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CHAPTER

INSPECTION, SEARCH AND SEIZURE UNDER GST

INSPECTION, SEARCH AND SEIZURE

In any tax administration the provisions for Inspection, Search and Seizure are provided to protect the interest of genuine tax payers as the Tax evaders by evading the tax get an unfair advantage over the genuine tax payers. These provisions are also required to safeguard and protect interest of revenue. It may be mentioned that the options of Inspection, Search and Seizure should be exercised only in exceptional circumstances and as a last resort.

Thus, to ensure that these provisions are used properly, effectively and the rights of tax payers are also protected, it is stipulated that Inspection, Search or Seizure can only be carried out by a proper officer as envisaged by legislatures (*i.e. rank of Joint Commissioner or above in GST law*), only when such proper officer has '*reasons to believe*' regarding the existence of such exceptional circumstances.

It is well settled law that search and seizure being an inroad on fundamental right of citizen which adversely affects his reputation and paralyze his business. Therefore, while exercising such powers, the authorities should be rather careful and cautious and must exercise it strictly under an authority of the law¹.

1.1 DIFFERENCE BETWEEN INSPECTION AND SEARCH

'Inspection' is a softer provision than search which enables officers to access any place of business of a taxable person or of a person engaged in transporting goods or who is an owner or an operator of a warehouse or godown, whereas **'Search'**, in simple language, denotes an action of a government machinery to go, look through or examine carefully a

1. *Bawa Gopal Das Bedi & Sons v. Union of India* 1982 (10) ELT 351 (Patna).

place, area, person, object etc. in order to find something concealed or for the purpose of discovering evidence of a crime.

Under GST, inspection as well as search can be carried out only after authorization by proper officer not below rank of Joint Commissioner and such proper officer must have reason to believe for existence of exceptional circumstances to justify invoking provisions of Search and Seizure. Sections 67 to 72 of the CGST Act read with rules 139 to 141 of CGST Rules deal with powers and procedure of Inspection, Search & Seizure.

It is imperative to mention here that application of the provisions of the Code of Criminal Procedure arises only when the premises is searched and not inspected².

1.2 PROVISIONS REGARDING INITIATION OF 'INSPECTION' UNDER GST

Sub-section (1) of section 67 of the CGST Act empowers proper officer to conduct inspection at business place of taxpayer. **Section 67(1)** reads as below:

“Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that:

- (a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or
- (b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act,

he may authorise in writing any other officer of central tax to **inspect** any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.”

Some of key aspects of above provisions are as under:

- (a) Authorisation of Inspection has to be given by the officer of the rank of Joint Commissioner and above.

2. *S.Y. Modagekar & Sons v. CTO* 1978 41 STC 298 (Kar.).

- (b) Authorising officer must have reason to believe about Taxable person that—
- (i) Suppressing of any transaction relating to supply of goods or services or both; or
 - (ii) Suppressing Stock in hand; or
 - (iii) Claiming of excess Input Tax Credit; or
 - (iv) Indulging in contravention of any of the provisions of the law to evade tax; or
- (c) Authorising officer must have reason to believe that, transporter is keeping the goods which has escaped tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax; or
- (d) Authorising officer must have reason to believe that owner or operator of warehouse or godown or any other place is keeping the goods which has escaped tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax.

It is need to be noted here that, Authorisation for the purpose of Inspection under section 67(1) of the CGST Act, should be in writing and in prescribed form³. Rule 139 of the CGST Rules envisage procedural aspects of Inspection, Search and Seizure. **Rule 139 of the CGST Rules** read as follows:

“(1) Where the proper officer not below the rank of a Joint Commissioner has reasons to believe that a place of business or any other place is to be visited for the purposes of inspection or search or, as the case may be, seizure in accordance with the provisions of section 67, he shall issue an authorisation in **FORM GST INS-01** authorising any other officer subordinate to him to conduct the inspection or search or, as the case may be, seizure of goods, documents, books or things liable to confiscation.

(2) Where any goods, documents, books or things are liable for seizure under sub-section (2) of section 67, the proper officer or an authorised officer shall make an order of seizure in **FORM GST INS-02**.

(3) The proper officer or an authorised officer may entrust upon the owner or the custodian of goods, from whose custody such goods or things are seized, the custody of such goods or things for safe upkeep and the said person shall not remove, part with, or otherwise deal with the goods or things except with the previous permission of such officer.

(4) Where it is not practicable to seize any such goods, the proper officer or the authorised officer may serve on the owner or the custodian of

3. Form No. GST INS-01 [Rule 139(1)].

the goods, an order of prohibition in **FORM GST INS-03** that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(5) The officer seizing the goods, documents, books or things shall prepare an inventory of such goods or documents or books or things containing, *inter alia*, description, quantity or unit, make, mark or model, where applicable, and get it signed by the person from whom such goods or documents or books or things are seized."

It is pertinent to note that, section 67(1) categorically provides that Inspection can be at place of business of the assessee. It is further need to be noted here that section 2(85) of the CGST Act defines the phrase 'place of business' which reads as follows:

“place of business” **includes**—

- (a) a place from where the business is ordinarily carried on, and includes a warehouse, a godown or any other place where a taxable person stores his goods, supplies or receives goods or services or both; or
- (b) a place where a taxable person maintains his books of account; or
- (c) a place where a taxable person is engaged in business through an agent, by whatever name called;'

Definition of place of business is inclusive which includes godown or any other place where a taxable person stores his goods or maintains his books of accounts or place of agent. Accordingly, if books of accounts are being maintained or kept at residence of director or any other key managerial person the same may be treated as place of business and inspection can be carried out there as well.

1.3 PROVISIONS REGARDING INITIATION OF 'SEARCH AND SEIZURE' PROCEEDINGS IN GST

Sub-section (2) of section 67 of the CGST Act empowers proper officer not below rank of Joint Commissioner to carry out search proceeding, provided that Joint Commissioner has reason to believe that any goods liable to be confiscation or any documents/books which in opinion are relevant for the proceedings under the Act but such documents/books/things/goods are secreted at any place. **Section 67(2) and 67(3) of the CGST Act** reads as follows:

“(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has **reasons to believe** that any goods liable to confiscation or

any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, **are secreted in any place**, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice."

Some of key aspects of above provisions are as under:

- Authorisation of Search and Seizure has to be given by the officer of the rank of Joint Commissioner and above.
- Authorising officer must have reason to believe about:
 - (a) Goods liable for confiscation are secreted in any place;
 - (b) books, documents or something, which is useful or relevant for proceeding under GST law, are secreted in any place.
- Authorisation should be in writing in Form GST INS-01 for Search.
- In case of Seizure, Order of Seizure is to be issued in Form GST INS-02.

1.4 MEANING OF REASON TO BELIEVE

It is most humbly submitted here that meaning of 'Reason to believe' is not defined under the CGST Act/SGST Act. It is need to be noted here that the said term is defined under section 26 of the Indian Penal Code, which reads as follows:

'Reason to believe — A person is said to have "reason to believe" a thing, **if he has sufficient cause to believe** that thing but not otherwise.'

It is settled legal position that belief should be honest and reasonable belief. Hon'ble Supreme Court in the case of *Barium Chemicals Ltd. v.*

Company Law Board AIR 1967 SC 295/[1966] 36 Comp. Case 639 (SC), the Supreme Court pointed out, on consideration of several English and Indian authorities that the expressions “is satisfied”, “is of the opinion” and “has reason to believe” are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. Further, **Hon’ble Supreme Court** in the case of *ITO v. Lakhmani Mewal Das* [1976] 103 ITR 437 (SC)/AIR 1976 SC 1753, the Supreme Court construed the expression “reason to believe” employed in section 147 of the Income-tax Act, 1961 and observed that the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

The words “where the proper officer has reasons to believe” in section 67 of the Act suggest that the belief must be that of an honest and reasonable person based upon the relevant materials and circumstances. The satisfaction has to be of the Proper Officer not below the rank of Joint Commissioner. The Proper Officer should have reasons to believe that a taxable person has suppressed any transaction relating to supply of goods or services or both. Further, **Hon’ble Supreme Court** in the case of *Pukhraj v. D. R. Kohli* AIR 1962 SC 1559, the Supreme Court observed as follows:

“After all, when we are dealing with a question as to whether the belief in the mind of the officer who effected the seizure was reasonable or not, we are not sitting in appeal over the decision of the said officer. All that we can consider is, whether there is ground which *prima facie* justifies the said reasonable belief.” (p. 1563)

Term ‘*Reason to believe*’ have been discussed in detail at the end of Chapter.

Hence, if the information is such as leads the Proper Officer to believe that the articles of search are secreted in a place, he may thereby have ‘reasons to believe’ as contemplated under section 67 of the Act and authorise in writing any other officer to search and seize such goods.

All that the Court can consider is, whether there is ground which *prima facie* justifies the reasonable belief. Further, the statutory requirement of reasonable belief, rooted in the information in possession of Proper Officer under the Act, is to safeguard the citizen from vexatious proceedings.

'Belief' is a mental operation of accepting a fact as true, so, without any fact, no belief can be formed. It is true that it is not necessary for the Proper Officer under the Act to state reasons for his belief. But if it is challenged that he had no reasons to believe, in that case, he must disclose the materials upon which his belief was formed, as it has been held by the **Hon'ble Supreme Court in Sheo Nath Singh v. Appellate Asstt. CIT** AIR 1971 SC 2451, that the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court.

It is further submitted here that the **Hon'ble Gujarat High Court Patran Steel Rolling Mill v. Assistant Commissioner of State Tax** [2019] 101 taxmann.com 80 (Guj.) held that provision of section 67, should not be exercised as a matter of course, but only after due application of mind to the relevant factors.

It is further need to be noted here that, in Form GST INS-02 prescribed under rule 139(2) of the CGST Rules. Rule 139 of the CGST Rules relates to inspection, search and seizure. Sub-rule (1) thereof provides for issuance of authorisation in Form GST INS-01 by the proper officer not below the rank of Joint Commissioner authorising any officer subordinate to him to conduct the inspection or search or, as the case may be, seizure of goods, documents or things liable to confiscation. Sub-rule (2) thereof provides that any goods, documents, books or things are liable to seizure under sub-section (2) of section 67, the proper officer or an authorised officer shall make an order of seizure in Form GST-INS-02. Sub-rule (5) thereof provides that the officer seizing the goods, documents, books or things shall prepare an inventory of such goods or documents or books or things containing *inter alia*, description, quantity or unit, make, mark or model where applicable, and get it signed by the person from whom such goods or documents or books or things are seized.

It is need to be noted here that section 67 read with rule 139 of the CGST Rules mandate that, seizure proceedings shall be authorised by proper officer not below the rank of the Joint Commissioner. Hence, every search and seizure shall be authorised by proper officer. Further, at this juncture it is germane to refer section 157 of the CGST Act/SGST Act which provides protection/immunity to officers of CGST/

SGST officer for action taken by him in good faith. Section 157 of the CGST Act/SGST Act reads as under:

“157. Protection of action taken under this Act.—(1) No suit, prosecution or other legal proceedings shall lie against the President, State President, Members, officers or other employees of the Appellate Tribunal or any other person authorised by the said Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

(2) No suit, prosecution or other legal proceedings shall lie against any officer appointed or authorised under this Act for anything which is done or intended to be done in good faith under this Act or the rules made thereunder.”

Thus, bare perusal of sub-section (2) of section 157 of the CGST Act gives immunity to an officer appointed or authorised under that Act for anything which is done or intended to be done in good faith under that Act or the rules made thereunder. Thus, an officer is protected provided he is authorised to do something under the CGST Act and provided such act has been done in good faith. Hence, any search and seizure proceedings conducted by proper officer without any proper authorising shall not get immunity under section 157 of the CGST Act and therefore liable for exemplary cost. At this juncture it is need to be noted here that when an officer functioning under the CGST Act, acts in a highhanded and arbitrary manner in excess of the authority vested in him the same is required to be viewed very seriously. Justice demands that such citizen be compensated for the undue harassment faced by him on account of the unauthorised action of the concerned officer⁴.

1.5 TERM ‘SECRETED PLACE’ UNDER SECTION 67(2) IS REALLY SECRETED?

Sub-section (2) of section 67 of the CGST Act empowers proper officer not below rank of Joint Commissioner to carry out search proceeding, provided that Joint Commissioner has reason to believe that any goods liable to be confiscation or any documents/books which in opinion of the proper officer is relevant for the proceedings under the Act but such documents/books/things/goods are secreted at any place.

It is imperative to mention here that since it is settled position that tax laws are always interpreted in strict manner therefore one may take a view that search and seizure proceedings can be initiated by proper

4. *Prakashsinh Hathisinh Udavat v. State of Gujarat* [2019] 112 taxmann.com 124 (Guj.).

officer only when such proper officer have an opinion that any goods/books/documents/things which are relevant/useful to any proceedings under the CGST Act and/or rules made thereunder, are secreted at any place. However, here it is pertinent to note that, where all goods are duly recorded in the books or where all relevant books/documents/things are found at business place of taxpayers even in then the word 'secreted' have significant role.

The word secreted has not been defined under the Act. It is also settled principle that a word used in legislation may be given the meaning in the context in which it has been used.

It is important to note that, section 67(2) of the CGST Act/SGST Act is *pari materia* to section 105 of the Customs Act, 1962.

"105. Power to search premises.—(1) If the Assistant Collector of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

(2) The provisions of the Code of Criminal Procedure, 1898, relating to searches shall, so far as may be, apply to searches under this section Subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word 'Magistrate', wherever it occurs, the words "Collector of Customs" were substituted."

The Supreme Court in the case of *Gian Chand v. State of Punjab* [1961] 1961 taxmann.com 8/1983 (13) ELT 1365 (SC) had an occasion to consider the meaning of the word "secreted" within the meaning of section 105 of the Customs Act. The Supreme Court in the aforesaid decision has observed and held as under:

"...It cannot be said that the documents have not been 'secreted within the meaning of section 105 of the Customs Act unless they are hidden or concealed. In the context of the section the word means documents which are not kept in the normal or usual place' or it may even mean 'documents or things which are likely to be secreted'; in other words documents or things which a person is likely to keep out of the way or to put in a place where the officer of the law cannot find it.

The power to search granted under section 105 of the Customs Act is a power of general search and it is not necessary for its exercise that the authorisation should specify the documents for which search is to be made. But it is essential that before this power is exercised the preliminary

conditions required by the section must be strictly satisfied that is, the officer concerned must have reason to believe that any documents or things which-in his opinion are relevant for any proceeding under the Act are secreted in the place searched.”

In view of the above, even if the authority has reason to believe that the goods liable to be confiscated are likely to be secreted the authority will have the power to pass an order of prohibition pursuant to the order of seizure.

In *Pukhraj v. D. R. Kohli* 1962 taxmann.com 6/1983 (13) ELT 1360 (SC) the Hon’ble Supreme Court observed as follows:

“After all, when we are dealing with a question as to whether the belief in the mind of the officer who effected the seizure was reasonable or not, we are not sitting in appeal over the decision of the said officer. All that we can consider is, whether there is ground which *prima facie* justifies the said reasonable belief.”

If the information is such as leads the Proper Officer to believe that the articles of search are secreted in a place, he may thereby have ‘*reasons to believe*’ as contemplated under section 67 of the Act and authorise in writing any other officer to search and seize such goods. All that the Court can consider is, whether there is ground which *prima facie* justifies the reasonable belief.

Further, reference is invited to *Durga Prasad v. H.R. Gomes, Superintendent (Prevention) Central Excise* 1983 (13) ELT 1501 (SC), it was argued before the Supreme Court that in context of section 105 of the Customs Act that the authorisation in the said case was not legally valid since there was no averment by the Assistant Collector that the documents were “secreted”. Hon’ble Supreme Court in the said matter observed as follows:

‘According to the appellant the power of seizure under section 105 of the Customs Act cannot be exercised unless the Assistant Collector had reason to believe that the documents were secreted. It was argued that the word ‘secreted’ is used in section 105 in the sense of being hidden or concealed and unless the officer had reason to believe that any document was so concealed or hidden, a search could not be made for such a document. We are unable to accept the submission of the appellant as correct. In our opinion, the word ‘secreted’ must be understood in the context in which the word is use in the section. **In that context, it means “documents which are kept not in the normal or usual place with a view to conceal them” or it may even mean “documents or things which are likely to be secreted”; in other words, documents or things which a person is likely to keep out of the way or to put in a place where the officer of**

law cannot find it. It is in this sense that the word 'secreted' must be understood as it is used in section 105 of the Customs Act.

In this connection reference was made by the Solicitor-General to the affidavits of the Superintendent of Central Excise dated October 28, 1963. Para 6 states that **"some of the documents were recovered from the living apartments and safe of the petitioner and also from the drawers of the tables and cabinets utilised by his sons and a search was made for documents which may have been secreted in the premises"**.

Further, Hon'ble Supreme Court in the case of *R.S. Seth v. R.N. Sen* [1967] 1967 taxmann.com 1/[1983] 13 ELT 1434 with regard to power given under section 105 of the Customs Act observed as follows:

"Section 105 of the Act confers an unguided and arbitrary power on the Assistant Collector of Customs to make a search, the only condition being of the facts mentioned therein. It is said that the said belief is practically a subjective satisfaction and the section neither lays down any policy nor imposes any effective control on his absolute discretion. So stated the argument is attractive, but a deeper scrutiny of the provisions indicates not only a policy but also effective checks on the exercise of the power to search by the Assistant Collector of Customs. The object of the section is to make a search for the goods liable to be confiscated or the documents secreted in any place which are relevant to any proceeding under the Act. The legislative policy reflected in the section in that the search must be in regard to the two categories mentioned therein, namely, goods liable to be confiscated and documents relevant to a proceeding under the Act. **No doubt, the power can be abused. But that is controlled by other means. Though under the section the Assistant Collector of Customs need not give the reasons, if the existence of belief is questioned in any collateral proceedings, he has to produce relevant evidence to sustain his belief.**"

Conclusion:

Thus, if the information is such as leads the Proper Officer to believe that the articles of search are secreted in a place, he may thereby have 'reasons to believe' as contemplated under section 67 of the Act and authorise in writing any other officer to search and seize such goods. All that the Court can consider is, whether there is ground which *prima facie* justifies the reasonable belief.

In *Durga Prasad's* case (*supra*) it has been held by the Supreme Court that the power of search granted under section 105 of the Customs Act (*para materia* to section 67 of the 2017 Act) is a power of general search but it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, that is, the

officer concerned must have reasons to believe that the documents and things which in his opinion are relevant for any proceedings under the Act, are secreted in their place. In *R.S. Seth Gopikisen's* case (*supra*), the Supreme Court held that section 105 of the Customs Act did neither compel the officer to give reasons nor the particulars of the goods and of the documents were to be given in the authorisation. The statutory requirement of reasonable belief, rooted in the information in possession of Proper Officer under the Act, is to safeguard the citizen from vexatious proceedings.

Considering the Scheme of the CGST Act the word 'secreted' plainly implies to be hidden or not disclosed to the revenue authorities for the purposes of making a fair self-assessment. Once the dealer does not record the goods in his regular books of account, a presumption arises that he does not intend to disclose the same to the Assessing Authority or the revenue for the purpose of making a fair self-assessment of his turnover. The Act does not work on the principle of physical verification of each and every goods dealt with or transaction performed by any assessee. In fact if at all it would be the books of account that would be examined to determine both the nature of the goods as also the quantum of value of the goods dealt with by the assessee.

Further, Hon'ble Allahabad High Court in the case of *Rajeev Traders v. State of U.P.*⁵ While considering legality of seizure order passed under section 67(2) of the UPGST Act held that once it was admitted that the assessee had not recorded goods found/stored at its principal place of business, in its books of account, a presumption of goods having been *secreted* did arise. The Hon'ble Allahabad High Court while upholding the seizure order observed that there was nothing to restrict meaning of '*in any place*' in section 67 to only undisclosed place of business. Relevant extract of judgment is reproduced below:

'17. Therefore, once it was admitted to the assessee during the course of the survey that it had not recorded the goods found stored at his disclosed place of business in the regular books of account, a presumption of the goods having been 'secreted' did arise, constructively. It may be added here itself that the presumption, as has been considered here, would remain rebuttable. However, at this stage its existence may not be denied.

18. Also, to the place where the documents, books or items may be 'secreted', the Act uses the words 'in any place'. Plainly, the ambit of this phrase includes both the disclosed place/s of business and the undisclosed place/s of business of an assessee. There is no warrant to restrict the meaning of these words to only undisclosed place of business

since the legislature has neither used any word or phrase to introduce such intendment nor otherwise there is any reason to restrict the plain grammatical meaning of those words.

19. The object of the provision being clearly to ensure that dealers would disclose their stocks in their books of account and not indulge in any undisclosed trading, the interpretation as suggested by learned counsel for the assessee would, if accepted, defeat that object and encourage conduct of undisclosed business from disclosed place/s of business.'

It is also need to be noted here that similar view has been taken by the **Hon'ble Gujarat High Court** in the case of *Golden Cotton Industries v. Union of India* [2019] 102 taxmann.com 412/72 GST 406 (Guj.)

Section 67(3) of the CGST Act provides that return of those documents/books/things which are not relied by the proper officer upon issuance of show notice to taxpayer after conducting of search and seizure under sub-section (2) of section 67 of the CGST Act, shall be returned back within a period of thirty days from date of issue of notice.

It is pertinent to note that, jurisprudence has already been developed with regard to power of search and seizure under fiscal laws. The Hon'ble Supreme Court in *M.P. Sharma v. Satish Chandra Magistrate* AIR 1954 SC 300/[1954] 2 ELT 287 (held that power of search and seizure in any system of jurisprudence is an overriding power of the State to provide security and that power is necessarily regulated by law. Further, Hon'ble High Court of Madras in the case of *V.V.V.R. Sathyam v. Superintendent (STU)* [2013] 29 STR 214/[2012] 276 ELT 318 held that 'search and seizure' is not a new weapon in the armory of those whose duty is to maintain social security it its broadcast sense. The process is widely recognised in all civilised countries. A search and seizure is only a temporary interference with the right to hold the premises searched and the articles seized. Therefore, it cannot be a violation of the provisions of Article 19(1) of the Constitution of India.

1.6 'GOODS LIABLE TO CONFISCATION' - SITUATION BASED TEST

It is important to note here that, section 67(2) of the CGST Act provides that where the proper officer having rank of Joint Commissioner or above, either pursuant to an inspection as carried in accordance with provisions of section 67(1) of the CGST Act or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, then in such case he may authorise in writing any other officer of central tax to search

and seize or may himself search and seize such goods, documents or books or things.

Therefore, books or documents or things can be seized when proper officer in his opinion⁶ finds that any books or documents or things are useful/relevant for any proceedings under the provisions of the CGST Act, **are** secreted at any place. Hence, for the purpose of seizure of books or documents or things there must be satisfaction of twin condition *i.e.* (a) such books or documents or things are useful/relevant for proceedings under the CGST Act and (b) there is presumption/reason to believe that such books or documents or things are secreted at any place. Term 'secreted place' has already been discussed above.

However, it is need to be appreciated here that, goods can be seized in terms of section 67(2) of the CGST Act only when they are liable to confiscated. Although term '*goods liable to confiscation*' is not defined under the CGST Act however section 130(1) of the CGST Act envisages the situation when goods shall be liable to confiscation. Section 130(1) of the CGST Act reads as follows:

"(1) Notwithstanding anything contained in this Act, if any person—

- (i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (ii) does not account for any goods on which he is liable to pay tax under this Act; or
- (iii) supplies any goods liable to tax under this Act without having applied for registration; or
- (iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, **all such goods** or conveyances **shall be liable to confiscation** and the person shall be liable to penalty under section 122."

In nutshell, section 130(1) of the CGST Act provides for specific situations or causes leading to the confiscation of goods/conveyances. Followings are the situations where goods shall be liable to confiscation:

6. The meaning of term '*Opinion*'/in his *Opinion/Commissioner's Opinion*' has been discussed separately in Chapter titled ***Provisional Attachment to protect revenue in Summon proceedings under GST***.

- (a) If supply is made in contravention of any of the provisions of GST law with intention to evade payment of tax; or
- (b) If goods are not accounted for on which tax is liable to be paid; or
- (c) If goods liable to tax are supplied without having applied for registration (30 days time limit is there for applying registration, from the date person becomes liable for paying tax); or
- (d) Contravenes any of the provisions of this Act or the rules made thereunder with an intention to evade payment of tax.

Therefore, if any of the above referred situations emerged then only, goods shall be liable for confiscation. Further, if goods are liable for confiscation then only goods can be seized. In other words, if goods are not liable to confiscation in terms of provisions of section 130(1) of the CGST Act then such goods cannot be seized in terms of provisions of section 67(2) of the CGST Act.

It is need to be appreciated here that, in terms of section 67(2) of the CGST Act, goods can be seized when proper officer has reason to believe that goods are liable for confiscation. Therefore, reason to believe as formed by the proper officer should categorically justify/shows, under which situation (*out of 4 situations as envisaged under sub-section (1) of section 130*) goods are liable to confiscation.

Section 130 of the CGST Act prescribes specific circumstances for the purpose of invoking the provisions relating to confiscation. It is need to be appreciated here that section 130 of the CGST Act specifically talks about the intention. It is need to be appreciated here that the Hon'ble Gujarat High Court in the case of *Synergy Fertichem (P.) Ltd. v. State of Gujarat* [2020] 116 taxmann.com 221 (Guj.) held that at the time of detention and seizure of goods, the first thing the authorities need to look into closely is the nature of the contravention of the provisions of the Act or the Rules. The second step in the process for the authorities to examine closely is whether such contravention of the provisions of the Act or the Rules was with an intent to evade the payment of tax (where it is essential). At this juncture, it is need to be appreciated here that section 135 of the CGST Act provides for presumption of culpable mental state but such presumption is available to the department only in the cases of prosecution and not for the purpose of section 130 of the Act. The Hon'ble High Court observed that, the contravention may be quite trivial or may not be of such a magnitude which by itself would be sufficient to take the view that the contravention was with the necessary intent to evade payment of tax.

Merely on suspicion, the authorities may not be justified in invoking section 130 of the CGST Act straightway and conclude that goods are liable for confiscation and accordingly such goods shall be seized in terms of provisions of section 67(2) of the CGST Act. GST authorities while holding that goods shall be liable for confiscation record their reasons for such belief in writing, and such reasons shall be recorded in writing. Kindly refer Chapter 3 for detailed discussion.

It is need to be appreciated here that, formation of reason to believe by the Joint Commissioner or above rank, regarding goods are liable to confiscation must be based on credible material and such reason to believe should be formed in good faith. The formation of the opinion by the authority that the goods are liable to be confiscated should reflect intense application of mind and based on justifiable grounds. In short, action must be held in good faith and should not be a mere pretence.

At this juncture, it is need to be noted here that section 130(4) of the CGST Act provides that no order of confiscation of goods shall be passed without granting an opportunity of hearing to the concerned person. In author's view provision of section 130(4) of the CGST Act has no role while passing of seizure order. It is need to be appreciated here that, section 67(2) of the CGST Act provides that goods shall be seized when they are liable to confiscation and situation where goods shall be liable to confiscation are envisaged under section 130(1) of the CGST Act. Section 67(2) of the CGST Act nowhere provides that for the purpose of passing of seizure order, there is prerequisite of compliance of Section 130(4) of the CGST Act. The goods may be seized by the proper officer not below the rank of Joint Commissioner, when such proper officer has reason to believe that goods are liable to confiscation and term '*goods liable to confiscation*' must be read in context of section 130(1) of the CGST Act only. It is also need to be noted here that for the purpose of seizure of goods in terms of provisions of section 67(2) read with section 130(1) of the CGST Act, there is no requirement for passing of confiscation order and hence no question of compliance of section 130(4) comes as section 130(4) of the CGST Act is effective only when any confiscation order is passed.

The phrase "*with intent to evade payment of tax*" and the element of *mens rea*:

When the statute talks about intent to evade payment of tax, the same could be co-related with the term "*wilful attempt*". For the purpose of evading tax and that too, with the necessary intention, there is always a wilful attempt. In other words, the attempt to evade should be "*wilful*". The term "*wilful*" has not been defined under the CGST Act. Under the

common legal columns, the word “*wilful*” suggests the guilty mind of the assessee. In other words, the assessee has consciously or knowingly attempted to thwart the chargeability or payment of tax. Further, such wilful attempt should be to “*evade*” the chargeability or imposition or payment of tax etc. The word “*evade*” has also not been defined in the CGST Act. As per the Cambridge Dictionary, the word “*evade*” means “*to avoid or escape from someone or something*”. Further, as per the K.J. Ayar’s Judicial Dictionary, the word “*evade*” is capable of being used in two senses, one which suggest underhand dealing and another which means nothing more than the intentional avoidance of something disagreeable. It is need to be appreciated here that legislature has used the words “*with intent to evade payment of tax*” in section 130 of the CGST Act. Therefore, when the law requires an intention to evade payment of duty, then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word “*evade*” in the context means defeating the provisions of law of paying duty. It is made more stringent by use of the word “*intent*”. In other words, the assessee must deliberately avoid the payment of duty which is payable in accordance with law. “*Mens rea*” is a state of mind. Under the criminal law, *mens rea* is considered as the ‘guilty intention’ and unless it is found that the ‘accused’ had the guilty intention to commit the ‘crime’, he cannot be held ‘guilty’ of committing the crime. The principle of *mens rea* comes from English Criminal Law from times when the law was not codified. It was said that *actus non facit reum nisi mens sit rea* (the intent and act must both concur to constitute the crime). But this principle has lost much of its significance owing to greater precision of modern statutes. The nature of intent or the ingredients of offences are now clearly stated in the statutes and nothing further is required to establish as offence then what the statute specified. We have words like ‘*voluntarily*’, ‘*intentionally*’, ‘*negligently*’, ‘*knowingly*’, ‘*fraudulently*’, ‘*dishonestly*’, ‘*rashly*’, ‘*omits*’, ‘*without lawful authority*’ etc., in various statutes. Proof of the state of mind or of the conduct of the person as indicated by the aforesaid word establishes the offence and no further guilty intent or *mens rea* need be proved. In fact there are many acts which are offences and do not require proof any *mens rea* or guilty intention. It is not always necessary that the doctrine of *mens rea* is attracted in every fiscal statute in all situations⁷. Therefore, confiscation proceeding cannot be held as criminal proceedings, it should

7. *R.S. Joshi v. Ajit Mills Ltd.* AIR 1977 SC 2279; *State of Rajasthan v. D.P. Metals* AIR 2001 SC 3076; *Lalji Moolji Transport Co. v. State of Rajasthan* [DB CW No. 324 of 2002 (Raj.)].

be considered as quasi judicial proceeding. Ordinarily, proof beyond reasonable doubt and proof of *mens rea* are foreign to the scope of the confiscation proceeding⁸. However, the language of the statute should be read closely. Sometimes, the language of the statute may indicate the need to establish the element of *mens rea*. It is true that *mens rea* is not an essential element for imposing.

1.7 MEANING OF 'BOOK'

Section 67(2) of the CGST Act provides that proper officer not below the rank of Joint Commissioner may search and seize books or documents or things, thus question arise what would be the meaning of these terms *i.e.* 'book' or 'documents' or 'things'.

It is need to be noted here that term 'books' is not defined under the provisions of the CGST Act. Reference is invited to judgment of the Hon'ble Nagpur High Court in the case of *Mukundram v. Dayaram* AIR 1914 Nagpur 44 observed that in ordinary sense, book signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The binding is of a kind which is not intended to the movable in the sense of being undone and put together again. The said judgment is delivered in the context of section 34 of the Indian Evidence Act, 1872⁹. Relevant extract of the judgment is reproduced herein below:

In its ordinary sense it signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The binding is of a kind which is not intended to the movable in the sense of being undone and put together again. A collection of papers in a portfolio, or clip, or strung together on a piece of twine which is intended to be untied at will, would not, in ordinary English, be called a book...I think the term 'book' in S. 34 aforesaid may properly be taken to signify, ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. It is easier however to say what is not a book for the purposes of S. 34, and **I have no hesitation in holding that unbound sheets of paper in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of S. 34.**

8. Synergy Fertilchem (Gujarat High Court) (*Supra*).

9. Section 34 of the Indian Evidence Act, 1872 reads as under:

"Entries in books of accounts including those maintained in an electronic form, when relevant.—Entries in books of accounts, including those maintained in an electronic form, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

It is imperative to note here that the Hon'ble Supreme Court in celebrated judgment of *Central Bureau of Investigation v. V.C. Shukla* (1998) 3 SCC 410 followed the view of the Hon'ble Nagpur High Court as taken in the case of *Mukundram* (*supra*) and held that 'Book' ordinarily means a collection of sheets of paper or other material, blank, written, or printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed as 'book' for they can be easily detached and replaced. The Hon'ble Supreme Court held that spiral pads, dairies and spiral notebooks are 'books' where it records monetary transactions, entries of receipt of money from certain persons on left side of page and payment to certain persons on right side. Entries also totalled and balanced and thus dully reckoned. Such note book is a 'book'/'books of account' and not a bundle of loose sheets of papers as contained in files. Therefore, collections of sheets or papers whether serially numbered or not, printed or hand written but fastened or bound together so as to form a material as whole would be treated as book. However, any loose papers or any file containing loose sheets of papers would not be treated as 'books'. It is need to be noted here that view of the Supreme Court as held in case of *V.C. Shukla* (*supra*)¹⁰ has been followed by the Mumbai (Three Member) Bench of Hon'ble Income-tax Appellate Tribunal in case of *S.P. Goyal v. Dy. CIT* [2002] 82 ITD 85 (Mum. - Trib.) (TM). It is imperative to note here that in this case during the course of search certain documents were seized consisting of 10 loose sheets. Out of this, one sheet of paper contained certain hand writing by the assessee. The said handwriting was on the loose diary sheet of November 1992 where sum of INR 60 lakhs had been entered as cash. Question before the Hon'ble ITAT was whether loose sheets of paper torn out of diary for 1992 could be considered as books for purpose of section 68 of the Income-tax Act, 1961. In this case third member held that if the loose papers seized in the premises of the assessee were examined in the light of the ratio of the Supreme Court in *V.C. Shukla's case* (*supra*), it was quite clear that these loose papers could not be termed as books of account an assessee maintained for any previous year. The loose papers appeared to be part of a 1992 diary. However, these loose papers consisted of pages torn out from March, April, November and December. There were neither closing balances nor opening balances and there was no reconciliation of these entries. Therefore, these could not be termed as books maintained by

10. It is need to be noted here that Ahmedabad Bench of Hon'ble ITAT in case of *Prarthana Construction (P) Ltd. v. Dy. CIT* [2001] 118 Taxman 112 (Ahd. - Trib.) (Mag.) held that loose papers/loose sheets of papers cannot be termed as book.

the assessee during the previous year. The Hon'ble ITAT also observed that loose paper in itself has got no intrinsic value. In light of the above judgments it is ample clear that loose papers/loose sheets of papers or files of loose papers/sheets cannot be termed as 'book'¹¹. However, the same may be termed as 'documents' or 'things'. The term 'documents' or 'things' are also not defined under the CGST Act. However, Indian Evidence Act, 1872 defines term 'document' as follows:

“Document”- means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations:

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.’

Bare perusal of definition of 'document' as stated under Indian Evidence Act, 1872, it appears that every letter, figures, marks, etc. which are used or intended to be used for the purpose of recording. Therefore, loose papers/loose sheets of papers or files of loose papers which probably would not qualify the definition of 'book' but in author's view certainly can be considered as 'document'. At this juncture, it is need to be noted here that 'thing' is neither defined under Indian Evidence Act, 1872 nor under General Clauses Act. In view of author term 'things' is very wide term and therefore anything which is neither 'book' nor 'document' would be counted as 'things' but it obviously would not include stock, goods, etc.

1.8 POWER OF PROPER OFFICER TO BREAK/SEAL ANY PREMISE/ALMIRAH/ELECTRONIC DEVICE, ETC

Sub-section (4) of section 67 of the CGST Act empowers proper officer to break/seal/access any premise/almirah/electronic device, etc. in

11. At this juncture, it is need to be noted here that term 'books of accounts' is also not defined under the CGST Act. It is need to be appreciated here that, under the Income-tax Act term 'books of accounts' is equated with term 'book'. Section 2(12A) of Income-tax Act, 1961 defines 'books' or and 'books of accounts' as follows:

“books or books of account” includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;’