

ARREST UNDER GST AND CODE CRIMINAL PROCEDURE, 1973 FOR BAIL

Provisions relating to prosecution with respect of evasion of tax being imprisonment is contained in Section 132 of CGST Act, 2017 which is akin to Section 9 and Section 9A of the Central Excise Act, 1944 and Section 89 and 90 of the Finance Act, 1944. Hence the objective of making such offence liable to imprisonment is same as that of Central Excise Act, 1944.

Prosecution u/s 132 can be initiated for the offences u/s 132(1)

- a. Person who commits offence
- b. Person who causes to commit the offence and retains the benefit of such offence

Commissioner Sanction

Section 132(6)- A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Further power to arrest is also given to Commissioner u/s 69 of the CGST Act, 2017 for the offences 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 (ii) of sub-section (1), or sub-section (2) of the said section,

Cognizable and Non-Bailable Offence

Section 132(5)- Following Offences are Cognizable and Non Bailable subject to the limit in Section 132(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;
- (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;
- (c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;
- (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
- (i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

Imprisonment for the Offence

The person who causes to commit the offence and also retains the benefit of such offence are liable to prosecuted. Hence if the person who caused to commit the offence for the acts as per Section 132(1) and his discharged/ paid to the government the benefit which he has taken for his acts, then the provisions of section 132 cannot be invoked. However such person would continue to be liable for the penalty u/s 122 of the CGST Act, 2017.

Amount of Evasion of Tax, ITC wrongly taken or utilized or Refund Wrongly Taken	Term of Imprisonment	Nature
Exceed Rs. 5 Crore or When any person convicted of an offence under this section is again convicted of an offence	For a period which may Extend to 5 year	Cognizable and non-bailable
More than Rs. 2 Cr but less than Rs. 5 Crore	For a period which may Extend to 3 year	Non- cognizable and Bailable
More than Rs. 1 Crore but less than Rs. 2 Crore	For a period which may Extend to 1 year	Non- cognizable and Bailable
Person Commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j),	For a period which may Extend to 6 Months	Non- cognizable and Bailable

Cognizable Offence- “cognizable offence” in Section 2(c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

Further as Section 41 of the Code of Criminal Procedure, 1973 covers the situation where the police may arrest the person without warrant.

Further Section 41A of the Code of Criminal Procedure, 1973 covers the situation wherein the person is not required to be arrested where the police officer has issued the notice to the accused to appear before him and such person complies and continues to comply with the notice.

Non Cognizable Offence- Section 2(l) of the Code makes it clear that a non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant

“bailable offence” – As per 2(a) of Code of Criminal Procedure, 1973 means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and

“non-bailable offence” – As per 2(a) of Code of Criminal Procedure 1973 means any other than bailable offence

Offence- As per Section 2(n) "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle- trespass Act, 1871 (1 of 1871);

Discretionary Power with respect to Period of Imprisonment

With respect to the offences liable to imprisonment being 5 years, 3 years, 1 year and six months as per Section 132(1)(i), 132(1)(ii), 132(1)(iii), the Commissioner has discretionary power with respect to the term of imprisonment. The words "extend to" indicate that the maximum period. Hence it is within the powers of the Commissioner to order for shorter period of imprisonment.

Offence u/s 132(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;*
- (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;*
- (c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;*
- (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;*
- (e) evades tax or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);*
- (f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;*
- (g) obstructs or prevents any officer in the discharge of his duties under this Act;*
- (h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;*
- (i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;*
- (j) tampers with or destroys any material evidence or documents;*
- (k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or*
- (l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section,*

Petition for Bail u/s 439 of Criminal Procedure, 1973

If a person is arrested being accused for an offence u/s 132(1)(i) and he opts to apply for bail, then Petition has to be filed before the Court u/s 439 of the Criminal Procedure, 1973 before the jurisdictional Court. Court may order for anticipatory bail on terms and conditions as per the order or may not accept the bail.

Further as per Section 439(2)- A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody

Section 439(1)

- (a) that any person accused of an offence and in custody be released on bail, and if the

offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Section 437(7) of Code of Criminal Procedure 1973- If, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

Default Bail- Charge sheet not filed within 60 Days

Where the Petition has been filed u/s 439 of the Criminal Procedure, 1973 for bail and the charge sheet has not been filed against the person accused within 60 days then such accused person is eligible for default bail u/s 167(2) of the Code of Criminal Procedure, 1973.

Application u/s 439 of Cr.P.C for grant of bail was filed before the High Court of Judicature of Madhya Pradesh at Gwalior by Nitin Nikhra [2019 (28) G.S.T.L 199]. Section 167(2) of Cr.P.C has not been complied which requires that Charge Sheet is to be filed within a period of 60 days. Applicant has already suffered confinement of 63 days. Held that right of "default bail" has accrued to assessee after the completion of 60 days following the principle reiterated by Apex Court in case of Achpal alia Ramswaroop . Applicant was released on bail with certain conditions.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD in case SANDEEP MAGANBHAI CHANIYARA Vs COMMISSIONER, CENTRAL EXCISE AND CGST, RAJKOT reported in TOG-673-HC-GUJ-GST-2019. Application is filed u/s 439 of the Code of Criminal Procedure, 1973 for regular bail. The applicant is arrested on 08.07.2019 and the fact that till date even after passage of 60 days, neither any complaint nor chargesheet is filed and, therefore, the applicant would be entitled for default bail with other terms and conditions.

Prasad Purshottam Mantri vs Union of India [2019 (29) G.S.T.L. 647 (Bom.)]- Petitioner was arrested on 21st February, 2019. As of today, 57 days are over since his arrest and otherwise also, in view of the provisions of Section 167(2) of the Code of Criminal Procedure, he will be entitled to be released on default bail after completion of 60 days if the charge-sheet is not filed.

Offence- Issue of Invoice without Supply and Credit Availed without Receipt of Goods

Section 132(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely:-

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;

In view of the above provision three type of Offence is covered

1. Issue of Invoice without supply of Goods
2. Credit of Input Tax without the receipt of the goods
3. Credit of Input Tax without any Invoice

The above offence are punishable with imprisonment as per the limit prescribed in Section 132(1)(i),(ii),(iii). However the person cannot be imprisoned for indefinite period during the process of Investigation or till the final determination of tax, interest and penalty u/s 74.

Judicial Pronouncement

Akshay Dinesh Patel vs C. CGST [2020 (4) TMI 334 - GUJARAT HIGH COURT]- Present application is filed under Section 439 of the Code of Criminal Procedure, 1973. Applicant is that he has committed an offence punishable under Section 132(1)(b) and 132(1)(c) . Held Applicant is ordered to be released on regular bail on certain terms. Court order after considering the petitioner plea that applicant is in jail since 23.12.2019, it is always open for the respondent department to take departmental action for recovery of penalty against the applicant, applicant will cooperate with the respondent department during the course of further investigation, applicant is ready and willing to deposit Rs. 25 lakhs and relied on Hon'ble Apex Court in the case of Sanjay Chandra Vs. Central Bureau of Investigation, reported in [2012] 1 SCC 40.

In the High Court of Punjab and Haryana in case of Sanjay Dhingra vs DGGI [TOG-136-HC-P&H-GST-2020]. Petitioner was arrested for the offence committed u/s 132(1)(b) and 132(1)(c) on 07.10.2019 and seeking for regular bail. Allegations against the petitioner are with regard to commission of economic offence of high magnitude and was rejected. Reliance was placed on the decision of Supreme Court in the cases of Nimmagadda Prasad vs. CBI, 2013(3) SCC (Criminal) 575 and Y.S.Jagan Mohan Reddy vs. CBI, 2013(3) R.C.R. (Criminal) 108 that while granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public and the State and other similar considerations.

No Arrest before Completion of Adjudication if not a Habitual Evader

Cases where amount of Evasion of Tax, ITC wrongly taken or utilized or Refund Wrongly Taken exceed Rs. 5 crore such cases fall under purview of Section 132(1)(i) such offence are cognizable and non

bailable. Cognizable Offence are those offences where the power of arrest can be exercised without warrant. Hence the person can be arrested during the course of investigation. However Court is of the view that such action can be initiated against the persons who are habitual tax evaders, or person who are not ready to co-operate in course of investigations, habitual defaulters in filing returns, person likely to abscond, he would tamper with the evidence, influence the witness

Judicial Pronouncements

Cleartrip Private Limited vs Union of India [2016 (42) S.T.R. 948 (Bom.)]- It is only when these investigations conclude that the authorities would be in a position to take a decision whether to launch any prosecution. In such a prosecution as well, if the provisions of the Criminal Law, which enable arrest in cases of cognizable offences and non-bailable, that the Petitioners can have an apprehension and which also can be taken care of by approaching a competent Criminal Court.

Delhi High Court in case of Makemytrip India Pvt Ltd vs Union of India Service Tax [2016] 73 taxmann.com 31 (Delhi): Before making arrests under service tax, department must adjudicate demand and also grant hearing to assessee as to materials collected; however, in case of habitual tax-evaders, arrests may be made straightaway, but, subject to review of past conduct and only after recording prima facie view as to how assessee is a habitual tax-evader. The view has been upheld by Supreme Court [[Union of India v. Makemytrip (India) Pvt. Ltd. - 2019 (22) G.S.T.L. J59 (S.C.)].

Madras High Court in case of GST Jayachandran Alloys (P.) Ltd v. Superintendent of GST & Central Excise, Salem [2019] 105 taxmann.com 245 (Madras)- Power to punish set out in section 132 would stand triggered only once it is established that an assessee has 'committed' an offence that has to necessarily be post-determination of demand due from an assessee, that itself has to necessarily follow process of an assessment. The exceptions to this rule of assessment are only those cases where the assessee is a habitual offender, that/who has been visited consistently and often with penalties and fines for contraventions of statutory provisions.

Offence Cognizable if Evasion Exceeds Rs. 5 Crore

Cases where amount of Evasion of Tax, ITC wrongly taken or utilized or Refund Wrongly Taken exceed Rs. 5 crore such cases fall under purview of Section 132(1)(i) such offence are cognizable and non bailable. In case where the amount alleged for evasion exceed Rs. 5 crore, however part payment has been done to as to bring the alleged evasion less than Rs. 5 crore, hence such offence would fall within the ambit of non-cognizable and bailable.

In a Petition filed u/s 439 of the Criminal Procedure, 1973 before High Court of Rajasthan at Jaipur by Rakesh Kumar Khandelwal- Petitioner being authorize signatory of the firm arrested for availing the wrongful availment of the credit of Rs. 7 crore. Amount of Rs. 3.33 Crore was deposited with the Department, thus bringing the total disputed tax credit amount to below Rs. 5 Crore. Taking note of the fact that the partners of the firm have been granted protection by the Apex Court and petitioner is in

custody from 28-8-2019; the total amount which as per Department is wrongly claimed after deposit of Rs. 3.33 crores is less than Rs. 5 crore, Petition was allowed.

Petitioner to Co-operate during Investigations- Conditions for Bail

Application was filed u/s 439 of the Code of Criminal Procedure, 1973 for regular bail before High Court of Gujarat at Ahmedabad in case of Abhay Sanatbhai Bhatt Vs Commissioner of CGST [2019 (23) G.S.T.L. 471 (Guj.)]. The Applicant was in Jail since 18.01.2019 and allegation against the applicant was that he committed the offence u/s 132(1)(b) of CGST Act and has wrongly availed the Input Tax Credit. Further it is always open to the department to recover the tax and the penalty. Assurance was given by the Advocate of the Applicant that the applicant will co-operate during the course of further investigation. Applicant was ordered to release on bail on executing a personal bond of Rs. 10,000/- with one surety of like amount. The court has taken into consideration the law laid down by Hon'ble Apex Court in case of Sanjay Chandra V. Central Bureau of Investigation reported in (212) 1 SCC 40

Turnover within Group Company- No Movement of Goods- No Loss of Revenue

Karnataka High Court in case of Avinash Aradhya vs C.C.T Bengaluru [2019 (23) G.S.T.L. 168 (Kar.)]- That invoices are issued and circulated among the companies i.e., M/s. Aradhya Groups without actual movement of goods, thereby transferring the irregular input credit to the originating companies. Applicant contention that maximum punishment is five years of imprisonment, said offence is compoundable, no irregularity no loss of revenue, accused have not availed any loan or not raised any amount from the bank and ready to co-operate with the investigation. Held offences are compoundable by the commissioner on payment and maximum punishment of five years with fine and they are not punishable with death or imprisonment for life. When the maximum punishment which can be imposed is only up to five years with fine, will throw light on the seriousness of the offence. No material is produced to show the magnitude of the loss of revenue going to be caused and the manner in which it will affect the economy of the country

Circular Trading- No Movement of Goods

Circular Trading- Taxable Person at times to increase the turnover gets involved in Circular Trading. Circular Trading is a means by which one person issue the invoice in the name of the other with no movement of goods being taking place. The other person to whom the invoice has been issued avails the credit of the input and based on such invoice he again issues the Invoice. The output tax gets offset with input tax. The other person again issue the invoice and the chain continues.

In such type of transactions, there is no evasion of tax however such transactions fall within the ambit of Section 132 leading to commission of offence

- a. *Credit of input without the receipt of goods falls within the ambit of Section 132(1)(c)*
- b. *Issue of Invoice without the supply of goods- Section 132(1)(b)*

Further the credit of the input tax is in violation of Section 16(2)(b) of CGST Act, 2017.

As the above transactions falls within the ambit of Section 132, hence the Commissioner exercise the power conferred to him u/s 69- Power to Arrest.

It is also observed the Petitioner filing Bail Petition u/s 439 of the Criminal Procedure, 1973 was rejected.

Supreme Court in case of P.V. Ramana Reddy v. Union of India [2019 (26) G.S.T.L. J175 (S.C.)]- In this case Apex Court decline to interfere with order passed by Telangana High Court and hence the petition was dismissed. High Court has held that Person involved in circular trading and fraudulent ITC claim not entitled to relief against pre-trial arrest (2) Prosecution for offences under Section 132(1) of CGST Act, 2017 should not mandatorily be launched only after completion of assessment (3) Arrest for offences under GST — Merely that these are compoundable cannot be a ground not to arrest the accused (4) Compounding of offences under GST not permissible without any application and payment of compounding amount by the accused (5) Arrest for offences under GST — Accused person may either be released on bail by Magistrate or remanded to judicial custody and not to police custody or custody to proper officer (6) Arrest for offences under GST — Safeguards provided under Sections 41 and 41A of Cr.P.C. though not an absolute irrevocable guarantee against arrest to be considered before arresting an accused (7) Enquiry under GST by GST Commissionerate is a judicial proceedings and not a criminal proceedings (8) Arrest for offences under GST — Reasons therefor need not to be recorded in order of authorization when same contained in file (9) Arrest for offences under GST — In absence of any pre-arrest FIR, remedy against pre-trial arrest lies by way of filing writ petition and not by seeking anticipatory bail under Section 438 of Cr.P.C.