

GST evasion arrest hit SMEs hard; here's what courts must consider before putting promoters in jail

The powers conferred upon GST commissioners to make arrests in cases involving fake GST invoices cannot be disputed. However, the way these arrest provisions have been incorporated under the GST law is certainly amenable to a constitutional challenge.



Arrests under the GST laws have been incessant with Revenue Authorities belligerently investigating ostensible issuance of alleged fake invoices and availing credit in case of circular trading. The SME sector is also under scrutiny. Many small business concerns are being investigated in alleged GST evasion cases. Offences are non-bailable when the amount involved crosses Rs 5 crores and SMEs can easily come under the threshold.

Contravention of GST?

Allegations are predominantly based on the premise that goods are sold without actual movement or delivery. However, the GST Act itself recognises constructive delivery without movement of goods. Presence or absence of goods are fact-based and tax payment at every stage raises the concern whether any provision under GST has actually been contravened.

Different High Courts are discordant on this issue. In several petitions argued by us, the Bombay High Court was pleased to grant interim/ad-interim relief to protect from coercive action and video-recording of

interrogation proceedings in presence of an advocate. However, the Telangana High Court repudiated protection against arrests in a batch of writ petitions and affirmed the power of the GST Commissioner to arrest in cases involving circular trading.

The Supreme Court refused to interfere with the order of the Telangana High Court and dismissed the SLP preferred by the accused, however, the apex court refrained from interfering in case of favourable Bombay High Court decision. Interestingly, in one subsequent case, even the apex court granted interim protection against coercive action subject to payment of 10 per cent of the alleged evasion amount.

Challenging Arrest Provision

The powers conferred upon GST commissioners to make arrests in cases involving fake GST invoices cannot be disputed. However, the way these arrest provisions have been incorporated under the GST law is certainly amenable to a constitutional challenge. Even the Telangana High Court acknowledged that there are incongruities within several clauses of the arrest provisions under GST. Besides, the applicability of various checks and balances concerning arrests under the Code of Criminal Procedure (CrPC) have been bypassed in the GST Act.

“Reasons to Believe”

The Revenue Authority argues that CrPC has limited applicability with respect to post-arrest proceedings. Therefore technically, even an application for anticipatory bail under CrPC can be rejected by a Sessions Court or a High Court. Whereas, a Commissioner can issue arrest memos in a cognisable and a non-bailable offence if he simply has “reasons to believe” that a person has committed an offence. The term “reasons to believe” has not been elaborated anywhere in the GST Act. The accused has no option to challenge the maintainability of such “reasons” before any appellate authority as the Commissioner is not required to pass any “order” before the arrest. The accused has no opportunity to defend himself during the arrest, before any judicial authority, till he has been put under trial before a magistrate or a sessions judge.

Even under trial, the accused has to wait at least for a period of 60 days in judicial custody before he can effectively defend himself against a charge sheet, that too in cases where Revenue Authorities choose to file the same.

There is no accountability on officers in issuing arrest memos/summons notices or during search and seizure proceedings. Officers are not even obligated to substantiate with proper evidence, the basis of arrest as they can technically make an arrest based on confessions of the accused in their custody, even before the initiation of assessment proceedings. Article 20(3) of the Constitution provides that no person accused of an offence shall be compelled to be a witness against himself. One can argue that the arrest provisions under GST do not advance the cause of investigation/enquiry, but only provide satisfaction to the Revenue Authorities that they have punished the arrested person before trial for “reasons” they deem fit. This is arbitrary and fit for a constitutional challenge as it poses a serious threat to the right to life and personal liberty of the citizens.

The Supreme Court and High Courts now need to promptly take a considered view on what qualifies as “reasons to believe” under Section 69 of the CGST Act or if at all there is one to legitimise an arrest in a particular case. Courts also need to decide whether arrest can be made based upon “prima facie” evidence such as custodial confession statements. A business is severely impacted, especially an SME, when its director, partner, or proprietor gets arrested on mere apprehension of an offence without any substantial evidence. Courts must take a well-considered view in these matters so that appropriate reliefs can be granted in deserving cases.

(Abhishek A Rastogi is Partner at Khaitan & Co. Views expressed are the author’s own and do not constitute legal/professional advice of Khaitan & Co.)