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Analysing developments impacting business

SUPREME COURT TO CLARIFY THE POSITION RELATING TO ARREST PROVISIONS UNDER GST

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Introduction

The Hon'ble Supreme Court, *vide* its order dated 29 May 2019, while refusing to interfere with the order of the Bombay High Court, has held that the position regarding the arrest provisions under Central Goods and Services Tax Act, 2017 (CGST Act) and the corresponding state goods and services tax laws (SGST Acts) will be clarified by a three-judge Bench of the Supreme Court before whom all similar matters shall be placed.

The Apex Court heard special leave petitions (SLP(Crl.) No.4322-4324/2019) with the lead matter being *Union of India v Sapna Jain*, which were filed against the orders of the Bombay High Court wherein pre-arrest bail was granted to persons accused of tax evasion thereby fulfilling criteria for which the officials were empowered to exercise their powers of arrest under the CGST and SGST Acts. The persons facing arrest were represented by Khaitan & Co in the proceedings before the Bombay High Court and Supreme Court.

Previously, High Courts have taken conflicting positions on arrest provisions, for example the Telangana High Court had denied bail to persons arrested on charges of tax evasion whereas the Bombay High Court has granted pre-arrest bail on similar charges. It may be noted that the Supreme Court *vide* order dated 27 May 2019 in SLP(Crl.) No. 4430/2019 has upheld the order of the Telangana High Court.

Background

Goods and Services Tax (GST) officers are empowered to arrest persons accused of offences specified under Section 132 of the CGST Act. Section 132 provides that specified offences involving tax evasion in excess of INR 50,000,000 (Indian Rupees Fifty million) will be cognizable and non-bailable, and that officials can proceed with arrest as per the procedure laid out under Section 69 of the CGST Act. The specified offences are as follows:

- (a) supply of any goods or services or both without issue of any invoice, in violation of the provisions of the Act or the rules made thereunder, with the intention to evade tax;

- (b) Issue of any invoice or bill without supply of goods or services or both in violation of the provisions of the Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;
- (c) availment of input tax credit using such invoice or bill referred to in clause (b);
- (d) collection of any amount as tax and failure to pay the same to the Government beyond a period of 3 (three) months from the date on which such payment becomes due.

Amongst the offences listed above, the offences in (b) have gained importance. In the recent past, several transactions (similar to the impugned proceedings) were brought under the scanner wherein there was a supply of goods made without an actual movement of goods. This is commonly known as circular trading. The GST officials believe that such circular trading does not involve supply of goods even though applicable tax has been paid by each supplier in the chain. Further, it was often found that the GST officials were not able to make out a prima facie case in terms of the amount involved in the proceedings to justify arrest proceedings under the said provisions. Additionally, the need for filing of an FIR under Section 154 of the Code for Criminal Procedure 1908 was also discussed during the proceedings even though the specified offences are declared as cognizable offences under the CGST Act.

Comments

It appears that transactions where the goods are supplied by delivery of documents of title without actual movement, as in the case of warehoused goods (a common practice in commodity trading) are not considered genuine transaction by the revenue authorities. Such an interpretation may also outlaw in-bond transfer of customs bonded warehoused goods. Further, these proceedings beg a larger question as to whether transactions are susceptible even though applicable GST has been paid by the supplier. Accordingly, once the GST has been paid, the buyer should be rightfully entitled to avail the credit upon receiving constructive delivery of goods.

Accordingly, the decision of the three-judge Bench of the Supreme Court proposed to be constituted for the purpose of determining the criteria for exercising power under Section 132 of the CGST Act (and similar provisions under SGST Acts) will be crucial in determining the fate of such transactions specially in the commodities trade, shipping, oil and gas exploration sectors wherein constructive delivery is prevalent.

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