Safeguards Against Arrest and The GST Law

—Vidushi Gupta and Vinti Agarwal[1]

Economic offences such as tax evasion, money laundering, etc. are considered as grave in nature, as they affect the economy of the country as a whole, thereby posing a serious threat to its financial health. To deter persons from indulging in such economic offences, criminal sanctions are often imposed. One of the most prominent criminal sanctions imposed with regard to economic offences is that of arrest. It is widely acknowledged that arrests result in deprivation of liberty of a person. Thus, while it is imperative to maintain law and order in society, the power to arrest must also always be subject to necessary safeguards. Against this backdrop, the authors analyse the arrest provisions under the Goods and Services Tax Law, with a view to study the adequacy of the safeguards and authorisations built into the text of the statute. The authors also study the interplay between these provisions and the standards of arrest as established through judicial precedents, as well as other sources such as the Constitution of India and general statutes such as the Code of Criminal Procedure.

Keywords: *Economic offences, arrest, Goods and Services Tax Law, safeguards, judicial precedents, Constitution of India, other statutes.*

I. Introduction

Economic offences are a separate class of criminal offences that involve loss of public funds.[2] Typically, the motive behind committing these offences is avarice, their victim is the State, and the mode of operation of the offender is fraud and not force.[3] Tax evasion is one of the most prevalent illegitimate activ-

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[2] National Crime Records Bureau, Crime in India — 2014: Economic Offences, available at <https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%201.11_2014.pdf > (last visited on 23-9-2019).

[3] Law Commission of India, *The Trial and Punishment of Social and Economic Offences, 1972,* Report No. 47, (February 1972), available at http://lawcommissionofindia.nic.in/1-50/Report47.pdf (Last visited on September 25, 2019).

ities among the economic offences that are practiced by suppressing facts and manipulating records by tax payers.[4]

The criminalisation of an offence is meant to act as a deterrent for potential offenders. Specifically, in offences under tax law, criminal sanctions are meant to deter taxpayers from evading their tax obligations.[5] One of the most prominent criminal sanctions used to deter one from committing an offence, is by exercising the power to arrest. The term 'arrest' ordinarily means apprehension, restraint, or deprivation of one's personal liberty.[6]

There is broad consensus that arrest provisions must be sparingly exercised, and be accompanied with safeguards, oversight, and necessary authorisation. The primary argument against conducting arrests is based on the cornerstone of the basic human right of liberty. In addition to restraining one's personal liberty, arrests are said to undermine the fairness of trial, and increase the risk of a confession or statement being coerced by torture or ill-treatment.[7]

However, it has also been widely acknowledged that the power to arrest a person can be critical to a tax crime investigation.[8] The primary objectives behind arrest have been noted to include the facilitation of proper investigation of the offence; and the prevention of the arrested individual from committing any further offences, tampering with the evidence, and making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the courts or to the police officer.[9]

In order to strike a balance between the maintenance of law and order, and preserving the liberty of individuals, arrests are said to be justified only when it is lawful, necessary and reasonable. While there is no straitjacket formula in this regard, some of the circumstances that may warrant an arrest include cases where the offence involved is grave in nature; the accused is a habitual offender or is likely to commit further offences unless his movement is restrained.[10]

II. Power to Arrest Under The GST Law

Section 132 of the Central Goods and Services Tax Act, 2017 ('CGST Act') lists twelve offences that are punishable by imprisonment and/or a fine. The term

4 National Crime Records Bureau, *supra* note 2.

5 Organisation for Economic Cooperation and Development, Fighting Tax Crime: The Ten Global Principles, available at<http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf> (last visited on 17-10-2019).

6 *Directorate of Enforcement* v. *Deepak Mahajan*, (1994) 3 SCC 440 : AIR 1995 SC 1775.

7 United Nations, Report of the Subcommittee on Prevention of Torture on Paraguay, CAT/OP/PRY/1, [64], (7-6-2010).

8 Organisation for Economic Cooperation and Development, *supra* note 5.

9 *P.V. Ramana Reddy* v. *Union of India*, Writ Petition Nos.4764, 4769, 4892, 5074, 5130, 5329, 6952 and 7583 of 2019, ¶56.

10 *Joginder Kumar* v. *State of U.P.*, (1994)4 SCC 260 : AIR 1994 SC 1349.

of imprisonment and the amount of fine, is dependent on the amount involved in the offence, or in some cases, the act committed by the offender.[11] The provision further categorises certain offences as cognizable and non-bailable, if the amount involved exceeds INR five hundred lakh.[12] These offences relate to persons who supply goods or services without issuing invoices, or issue invoices without supplying goods or services and thus wrongfully avail input tax credit; or to persons who collect tax but fail to pay it to the government beyond a period of three months from date on which payment becomes due.[13] All other offences listed under the Act have been categorised as non-cognizable and bailable.[14]

Section 69 of the CGST Act appears to empower the Commissioner to authorise any officer to arrest persons who he believes to have committed some of the aforementioned offences.[15]

III. Safeguards against Arrests Codified Under The GST Law

From a perusal of the aforementioned provisions, it appears that certain safeguards against abuse of the powers to arrest have been inserted under the CGST Act itself.

First, the power to arrest has been granted only in respect of certain specific offences. These offences include cases where the act in question is committed with an intention to evade tax[16] or where it results in monetary loss to the Government exchequer.[17] In addition to the nature of the offence, the legislature has also added an additional layer of restriction on the power to arrest for most first time offenders by stating that such power can only be exercised when the aforementioned offences involve an amount exceeding INR one hundred lakh or more.[18] Notably, the aforementioned monetary threshold is not applicable to all offences. In certain cases, the amount involved in the offence is not relevant. For instance, in cases where any of the specified offences are committed for the second time, the power to arrest is applicable regardless of the amount involved.[19] Similarly, in cases where one commits or abets the commission of offences such as falsification of records, or obstructing an officer from conducting his duty, or tampering or destruction of material evidence, the amount involved is immaterial, and the power to arrest exists regardless.[20] Therefore, it appears that the grant

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11 The Central Goods and Services Tax Act, 2017, S. 132(1)(*i*)-(*iv*).
12 The Central Goods and Services Tax Act, 2017, S.132(5).
13 The Central Goods and Services Tax Act, 2017, S. 132(1)(*a*)-(*d*).
14 The Central Goods and Services Tax Act, 2017, S. 132(4).
15 The Central Goods and Services Tax Act, 2017, S. 69.
16 The Central Goods and Services Tax Act, 2017, S.132(1)(*a*), (*e*) and (*f*).
17 The Central Goods and Services Tax Act, 2017, S.132(1)(*b*), (*c*) and (*d*).
18 The Central Goods and Services Tax Act, 2017, S. 132(1)(*iii*).
19 The Central Goods and Services Tax Act, 2017, S. 132(2).
20 The Central Goods and Services Tax Act, 2017, S.132(*iv*).

of such powers under the CGST Act have been allowed based on the combined assessment of the severity of the offence and the amount involved therein.

Second, safeguards in the form of pre-arrest authorisations have also been inserted in the text of the CGST Act itself. As noted above, Section 69 of the CGST Act permits the Commissioner GST to authorise arrests in certain cases, based on the seriousness and the amount involved, but in all other cases, arrests are to be conducted according to provisions of the Code of Criminal Procedure ('CrPC').[21] There appears to be an inversely proportional relationship between the gravity of the offence in question and the safeguards applicable thereon. However, the provisions still appear to comply with basic standards as even in cases of the grave offences under the Act, the Commissioner who is a senior GST official is permitted to authorise arrest only if he has reason to believe that a person has committed an offence.[22] This position was also affirmed by the Jharkhand High Court. It was held that a Senior Intelligence Officer is not permitted to conduct arrests under the CGST Act till the Commissioner records his satisfaction on '*reasons to believe*' authorizing him to arrest the assessee.[23] The scope of the expression '*reason to believe*' has been examined in several cases. The Supreme Court[24] held that '*reason to believe*' must not be purely subjective satisfaction and must have a rational connection with, or a relevant bearing on the formation of the belief. The insertion of the phrase '*reason to believe*' demonstrates the legislature's intention to make an affirmative attempt to circumscribe the discretionary powers and permit their exercise only in a bona fide manner, to further the interest of revenue.[25] Thus, the discretion of the Commissioner to authorise arrest is in the most serious offences listed under the CGST Act.

Third, the CGST Act also provides the process to be followed once arrests are conducted by a central tax officer on the authorisation of the Commissioner. The officer in question is required to inform the arrested person of the grounds of his arrest and must produce such person before the Magistrate within twenty four hours of arrest.[26] This is in line with the safeguards provided under Section 49 of the CrPC and Article 22 of the Constitution of India.

IV. Other Safeguards against Arrests

In addition to the specific safeguards listed in the CGST Act, there are several other principles that limit an officer's power to arrest. In this section, the authors briefly discuss some of these restrictions.

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21 The Central Goods and Services Tax Act, 2017, S. 69.

22 The Central Goods and Services Tax Act, 2017, S. 69(1).

23 *Pramod Agarwal* v. *Union of India*, 2019 SCC OnLine Jhar 593.

24 *ITO* v. *Lakhmani Mewal Das,* (1976)3 SCC 757; (1976) 103 ITR 437.

25 *Mukesh Modi* v. *CIT*, 2014 SCC OnLine Raj 1719 : (2014) 267 CTR 409.

26 The Central Goods and Services Tax Act, 2017, S. 69(2).

Several provisions of the CrPC deal with arrests. Similar to the trend noted under the CGST Act, under the CrPC too, the degree of authorisation required before exercising powers to arrest, decreases as the severity of offence involved increases. The CrPC confers wide powers on the Police officer to arrest a person for cognizable offences.[27] In such cases, arrests are permitted to be carried out without first obtaining an order from the Magistrate.[28] However, for non-cognizable offences, a warrant from a Magistrate is required as a pre-requisite to the arrest.[29]

While Section 41(1) of the CrPC appears to provide a certain degree of discretion to police officers, its enactment has been limited through several judicial pronouncements. Given that arbitrary arrests restrict one's fundamental right to liberty as guaranteed under the Constitution of India and causes incalculable harm to the reputation and self-esteem of the person,[30] it has been held that the power to arrest, and specifically the power to arrest under Section 41(1) of the CrPC must be exercised with caution and circumspection.[31] Arrests without the prior permission of the Magistrate should only be conducted in cases where obtaining permission would unnecessary delay and defeat the purpose behind the arrest.[32] Several landmark cases have also held that arrests must not be made merely because doing so is within the officers' powers.[33] These powers should only be exercised after reaching reasonable satisfaction as to the genuineness of the complaint and that such arrest is necessary and justifiable.

Accordingly, Section 41-A of the CrPC provides officers with alternatives to arresting a person in cases where an arrest may not be necessary. The provision states that where the arrest of a person is not required, the police officer must issue a notice directing the accused to appear before him. If the accused complies with the terms of notice, he shall not be arrested unless the, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.[34] It was held by the Supreme Court that except in grave offences, arrest must be avoided if police officer issues notice to person and such person complies with the notice and ensures attendance whenever required.[35]

The CrPC also allows persons apprehending arrest for non-bailable offences, to apply for anticipatory bail. The grant of anticipatory bail is an extraordinary

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27 The Code of Criminal Procedure, 1973, S. 41(1).

28 The Code of Criminal Procedure, 1973, S. 41(1).

29 The Code of Criminal Procedure, 1973, S. 41(2).

30 *Joginder Kumar* v. *State of U.P.*, (1994) 4 SCC 260 : AIR 1994 SC 1349; *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416 : AIR 1997 SC 610; *Arnesh Kumar* v. *State of Bihar*, (2014) 8 SCC 273 : AIR 2014 SC 2756.

31 *M.C. Abraham* v. *State of Maharashtra*, (2003) 2 SCC 649.

32 *Bir Bhadra Pratap Singh* v. *D.M. Azamgarh*, 1958 SCC OnLine All 183 : AIR 1959 All 384.

33 *Arnesh Kumar* v. *State of Bihar*, (2014) 8 SCC 273 : AIR 2014 SC 2756.

34 The Code of Criminal Procedure, 1973, S. 41-A.

35 *Joginder Kumar* v. *State of U.P.*, (1994) 4 SCC 260 : AIR 1994 SC 1349.

power given to High Court and the Sessions Court under the CrPC, which should typically be exercised sparingly and only in special cases.[36] An order of anticipatory bail can be passed after imposing suitable conditions and taking factors such as nature and gravity of accusation, possibility of the applicant fleeing from justice, etc. into consideration.[37] The court, while granting anticipatory bail needs to strike a balance between protection of individuals from unnecessary humiliation and maintaining faith of the public in administration of justice.[38] It is relevant to note, that since the CrPC is a concurrent list subject, some Central statutes and State legislatures have the power to exclude the applicability of the anticipatory bail provision. This power has been exercised under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, as well as the State of Uttar Pradesh. High Courts have been empowered to provide relief in appropriate cases and they are given the discretion to decide the circumstances under which grant of anticipatory bail is warranted. Therefore, to provide an avenue for individuals apprehending arrest in cases where the CrPC anticipatory bail provision under the CrPC is not applicable, judicial precedents have included the option to hear such an application, within High Courts' jurisdiction under Article 226 of the Constitution of India.[39]

Besides the aforementioned safeguards that prevent an individual from being arrested, multiple safeguards also deal with protecting the individual once an arrest has been made. For instance, Section 49 of the CrPC provides that one shall not be subjected to more restraint than necessary to prevent his escape. On similar lines, the Indian Constitution mandates that the person arrested is informed of the grounds of arrest and must be produced before the Magistrate within twenty-four hours of such arrest.[40] Notably, an explicit provision requiring the same finds mention in the CGST Act.[41]

Further, persons accused of committing an offence are guaranteed the fundamental right to protect themselves against self-incrimination under the Constitution of India.[42] This principle is also explicitly codified under Section 25 of Indian Evidence Act, 1872 ('IEA') which states that any statements made by the person arrested to the police officer are inadmissible. Notably, this constitutional safeguard is only applicable when the person in question is accused of the offence in question. Therefore, in cases where an officer arrests a person for the purpose of holding an inquiry into a commission of offence which he has reason to believe has taken place, there is no formal accusation made, and thus Article 20(3) cannot be said to be applicable.[43] Similarly, Section 25 of the IEA is only

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36 *Balchand Jain* v. *State of M.P.*, (1976) 4 SCC 572 : AIR 1977 SC 366.

37 *Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : AIR 1980 SC 1632.

38 *Muzafar Hossain Khan* v. *State of Orissa*, 1989 SCC OnLine Ori 322 : 1990 Cri LJ 1024.

39 *Hema Mishra* v. *State of U.P.*, AIR 2014 SC 1066.

40 The Constitution of India, 1950, Art. 22.

41 The Central Goods and Services Tax Act, 2017, S. 69(2).

42 The Constitution of India, 1950, Art. 20(3).

43 *Ramesh Chandra Mehta* v. *State of W. B.*, AIR 1970 SC 940.

applicable when the confession is made to a police officer. Judicial precedents have held that the duties of Custom officer are substantially different from that of a police officer, and merely because certain powers exercised by both class of officers are similar, it cannot be said to qualify customs officers as police officers within the meaning of Section 25 of IEA.[44] In another similar case, Central Excise officers were also held not to be police officers as the power to file charge-sheet was missing on which cognisance is taken by a Magistrate.[45] Similarly, it could be plausibly argued that CGST officers cannot be termed as police officers as they are primarily concerned with prevention of tax evasion levied on supply of goods and services and do not have the power to file charge-sheet. Thus, the protection under Section 25 of Indian Evidence Act will not be applicable to persons arrested under CGST Act prior to when they are explicitly accused of the offence.

Lastly, wilful excess or unjustifiable use of powers by any authority with respect to trial and confinement is punishable under Section 220 of IPC.[46]

V. Applicability of The Safeguards Under The GST Law

While it is clear that the restrictions imposed by the Constitution of India would prevail, the question of whether the GST law would be subject to the provisions of the CrPC has been deliberated upon on several occasions.

In the pre-GST era, some legislations including the Central Excise Act included a clear provision subjecting the power of arrest of Commissioner of Central Excise to the provisions of CrPC relating to arrest.[47] Further, a landmark case dealing with the power to arrest under the service tax regime held, that while exercising the power to arrest, the safeguards mentioned in the CrPC as well as Constitution of India must be taken into consideration.[48] However notably, Section 69(1) of the CGST Act is silent on the applicability of provisions of the CrPC prior to arrest even though the process after arrest has been specifically subjected to the CrPC.

On a plain reading of the CGST Act, it appears that while the Legislature meant to subject the post arrest procedure to the provisions of the CrPC, as far as the process of the arrest itself is concerned, a conscious choice was made to deviate from the provisions of the erstwhile law that referred to the CrPC. Therefore, a clause similar to that of the erstwhile regime which subjected the process to the CrPC has categorically been excluded. However, this interpretation does not hold good juxtaposed against the settled position that when a special law is silent

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44 *State of Punjab* v. *Barkat Ram*, AIR 1962 SC 276; *Thomas Dana* v. *State of Punjab*, AIR 1959 SC 375.

45 *Badaku Joti Savant* v. *State of Mysore*, AIR 1966 SC 1746 : (1966) 3 SCR 698.

46 The Penal Code, 1860, S. 220.

47 The Finance Act, 1994, S. 91.

48 *MakeMyTrip (India) (P) Ltd.* v. *Union of India*, 2016 SCC OnLine Del 4951.

on a particular point, the provisions of the general law would apply.[49] Thus, even though the CGST Act does not specifically subject the provisions of arrest to the CrPC, the principles enshrined under the CrPC will still be applicable.

It is relevant to note that when there is an inconsistency between the provisions of two Acts, then the special law will prevail over general law.[50] While admittedly, this rule is not absolute, it has been held to be applicable specifically in cases where the legislature enacts a comprehensive scheme and deliberately targets specific problems with a specific solution.[51] The CGST Act being a special law designed particularly to deal with the subject-matter of taxing supply of goods and services it may be argued to be a self-contained code providing for special procedures as well as enlisting offence. Therefore, in case of inconsistency between provisions of CGST Act and a general law, the specific provisions of the CGST Act will prevail over the CrPC. This concept is also expressly recognised under Section 60-A of CrPC that provides that an arrest can be made in accordance with any other law providing for the same.[52] For instance, Section 41 of the CrPC differs from, and in some cases, even contradicts the procedure under Section 69(1) of the CGST Act. According to Section 41(2) of the CrPC, no person concerned in a non-cognizable offence can be arrested, except under a warrant, or an order of the magistrate. However, Section 69(1) allows the arrest of persons involved in certain specified non-cognizable and bailable offences, without such order or warrant. Therefore, in such cases, the CGST Act would maintain primacy over the CrPC.

VI. Conclusion and Key Takeaways

From a combined reading of the aforementioned enactments and judicial precedents, it is clear that the power to arrest is subject to several restrictions and limitations. However, the applicability of these safeguards to the CGST Act requires further deliberation. While the Constitutional safeguards are ubiquitous, some pertinent questions regarding the applicability of the CrPC remain unanswered.

As noted above, theoretically, it is clear that in matters relating to arrest, the CGST Act would prevail over the CrPC, to the extent that an inconsistency between the two exists. However, for practical purposes, determination of whether there indeed exists an inconsistency between the provision of the CrPC and that of the CGST Act is a question of interpretation and may lead to litigations.

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49 *Tejram Nagrachi Juvenile* v. *State of Chhattisgarh*, 2019 SCC OnLine Chh 24 : (2019) 200 AIC 559.

50 *LIC* v. *D.J. Bahadur*, (1981) 1 SCC 315; *Raval and Co.* v. *K.G. Ramachandran*, (1966) 2 MLJ 68.

51 *CTO* v. *Binani Cements Ltd.*, (2014) 8 SCC 319.

52 The Code of Criminal Procedure, 1973, S. 60-A.

For instance, there are strong arguments both in favour of, and against the applicability of Section 41-A of the CrPC on Section 69 of the CGST Act.[53] On the one hand, it is plausible to argue that since Section 69 of the CGST Act uses the expression 'may', it appears that while it empowers the Commissioner to authorise the arrest of persons who have allegedly committed certain specified offences, it does not mandate such authorisation. Therefore, it may be argued that since the CGST law is silent on the process to be followed if a Commissioner believes that it is not necessary to authorise the arrest of a person under Section 69(1), the provisions of Section 41-A of the CrPC would be applicable. However, the argument against the applicability of Section 41-A of the CrPC stems from the rationale offered by the Law Commission Report that suggested the introduction of the provision. A review of the Law Commission Report[54], along with the provisions of the Code of Criminal Procedure (Amendment) Act 2008, gives the impression that Section 41-A of the CrPC was only meant to apply to the offences under Section 41(1)(*b*), and not as a general guiding principle applicable to all arrests made under the Code. This argument may be further strengthened by the placement of the proviso which was inserted to clause (*b*) specifically, and not the whole of Section 41(1). Certain judicial precedents also hold that Section 41-A of the Code has no applicability on the offence committed under Section 41(1)(*ba*) of the Code.[55] Moreover, it is clear that the offences listed under Section 41(1)(*b*) are either less severe than other offences contained in sub-section (1) such as those under clauses (*ba*) and (*h*); or allow police officers the maximum amount of discretion in deciding if an offence has been committed as compared to other offences listed in clauses (*a*), (*c*), or clause (*e*). On the other hand, the offences listed under Section 69(1) of the CGST are the most severe under the Act. In fact, the GST Council specifically carved out a special arrest procedure for these offences.[56]

One cannot stress enough on the importance of limiting an officer's powers to arrest, through adequate safeguards. That said, subjecting a special statute listing certain specific offences, to the general provisions of the CrPC, may often cause the intention of the legislature to be diluted as demonstrated in the case of Section 41-A above. It is therefore imperative that when special statutes incorporate arrest provisions, they either specifically incorporate the safeguards mentioned in the CrPC and other general statutes within their scope, or categorically exclude the same if there is a reasonable justification to do so. The latter option however should be exercised with immense caution and must not contradict the constitutional mandate.