

Jest Myths, facts, misconception, reality, frauds arrest and bail

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ON 22.12.2020, the CBIC by **Notification No. 94/2020 - Central Tax** brought into force the **Central Goods and Services Tax (Fourteenth Amendment) Rules, 2020**

. The new rules were received with shock, surprise, anguish and agitation by all **concerned**

. The Board was quick to react. It took to twitter on 23rd December, just a day after the new rules struck an unsuspecting GST Community, to clarify the myths and facts of the new rules. CBIC stated,

"In order to curb the GST fake invoice frauds, the Government on the recommendations of the GST Council's Law Committee has issued notification to deal with the menace of fraudsters who avail and pass on ineligible ITC by fake or fly-by night firms. CBIC has booked about 12000 cases of ITC fraud and arrested 365 persons in such cases so far. During the last six weeks alone, more than 165 fraudsters have been arrested.

There have been some misinformation on the recent rule changes on the Social Media causing confusion among the genuine taxpayers.

CBIC therefore clarified misinformation with facts:

Three days after the **Myths Vs Facts** clarification, on 26th December, the Board clarified five **misconceptions**.

It is very kind of the Board to issue such clarifications immediately after the myths and misconceptions were created. But do we know who conceived these myths? Board states that 165 fraudsters have been arrested. Who decided that they are fraudsters? Perhaps, we have a system in this country that the policeman does not decide the guilt of the arrested person, who can at best be treated as an accused. A person accused of fraud will become a fraudster only when he is declared so by a court. Well, these are minor irritants, which at best, should be avoided, especially just before the New Year.

Arrest before Assessment :

Should there be arrest under GST? Why arrest? In **PV Ramana Reddy vs Union of India** - [2019-TIOL-873-HC-TELANGANA-GST](#), the Telangana High Court observed,

The objects of pre-trial arrest and detention to custody pending trial, are manifold as indicated in section 41 of the Code. They are:

(a) to prevent such person from committing any further offence;

(b) proper investigation of the offence;

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner;

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer;

The very power of arrest under GST is confusing and not clear even to a High Court. The Telangana High Court in the above case observed,

the incongruity between Section 69(1) and sub-Sections (4) and (5) of Section 132 of CGST [Act, 2017](#)

is that when the very power to order arrest under Section 69(1) is confined only to cognizable and non-bailable offences, we do not know how an order for arrest can be passed under Section 69(1) in respect of offences which are declared non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act.

we do not know how a person whom the Commissioner believes to have committed an offence specified in clauses (f) to (l) of sub-Section (1) of Section 132 of CGST Act, which are non-cognizable and bailable, could be arrested at all, since Section 69(1) of the CGST Act, 2017 does not confer power of arrest in such cases.

Thus, there is some incongruity between sub-Sections (1) and (3) of Section 69 read with section 132 of the CGST Act, 2017.

In spite of all this confusion, the High Court did not grant bail observing,

despite our finding that the writ petitions are maintainable and despite our finding that the protection under Sections 41 and 41-A of Cr.P.C., may be available to persons said to have committed cognizable and non-bailable offences under this Act and despite our finding that there are incongruities within Section 69 and between Sections 69 and 132 of the CGST Act, 2017, we do not wish to grant relief to the petitioners against arrest.

Perhaps the High Court was appalled at the levels of possible fraud in GST as it observed,

If, even before the GST regime is put on tracks, someone can exploit the law, without the actual purchase or sale of goods or hiring or rendering of services, projecting a huge turnover that remained only on paper, giving rise to a claim for input tax credit to the tune of about Rs.225.00 crores, there is nothing wrong in the respondents thinking that persons involved should be arrested. Generally, in all other fiscal laws, the offences that we have traditionally known revolve around evasion of liability. In such cases, the Government is only deprived of what is due to them. But in fraudulent ITC claims, of the nature allegedly made by the petitioners, a huge liability is created for the Government. Therefore, the acts complained of against the petitioners constitute a threat to the very implementation of a law within a short duration of its inception.

The petitioners in this case did not get relief in the Supreme Court - [2019-TIOL-216-SC-GST](#), as the apex court dismissed the SLP with the observation.

Having heard learned counsel for the petitioner and upon perusing the relevant material, we are not inclined to interfere.

Many experts, especially in the Department believed that the law is sealed and the department is free to arrest anyone who they thought was an offender.

Around the same time as the Telangana High Court delivered its judgement, a single Judge of the Madras High Court, while allowing a writ petition, declared,

I am of the considered view that the power to punish set out in Section 132 of the Act would stand triggered only once it is established that an assessee has 'committed' an offence that has to necessarily be post-determination of the demand due from an assessee, that itself has to necessarily follow the process of an assessment. - [2019-TIOL-1021-HC-MAD-GST](#)

Many experts on the other side (of the department) thought this nullifies the Telangana High Court judgement and there can be no arrest without assessment. But the Single Member decision is in appeal before the same High Court and is virtually under stay.

Even after referring to the Telangana High Court judgement, several High Courts granted bail as in these sample cases:

1. [2020-TIOL-1029-HC-KAR-GST](#)
2. [2019-TIOL-2449-HC-RAJ-GST](#)

The Calcutta High Court - [2019-TIOL-2948-HC-KOL-GST](#) referred to Telangana and refused bail observing,

For the reasons stated above and in consideration of the gravity of the economic offence and bearing in mind the principle laid down in case of P.V. Ramanna Reddy (supra), the petitioner is not entitled to be enlarged on bail, however, the petitioner is at liberty to approach the authority for compounding of the offence under Section 138 of CGST Act.

The Bombay High Court in **Sapna Jain** - [2019-TIOL-1146-HC-MUM-GST](#) granted interim relief, which was promptly challenged in the Supreme Court. The Apex Court in the **Sapna Jain** case - [2019-TIOL-217-SC-GST](#) observed,

As different High Courts of the country have taken divergent views in the matter, we are of the view that the position in law should be clarified by this Court. Hence, the notice.

As the accused-respondents have been granted the privilege of pre-arrest bail by the High Court by the impugned orders, at this stage, we are not inclined to interfere with the same. However, we make it clear that the High Courts while entertaining such request in future, will keep in mind that this Court by order dated 27.5.2019 passed in SLP(Crl.) No. 4430/2019 - [2019-TIOL-216-SC-GST](#) had dismissed the special leave petition filed against the judgment and order of the Telangana High Court in a similar matter, wherein the High Court of Telangana had taken a view contrary to what has been held by the High Court in the present case.

Beyond the above, we do not consider it necessary to observe anything further.

Thus, the matter is in the Supreme Court and the High Courts are free to decide the matters, but keeping in mind that the Supreme Court has dismissed the SLP against the Telangana judgement.

After the Supreme Court order, in the very same **Sapna Jain** case - [2019-TIOL-1473-HC-MUM-GST](#), the Bombay High Court continued the interim relief observing,

Since the Apex Court has proposed to decide the issue in question by referring it to the Bench of three Judges, awaiting the decision of Apex Court, we continue the ad-interim relief granted earlier till further orders.

In a very recent case ([2020-TIOL-2265-HC-DEL-GST](#)), the Delhi High Court on 21.12.2020 observed,

It is also conceded that no show cause notice has been issued to the applicant as yet and no proceedings for assessing the exact amount has been initiated. Although, the applicant has been arrested and the respondent proposes to launch prosecution without show cause notice or initiation of any assessment proceedings. According to the respondent it is not necessary to undertake any proceedings for determination of the tax due for launching prosecution for evasion of tax.

Plainly, the issues involved in the present application require examination.

In the meanwhile, the applicant is directed to be released on interim bail on his furnishing a Personal Bond in the sum of Rs. 1 lakh with two sureties of the like amount to the satisfaction of the trial court/duty magistrate.

After three and a half years of the adventure of GST, we are not sure whether the law allows the officer to arrest a person and whether he should be released on bail immediately or eventually. Fraudsters should be punished, but even they have to be tried before they are fried.

All the confusion and commotion could be avoided if the law is a little more clear and the procedure is made a little more simple. If GST has created so many fraudsters, there must be something seriously wrong with the system.

Can't we follow the system as in Income Tax where TDS paid to the government is credited to the account of the assessee and is shown in the Form 26AS? The GST paid by the supplier should immediately reflect in the Electronic Credit Ledger of the recipient and maybe credit should be allowed only if the GST is paid. This may be a little irritant for the taxpayers, but we can avoid these frauds and arrests and hopefully live in peace in the New Year and the years to come.

On that hopeful note, wishing you a [happy new year](#).

Until next week