officers like managing director or General Manager, who are at the helm of the affairs of the company might not be having knowledge of minute operational things. The Hon’ble Court held that Enquiry Officer should keep in mind that he being an Officer authorised by law to summon anybody does not make him an Officer having no control of reasonableness and though he has right to summon any person either the Managing Director or the General Manager of the company or even a clerk of the company but he should not summon unless it is required for the purpose of an inquiry.

G. Inspection of Business Premise

Sec. 71 of the C/SGST Act provides for access to **place of business** by the officers authorised by the proper officer not below the rank of Joint Commissioner. The purposes of such access

to business premises may be audit, scrutiny or verification to ensure safeguard interest of the revenue. In such cases person in-charge of place of business shall be under an obligation to make available books of account, financial statements, income tax audit report (if any), cost audit report under companies law (if any) and any other relevant records for examination and verification. These powers can be exercised by auditor appointed u/s. 66 as well. It is pertinent to note that the term audit as defined in sec. 2(13) of C/SGST Act includes examination and verification of records and documents maintained under provisions of GST law or **under any other law** for the time being in force, that means authorised officer or special auditor may ask for records which are mandated to be kept under GST law. For example, in case of mining company, records made under mining law can be asked for and in case of a hotel the records of guest (or guest register) can be asked for verification and examination to ascertain proper disclosure as regards to supply of goods or services and payment of taxes thereon.

H. Arrest (Sec. 69)

GST law provide officers power to arrest a person. Arrest is considered as strongest enforcement right as it breaches fundamental right of a person of freedom. The authorisation to arrest can be issued by Commissioner only, that too when he has reason to believe that such person has committed specified offence which is punishable u/s. 132(1) (i)/ (ii) or Sec. 132(2) of the C/SGST Act.

Specified offences are:

- Supply of goods or services without issue of invoice, with the intention to evade tax.
- Issue of invoice without supply of goods or services which leads to wrongful availment of ITC or refund of taxes.
- Availment of ITC on the basis of invoices for which actual supply has not been made.
- Failure in payment of tax after collection for more than three months.

Punishments covered:

Section	Description of Offence	Punishment
132(1)(i)	Tax Evaded/ ITC Excess Claimed/ Refund wrongly taken > INR 5 Cr.	Imprisonment up to 5 years with fine
132(1)(ii)	Tax Evaded/ ITC Excess Claimed/ Refund wrongly taken > INR 2 Cr. & up to INR 5 Cr.	Imprisonment up to 3 years with fine
132(2)	Conviction of person already convicted (irrespective of amount)	Imprisonment up to 5 years with fine

It is important to note that authorisation of arrest can be done only and only when the offence is among the specified category **and** is punishable as mentioned above. Further, in case of punishment u/s. 132(1)(ii) & Sec. 132(2) the offence is non-cognizable & bailable, that means arrest cannot be done without warrant from court and bail is to be granted as a matter of right. On the contrary in case of punishment u/s. 132(1)(i) the offence is cognizable & non-bailable, that means arrest can be made by the authorised officer without authorisation from court and the bail cannot be taken as a matter of right and has to be taken from court.

I. Release of books/Documents seized

Books of accounts, documents or other things seized u/s. 67(2) are to be kept with proper officer till the time they are required for verification or examination for enquiry or proceedings under the GST law. However, after issue of notice if some documents, books or things seized are not relied upon for issue of notice the same shall be returned within 30 days from the date of issue of notice. However, person from whom documents are seized shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the investigation.

J. Release of goods seized

Sec. 67(6)/(7), Rule 140

Goods seized at the time of search can be released on payment of applicable tax, interest and penalty.

Alternatively the goods seized can be released provisionally on furnishing of:

- Bond in Form No. GST INS-04 for value of the goods, declaring that goods shall be produced as and when required by the proper officer and any tax, interest, penalty, fine or other law full charges shall be paid within ten days of their demand in writing AND
- Security in the form of bank guarantee equivalent to the amount of tax, interest and penalty payable in respect of such goods.

If goods are seized in any search and no notice in respect thereof is given within six months of the seizure of the goods, such goods shall be released to the person from whose possession they were seized.

K. Seizure of perishable/ hazardous Goods

Sec. 67(8), Rule 141, Notification No. 27/2018(CT) Dt. 13-6-2018

If the goods seized under any search proceedings are perishable or hazardous in nature (as notified) the same shall be disposed of by the proper officer as soon as possible after its seizure. If the taxable person pays lower of 'market price of such goods' or 'demand (including interest and penalty), which is payable or may become payable, by the tax payer' such goods shall be released to him after passing the order in Form GST INS-05. If the tax payer doesn't pay the amount as stated above the Commissioner will dispose off such goods and realisation proceeds shall be adjusted against tax,

interest, penalty or any other amount payable in respect of such things.

Major goods notified for purposes of Sec. 67(8) i.e., to be treated as perishable or hazardous includes newspaper, batteries, petroleum products, fireworks, chemicals, drugs, unclaimed technology driven goods, all goods covered under chapters 1 to 24 of the Customs Tariff Act, 1975 i.e. all animals and vegetables and products made from them.

L. Jurisdiction for Inspection, Search & Seizure

GST is a unique tax law from the aspect that its first time when State and Central Governments are Levying & Collecting tax on same taxable event simultaneously. It poses challenges before the Government for administration of assesseees as well. To address this challenge, Sec. 6 was inserted in both the enactments i.e., State and Central to provide for cross empowerment, so that Central Tax Officer can have jurisdiction under State Tax and *vice versa* too. However, due to enabling cross jurisdiction by sec. 6, every taxpayer gets covered by two jurisdictional authorities. Whereas, as enumerated by Government many times, the idea was to have single jurisdiction (or interface) for all administrative purposes. In the 9th GST Council meeting held on 16th January 2017, to ensure its objective of single interface under GST State and Central Government decided to share taxpayer base, for all administrative controls, between them in the ratio of 90 : 10 for small taxpayers and 50 : 50 for other tax payers. Apart from the same it was decided that both the Central and the State tax administrations shall have the power to take intelligence-based enforcement action in respect of the entire value chain. However, in the afterward meetings of GST Implementation Committee (GIC), on 25th August and 31st August 2017, the matter in relation to principles for division of taxpayers between the centre and the states i.e., cross empowerment were discussed and laid before GST Council again in its 21st meeting held on 9th September 2017, whereby the same was approved. For implementation of its decisions

of cross-empowerment GST council issued a Circular No. 1/2017 dated 20-9-2017 mentioning its decision and principles for cross empowerment under GST for all administrative purposes. On the basis of this circular State GST Commissioners and Chief Commissioner of Central Taxes issued joint orders for cross-empowerment, whereby it was specifically written that to ensure single interface taxpayers are divided between State and Centre for all administrative controls/ purposes. **It is evident from documents of above meetings and circular that, intelligence based enforcement action was only discussed in 9th GST Council meeting and after that neither covered in 21st GST Council meeting nor the same was covered in authoritative documents released for cross-empowerment of the assessee's i.e. Circular No. 1/2017 of GST Council and Cross Empowerment Order(s) of respective States.** On the contrary some State Commissionerate(s) have issued letters/ instructions that intelligence based actions can be taken by both authorities i.e. State and Centre. The premises of such understanding under these letters is only and only decisions taken in 9th GST Council meeting. It nowhere discusses agenda, discussions and decisions in 21st meeting of GST Council and how decisions taken in 9th GST Council meeting have been implemented i.e. through which authoritative document having force of law.

From above analysis, *prima facie* it appears that as on date Central Tax authority can exercise jurisdiction for all purposes (including search and seizure) under both the enactments i.e. state Tax and Central Tax for assessee's assigned to it only. And on the same line for assessee's assigned to State, all actions can be taken up by State Tax Authorities only. Since this understanding is neither synchronised with how actually inspections and searches are carried on by both departments, nor with what was decided in 9th Council Meeting, in times to come it will be interesting to see how Courts decide the fate of jurisdiction aspect in intelligence-based enforcement actions.

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