

EY Tax Alert

SC upholds the constitutional validity of power to arrest under Customs and GST law

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Executive summary

This Tax Alert summarizes recent ruling of the Supreme Court (SC)¹ dealing with the constitutional validity of the provisions concerning power to arrest under the Customs and Goods and Services Tax (GST) law.

The key observations of the SC are:

- ▶ The debate over the power to arrest primarily originates from the Om Prakash case², which previously required a magistrate's approval for arrests. Amendments in 2012, 2013, and 2019 overhauled this framework, making certain offences cognizable and non-bailable with specific conditions for arrest.
- ▶ Additionally, the judiciary has emphasized the need for stringent safeguards when arresting without a warrant, necessitating concrete evidence and clear reasons for such actions.
- ▶ While the petitioners argue that tax evasion must be quantified before arrest, this is not always necessary. If the department is certain of an offence and the tax evasion falls within specified limits, the Commissioner can authorize an arrest, provided there are explicit recorded reasons for this belief.
- ▶ The power to levy and collect GST under Article 246A includes incidental and ancillary powers, which extend to summon, arrest, and prosecute. Therefore, challenge to the constitutional validity of Sections 69 and 70 of the CGST Act is rejected.
- ▶ The powers of judicial review may not be exercised unless there is manifest arbitrariness or gross violation, or non-compliance of the statutory safeguards provided under the special Acts.

For the aforesaid reasons, SC quashed the challenge to the constitutional validity concerning the power to arrest under Customs and GST law, while also establishing safeguards to protect assesseees from threat of arrest by the tax officers.

¹ TS-96-SC-2025-GST

² (2011) 14 SCC 1



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Background

- ▶ Several writ petitions were filed before the Supreme Court (SC) by petitioners challenging the constitutional validity of provisions relating to power to arrest under the Customs Act, 1962 (Customs Act) and Central Goods and Services Tax Act, 2017 (CGST Act).
- ▶ The petitioners sought judicial review of these powers, questioning their alignment with constitutional safeguards of personal liberty under Article 21 and 22 of the Constitution of India.

Petitioners' Contention

Legality of power to arrest

- ▶ Supreme Court in the case of Om Prakash³ observed that the offences under the Customs Act and the Central Excise Act, 1944 (Excise Act) are non-cognizable and therefore, even if the officers had the power to arrest, they could do so only after obtaining a warrant from the Magistrate in terms of Section 41 of the Code of Criminal Procedure, 1973 (CrPC).
- ▶ Therefore, Section 104 of the Customs Act, which provides for power to arrest by officer of customs, is invalid.
- ▶ Since a customs officer is not a police officer, anyone arrested under the Customs Act should be sent to judicial custody.
- ▶ The power to arrest under the Customs Act and CGST Act is arbitrary and violative of the fundamental rights.

Pre-conditions for arrest

- ▶ Relying upon the Delhi High Court (HC) ruling in the case of MakeMyTrip⁴, it is submitted that the power under Section 132(5) cannot be exercised unless procedure under Section 73 of the CGST Act is completed and an assessment order is passed quantifying the tax evaded or erroneously refunded or input tax credit (ITC) wrongly availed.
- ▶ In absence of a conclusive determination of tax liability, initiation of criminal proceedings under the CGST Act is contrary to the principles of natural justice and procedural fairness.
- ▶ Section 162(1) of the CGST Acts allows for compounding of offences, and principles from MakeMyTrip (supra) should apply to such Act. The liability cannot be quantified without an assessment order under Goods and Services Tax (GST) law, thus precluding the possibility of compounding applications.

Coercion allegations and anticipatory bail

- ▶ Absence of clear guidelines on the exercise of prosecutorial discretion under GST law has resulted in inconsistent and excessive use of coercive measures, warranting judicial intervention.
- ▶ The parties are compelled and coerced to admit and make payment of tax in view of the threat of arrest. This is in spite of the fact that there is no assessment or adjudication as to the alleged demand.

Constitutional Validity:

- ▶ Article 246A of the Constitution, which grants the Parliament and State Legislatures the power to levy and collect GST, does not explicitly authorize the violations thereof to be made criminal offences.
- ▶ Power to summon, arrest and prosecute are not ancillary and incidental to the power of levying GST and therefore, are beyond the legislative competence of the Parliament under Article 246A of the Constitution.
- ▶ Accordingly, the provisions of Section 69 and 70 of the CGST Act which provide for the power to arrest and the power to summon are constitutionally invalid.

Supreme Court Ruling

Legality of power to arrest

- ▶ The fountainhead of legal controversy regarding the power to arrest under the Customs Act and CGST Act stems from the decision of this Court in case of Om Prakash (supra).

Before this decision, offences under the Customs Act were treated as non-bailable and once arrested, the accused would be detained for a few months before being released on bail.

- ▶ The amendments made to the Customs Act in 2012, 2013 and 2019 are substantive and were introduced to effectively modify the application of Om Prakash (supra), which required a customs officer to obtain prior approval from a Magistrate before making an arrest.

These amendments designated specified offences as cognizable and non-bailable, while also imposing certain pre-conditions and stipulations for making arrest.

Consequently, the petitioners' reliance on Om Prakash (supra) is invalid and hence rejected, as such amendments have established stringent safeguards for exercise of the power of arrest.

³ (2011) 14 SCC 1

⁴ 2016 SCC OnLine Del 4951

- In Arvind Kejriwal⁵ and related rulings⁶, it was held that arresting a person without warrant is a drastic and extreme power.

Therefore, legislature has prescribed safeguards imposing stringent conditions on exercise of this power, which includes having “material” in possession, record in writing “reasons to believe” that the person being arrested is “guilty” of an offence and “grounds of arrest” are informed to the person arrested.

- Further, merely because Section 104(1) of the Customs Act does not explicitly require a customs officer to have “material in their possession” does not imply that an officer can conclude that an offence has been committed out of thin air or mere suspicion.

The threshold for arrest under Section 104(1) of the Customs Act is higher than that under Section 41 of CrPC, indicating a clear legislative intent to establish a distinct and unique procedure for the exercise of arrest powers by customs officers.

For the aforesaid reasons, petitioner’s challenge for validity of amendment made in Customs Act is rejected.

Further, the above reasoning and ratio would equally apply to GST Acts.

Pre-conditions for arrest

- An arrest cannot be made to merely investigate whether the conditions are being met. The arrest is to be made on the formulation of the opinion by the Commissioner, which is to be duly recorded in the reasons to believe.

The reasons to believe recorded must be based on the evidence establishing, to the satisfaction of the Commissioner, that the requirements of Section 132(5) of the CGST Act are met.

- The petitioner’s contention that proceedings must quantify the tax evaded before invoking Section 132(5) cannot be universally applied.

Normally, assessment proceedings do determine amount of tax evaded and identify any violations.

However, there may be instances where the department is certain of an offence and amount of tax evasion falls within the parameters specified, in such scenarios, the Commissioner may authorize an arrest and record explicit reasons to believe.

Coercion allegations and anticipatory bail

- The Central Board of Indirect Taxes and Customs (CBIC) had issued an Instruction⁷ listing the

procedure for arrest under GST law, ensuing adherence to the CrPC and Section 69(3) of CGST Act.

These procedures, which also aligns with the Supreme Court’s (SC) directives in case of D.K. Basu⁸, were further refined by a subsequent Instruction⁹, mandating provision of written grounds of arrest to arrested person and obtaining their acknowledgement.

- Further, CBIC released a Circular¹⁰ addressing concerns where assessee are coerced to admit and make payment of tax under threat for arrest.

The above Circular highlights the due process outlined in Section 79 of CGST Act, which requires notice issuance and demand confirmation through an adjudication order before recovery.

- Data collected from Revenue indicates that power of arrests under GST law were not exercised when payments were made compared to the cases when payments were not made.

In such cases, assessee may move to Courts and seek refund of tax deposited, and department should take appropriate action against the officers involved in such cases.

- Furthermore, the courts also have the authority to grant anticipatory bail in cases of arrest apprehension, upholding the right to life and liberty under Article 21 of the Constitution.

This Court in case of Gurbaksh Singh Sibbia’s¹¹, ruled that anticipatory bail should be considered when there are specific and credible reasons for arrest apprehension.

Such bail can even be sought before an FIR is lodged, provided the reasons for arrest apprehension are clear and reasonable. This was reaffirmed by a Constitution Bench of five judges in Sushila Aggarwal’s¹² case.

However, certain decisions¹³ of this Court that contradict to this ratio should not be considered binding.

Constitutional validity

- Article 246A of the Constitution provides a broad framework, and the doctrine of pith and substance is applicable. Under such Article, Parliament has power to make laws for GST.
- This Court has consistently ruled that when determining legislative competence, entries in the Constitution should not be interpreted narrowly, instead, they should be understood in their broadest

⁵ (2025) 2 SCC 248

⁶ 2023 SCC OnLine SC 1244, (2024) 7 SCC 576 and 2022 SCC OnLine SC 929

⁷ Instruction No. 02/2022-23 [GST-Investigation] dated 17 August 2022

⁸ (1997) 1 SCC 416

⁹ Instruction No. 01/2025-GST dated 13 January 2025.

¹⁰ Instruction No. 01/2022-23 [GST – Investigation] dated 25 May 2022 (1980) 2 SCC 565

¹¹ (2020) 5 SCC 1

¹² (2020) 5 SCC 1

¹³ 2023 SCC OnLine SC 1043, SLP (Cri.) No. 8525/2024.

meaning and widest amplitude, as they are intrinsic to a machinery of government.

- ▶ In case of R.S. Joshi¹⁴, this Court held that penalty or prosecution mechanisms for tax levy and collection are ancillary to the legislative power.
- ▶ Therefore, the powers to summon, arrest, and prosecute are incidental to the power to levy and collect GST under Article 246A. For these reasons, challenge to the constitutional validity of Sections 69 and 70 of the CGST Act is rejected.

Judicial review

- ▶ Power of judicial review under Articles 32 and 226 of the Constitution is extensive and plays a critical role in safeguarding fundamental rights. However, courts must exercise self-restraint when reviewing cases of arrest under fiscal statutes.
- ▶ The judicial review of an arrest under GST law is limited to examining whether the statutory authority acted within its jurisdiction, followed due process, and exercised its power based on "reasons to believe" supported by material evidence.
- ▶ It does not extend to re-evaluating the sufficiency of evidence relied upon by the tax authorities, but it does cover the examination of whether the arrest was made in a *malafide* manner, or in violation of the concerned statute; or when the authority acting under the concerned statute does not have the requisite authority *etc.*
- ▶ Such power, in cases of arrest under special Acts, should be exercised very cautiously and in rare circumstances to balance individual liberty with the interest of justice and of the society at large.

Any liberal approach in construing the stringent provisions of the special Acts may frustrate the very purpose and objective of the Acts.

- ▶ The powers of judicial review may not be exercised unless there is manifest arbitrariness or gross violation, or non-compliance of the statutory safeguards provided under the special Acts.

In view of the above the challenge to the constitutional validity as also the right of the authorised officers under the Customs Act and the GST Law to arrest were rejected and dismissed.

Comments

- a. Businesses may take note of the procedural protections highlighted by the SC and ensure that they are aware of their rights when facing prosecution under the taxing statutes.
- b. SC reaffirmed that legislative entries in the Constitution should be interpreted broadly. With this ruling, the apex court has strengthened the enforcement mechanism under GST.
- c. SC had earlier ruled (*supra*) that anticipatory bail cannot be filed before the power of arrest under Section 69(1) of the CGST Act has been invoked. The said decision is overruled by this judgement and the Court has clarified that an application for anticipatory bail can be filed at any time when there is an apprehension of arrest.

¹⁴ (1977) 4 SCC 98

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