

EY Tax Alert

CBIC issues instructions for launch of prosecution under GST

Tax Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

Executive summary

This Tax Alert summarizes recent Instruction¹ issued by Central Board of Indirect Taxes and Customs (CBIC) for launching of prosecution under Goods and Services Tax (GST).

The key highlights are:

- ▶ Prosecution should not be launched in cases of technical nature or where there is difference of opinion regarding interpretation of law.
- ▶ Decision on prosecution should be taken on a case-to-case basis depending on evidence available. In case of public limited companies, prosecution should not be launched against all directors of the company but should be restricted to only persons who oversee day-to-day operations of the company and have taken active part in committing the tax evasion.
- ▶ Normally, decision on prosecution should be taken immediately on completion of the adjudication proceedings, except in cases of arrest where prosecution should be filed as early as possible. However, prosecution complaint may be filed even before adjudication in few specified situations.
- ▶ Prosecution should normally be initiated where amount of tax evasion in relation to specified offences is more than INR 5 crores except in case of habitual evaders and arrest cases.

Earlier CBIC had issued guidelines on issuance of summons, arrests and bail under GST². Reference is invited to our tax alert dated 19 August 2022.

¹ Instruction Nos. 04/2022-23 both dated 1 September 2022

² Instruction No. 02-03/2022-23 both dated 17 August 2022

Background

- ▶ Section 132 of the Central Goods and Services Tax Act, 2017 (CGST Act) prescribes offences which warrant institution of criminal proceedings and prosecution. Prosecution is commencement of legal proceeding; the process of exhibiting formal charges against the offender.
- ▶ Central Board of Indirect Taxes and Customs (CBIC) has issued guidelines for launch of prosecution under GST³.
- ▶ Earlier CBIC had issued guidelines on issuance of summons, arrests and bail under GST⁴. Reference is invited to our tax alert dated 19 August 2022.
- ▶ The earlier guidelines on arrest and bail did not cover prosecution and hence, separate guidelines are issued now.

Key Guidelines

Sanction of prosecution

- ▶ Availability of adequate evidence is an important consideration for launching of prosecution.
- ▶ The standard of proof required in a criminal prosecution is higher than adjudication proceeding as the case has to be established beyond reasonable doubt.
- ▶ Decision to file prosecution should be taken on case-to-case basis considering various factors, such as, nature and gravity of offence, quantum of tax evaded/ ITC wrongly availed/ refund wrongly taken and the nature as well as quality of evidence collected.
- ▶ Adequate evidence should be collected to establish beyond reasonable doubt that the person had guilty mind, knowledge of the offence, or had fraudulent intention or in any manner possessed mens-rea for committing the offence.
- ▶ Prosecution should not be filed merely because a demand has been confirmed in the adjudication proceedings.
- ▶ Prosecution should not be launched in cases of technical nature or where additional claim of tax is based on a difference of opinion regarding interpretation of law.
- ▶ In case of public limited companies, prosecution should not be launched against all directors of the company but should be restricted to only persons who oversee day-to-day operations of the company and have taken active part in committing the tax evasion.

Timing of Prosecution

- ▶ Normally, decision on prosecution should be taken immediately on completion of the adjudication proceedings, except in cases of arrest where prosecution should be filed as early as possible.
- ▶ However, in light of Supreme Court observations in Radheshyam Kejriwal⁵ case, prosecution complaint may be filed even before adjudication of the case, where offence involved is grave /qualitative evidence are available / it is apprehended that the concerned person may delay completion of adjudication proceedings.
- ▶ In cases where any offender is arrested under Section 69, prosecution complaint may be filed even before issuance of the show cause notice.

Monetary Limits

- ▶ Prosecution should normally be launched where amount of tax evasion /ITC misuse/fraudulently obtained refund in relation to specified offences under Section 132(1) is more than INR 5 crores. However, the said monetary limit shall not be applicable in following cases:
 - ▶ Habitual evaders - Taxpayer who has been involved in two or more confirmed demand cases of tax evasion/fraudulent refund/misuse of ITC involving fraud, suppression of facts, etc. (at the first adjudication level or above) in past two years and the total confirmed demand [pertaining to total tax evaded and/or total ITC misused and/or fraudulent refund] exceeds INR 5 crores.
 - ▶ Arrest cases - Cases where during the course of investigation, arrests have been made under Section 69.

Sanctioning Authority

- ▶ The prosecution complaint should be filed only after obtaining the sanction of the Principal Commissioner/ Commissioner of CGST in terms of Section 132(6) .
- ▶ In respect of cases investigated by DGGI, the prosecution complaint should be filed only after obtaining the sanction of Principal Additional Director General/ Additional Director General, Directorate General of GST Intelligence (DGGI) of the concerned zonal unit.

Compounding of offences

- ▶ Section 138 provides for compounding of offences on payment of compounding amount. same should be brought to the notice of person being prosecuted and such person should be given an offer of compounding.

Publication of names of convicted persons

- ▶ Section 159 empowers Revenue to publish name and other particulars of the person convicted under the Act.

³ Instruction No. 04/2022-23 dated 1 September 2022

⁴ Instruction No. 02-03/2022-23 both dated 17 August 2022

⁵ 2011 (266) ELT 294 (SC)

- ▶ In deserving cases, Revenue should invoke this section in respect of persons who are convicted under the Act.

Transitional provisions

- ▶ All cases where sanction for prosecution is accorded after the issuance of instructions, shall be dealt in accordance with the provisions of the said instructions irrespective of the date of the offence.
- ▶ Cases where prosecution has been sanctioned but no complaint has been filed before the magistrate, shall also be reviewed by the prosecution sanctioning authority considering the provisions of these instructions.

Other Procedures for Prosecution

- ▶ Various procedures to be followed by authorities such as procedures with respect to filing of prosecution, withdrawal of prosecution, filing of appeal against order of court, general guidelines, maintenance of records, monitoring, etc. have also been prescribed.

Comments

Instructions issued by CBIC are likely to alleviate industry's fear concerning revenue authority's powers to prosecute a person for specified offences. Proper implementation of these instructions by the concerned authority would be key to achieving the desired objective.

Government's intent to relax the thresholds for initiating prosecution proceedings is a welcome move. This should also be backed by a suitable amendment in the GST law.

Clarification that prosecution should not be launched in cases of technical nature and requirement of establishing mens-rea will help avoiding undue hardships of taxpayers.

Instructions on certain aspects dealing with prosecution could give rise to subjectivity that may result in divergent practices and unwarranted litigation.

While some of the areas concerning offences seem to have been resolved, the Government should consider addressing other key representations made by the industry on decriminalization of offences.

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