

Powers to Summon under Section 70 of Central Goods and Services Tax Act, 2017 - Whether They are Synonymous with Powers in Other Indirect Tax Statutes: An Analysis

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ABSTRACT

Central Goods and Services Tax Act, 2017 was enacted in 2017. This new Act subsumed into it a number of previous indirect statutes that were in force, like Central Excise Act, 1944, Finance Act, 1994 etc which were repealed through this Act. Provisions to summon witness in an inquiry is a provision which underwent major changes evolving into enactment of Section 70 of this Act of 2017. However, as of now, authorities under this new Act are exercising the power to summon in the same manner as they were doing during the Service Tax regime. Therefore, the following questions are being examined, namely, whether the above actions by 'proper officers' violates the provisions of the enactment of 2017, whether such violations lead to denial of natural justice and procedural safeguards to the assessee, whether the law regarding issue of summons remains the same even under the enactment of 2017 or if the law has moved forward or not.

Keywords: *Summons, Witness, Inquiry, Code of Civil Procedure, Service Tax Act, Central Goods and Services Tax Act.*

1.0 Introduction

Post enactment of 101st Amendment to Indian Constitution, the Central Goods and Services Act, 2017 was enacted by Parliament. This came into force with effect from 01.07.2017 FN. This new enactment subsumed into itself a number of previous indirect tax statutes. The Central Excise Act 1944, Finance Act, 1994 (popularly known as Service Tax Act) are a few to name. This new Act has assumed powers to levy central tax on supply of Goods and Services. All States and Union Territories too enacted similar statutes in the respective states to assume powers to levy tax on supply of Goods and Services in their respective territories.

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These Acts also came into force simultaneously with effect from 01.07.2017. Powers of Summon under the Central Goods and Services Tax Act, 2017 as provided in Section 70 (read with Section 136) of the Act is analysed here. In order to bring home a few points, it is necessary to consider and make an analysis on the provisions of summons found in a few other taxation statutes and also in Code of Civil Procedure, 1908.

The Central Goods and Services Tax Act, 2017 is the latest piece of Central Indirect Tax legislation which subsumed some of the previously enacted central indirect tax legislations. As the pool of case laws are limited regarding relevant provisions of the Central Goods and Services Tax Act, 2017, there are some difficulties in making comprehensive comparison with other Acts, namely, Central Excise Act, 1944 and Service Tax Act (Finance Act, 1994). It can be seen that the provisions contained in the other two Central indirect Tax legislations mentioned here are totally identical to each other, as provided in Section 14 read with Section 9D of Central Excise Act, 1944 and Section 83 of Service Tax Act respectively. However, there are quantum changes brought through Section 70 of this new legislation. As far as the power to summon under Section 70 of the Act goes, it has to be stated that law having moved much away from the previously enacted central indirect taxation statutes, the Central Goods and Services Tax Act, 2017 is unique in this power.

On the other hand, it is noteworthy to mention that powers in Income Tax Act, 1961 (Section 131) are far different and are, by and large, similar to the powers in Code of Civil Procedure, 1908. Origin of this similarity can be traced to the fact that the concerned authorities in Income Tax Act, 1961 have same powers in respect of certain matters as are vested in a Civil Court under the Code of Civil Procedure, 1908 while trying a suit. It is seen that the type of powers conferred for summon in Central Excise Act, 1944 and Service Tax Act are quite distinctly different from powers to summon conferred in Section 131 of Income Tax Act, 1961. This gives clarity to the fact that the two sets of powers are different from each other. Further, it is now safer to assume that the powers to summon in Section 70 of Central Goods and Services Tax Act, 2017 are different from the above two sets of powers and as such, unique. However, by invoking the mention of Powers of Civil Court in Code of Civil Procedure, 1908, the power to summon in Central Goods and Services Tax Act, 2017 resembles more to the latter set of powers. It is submitted that this resemblance is limited only to the manner in which the power to summon is exercised and the comparison does not cover the powers after the summon has been answered by the witness by his attendance.

2.0 Comparison between Central Goods and Services Tax Act, 2017 and Other Central Indirect Tax Statutes with Respect to Law on Summons

Central Excise Act, 1944 is a central enactment to levy indirect tax on the basis of Manufacturing or Production. Service Tax Act (Finance Act, 1994) was enacted to levy tax for

the taxable services rendered which was introduced for the first time in 1994. Provisions for assessment, enforcement, recovery and prosecution/ punishment are provided in all the above enactments. These powers include power to summon persons and power to search & seizure by nominated authorities. After the 101st Constitutional Amendment and through the enactment of Central Goods and Services Tax Act, 2017, the Central Excise Act, 1944 and Service Tax Act are repealed and these provisions are subsumed into the new Act.

First and foremost difference between the above two Central Indirect Tax Statutes on the one hand and the Central Goods and Services Tax Act, 2017 on the other hand can be traced to the fact that in the former, the power to summon is unqualified where as in Central Goods and Services Tax Act, 2017, the power to summon any person is qualified as 'in the same manner, as provided in the case of a Civil Court under provisions of Code of Civil Procedure, 1908. Second difference is that in the case the former set of statutes, an omnibus summon of documents are allowed.

The summon can require production of all documents or things of a certain description under the control of the person summoned. In Section 70 of Central Goods and Services Tax Act, 2017, the documents that are required to be produced are to be mentioned. Thirdly, in the case of the former set of statutes, the person summoned is to state the truth and to make statement, failure of which shall attract punishment under Sections 174, 175 and 177 of Indian Penal Code, 1860. But, in the case Central Goods and Services Tax Act, 2017, there is no sanction in case the person refuses to testify or to furnish information after answering the summons. Fourth difference is with regard to evidentiary value of the statement signed by the person during appearance in response to summon or otherwise.

In case of the former set of statutes, there is a near bar to evidentiary value by virtue of Section 9D (2) of Central Excise Act, 1944. By virtue of Section 83 of Finance Act, 1994, the section 9D (2) of Central Excise Act, 1944 is made applicable to Service Tax also. On the other hand, in the case of Central Goods and Services Tax Act 2017, there is no mention about any bar or otherwise on the evidentiary value of the statements in case of any proceedings under that Act. A moot point to be noted here is that, in any of these indirect tax statutes, there are no express provisions or powers to record statement or to obtain signed statements from anyone other than from a 'witness' and such statements can be obtained 'pursuant to summons' alone. However, powers to record statements during 'Search' is conferred in the case of Section 132 (4) of Income Tax Act, 1961, though this power is qualified by certain express provisions.

3.0 Bar to Evidentiary Value of Statements Made and Signed Behind the Tax Payers

This last difference brings to the fore a curious inference. These above sections are captioned under 'Relevancy of Statements under Certain Circumstances' in both these enactments. These provisions put sweeping bar on evidentiary value of statements made earlier

during any proceedings under these Acts. Besides certain express provisions for providing and for restricting evidentiary value unless examined in a proceeding, what additionally can be read through is that, the statements so obtained, be it obtained pursuant to summons or be it obtained during search/ seizure, are not to be treated as obtained in any quasi-judicial proceedings. But, in case of Central Goods and Services Tax Act, 2017, the statements so obtained are obtained as evidence in quasi-judicial inquiries itself in relation to matters of fact under inquiry. So, there is no question of adding any disqualification/ bar to the evidentiary value as seen in other Statutes. Also, it gives a clear indication that proceedings pursuant to summon in Central Goods and Services Tax Act, 2017 stand at a different footing in so far as the evidentiary value of statements and documents obtained therein, stage at which they can be obtained and forum at which they can be used against the assessee are concerned, than that pursuant to summon in the other indirect tax statutes mentioned above.

As such, the inferences that are drawn here remains ‘res integra’. However, these discussions take us to another inference. The Proceedings pursuant to summons under Section 70 of Central Goods and Services Tax Act, 2017 are part of quasi-judicial proceeding similar to such proceedings pursuant to Section 131 of Income Tax Act or Section 28 of Foreign Exchange Management Act, 1999 or pursuant to similar provisions found in a host of other statutes. The comparative Table 1 will give clarity to the above aspects

Table 1: Comparative Table of Power of Summon in Different Statutes.

Description of Power	Under Central Excise Act, 1944 & Under Service Tax Act	Under Central Goods and Services Act,2017
Person summoned is legally bound to state the truth when examined or to make statements and to produce documents required	YES	NO
Bar to Evidentiary Value in any Proceedings	YES	Not Mentioned
Power to Summon in the same manner as provided in Code of Civil Procedure Code,1908	NO	YES
Power to (a) compel attendance and (b) take evidence on Oath	NO	NO

Source: <https://www.indiacode.nic.in/bitstream/123456789/19238/1/a1944-01.pdf> and *Commercial Law Publishers Bare Act of Service Tax Act (2023) & Commercial Law Publishers Bare Act of Central Goods and Services Tax Act, 2017(2023)*.

4.0 Provisions for Summon in Central Goods and Services Tax Act, 2017, Income Tax Act, 1961 and in Code of Civil Procedure, 1908

In the Central Goods and Services Tax Act, 2017, Powers to summon in the same manner, as provided in the case of a Civil Court under the provisions of Code of Civil Procedure, 1908 is vested in the Authorities. But, in the case of Income Tax Act, 1961, there is a difference. The authorities under Section 131 (1) have powers as are vested in a Court under Code of Civil Procedure, 1908, when trying a suit in respect of certain matters. The reference to civil Court and Code of Civil Procedure, 1908 in both these statutes makes it easier for a meaningful comparison between the powers to summon under these two pieces of taxation legislations and under the Code of Civil Procedure, 1908. Plus, we have the advantage of a large pool of case laws in the case of the Income Tax Act 1961 for deriving benefits.

In *Pawan Kumar Goel V Union of India*¹, summons was issued to the petitioner under Section 131 of the Act, which indicated that the premises of the petitioner were converted into a camp office and advised the petitioner to attend the office and give evidence or produce books of accounts, failing which a penalty of Rs.10,000/- for each default would be imposed upon him. Towards the bottom of the summons, it is written “Books of accounts/documents specified”. A division bench of Punjab and Haryana High Court in its judgment dated 22.05.2019 held that provisions of section 131 (1) could be invoked only if some proceedings were pending. There has to be reason to suspect that income has been concealed or is likely to be concealed by any person or class of person that can prompt an enquiry or investigation to invoke the powers under section 131 (1).

In *ITO V James Joseph O Gorman*², a writ petition filed by the assessee bank was allowed and the summons issued under Section 131(1) was quashed by single bench of Calcutta High court. In dismissing an appeal filed by the Income tax officer, a division bench of the Calcutta High Court, in its judgment dated 11.05.1989 held that ‘In other words the authority concerned is not entitled to exercise power under section 131 as a mere cloak for the purpose of making a fishing investigation and a roving enquiry in order to take proceedings under section 147. In *Jamnadas Madhavji & Co. V ITO*³, the assessee received fresh summons under Section 131 of Income Tax Act after the initial summons were resisted by the assessee on the ground that there is no proceeding pending. In the fresh summons it is mentioned that Section 131 can be invoked even where there is no proceeding are pending and “the purpose of the information called for was with a view to investigate the information with me whether the above assessment should be reopened under section 147 or not”.

Bombay High Court in its judgment dated 31.05.1986 held that a summons issued with a view to investigate whether the completed assessment should be reopened under section 147 is liable to be quashed if no proceeding was pending at the time of issuing such summons. In *G.M Breweries Ltd V Union of India*⁴, the petitioner company was directed to produce book

of accounts “under section 131/37/36 of the Income-Tax Act, 1961/Wealth-Tax Act, 1957/Gift Tax Act, 1958”. Bombay High Court in its judgment dated 24.08.1999 held that ‘the expression “for the purposes of the Act” must mean for the purposes of proceedings under the Act pending before the concerned authority. The powers given to the Income-Tax Authorities under section 131(1) are powers of the Court of law. While exercising these powers, the Income-tax Authorities Act in a quasi-judicial capacity. These powers must be exercised strictly for the purposes set out in sub-section (1) of section 131 of the Act and not for any extraneous purposes. Powers under section 131 can be exercised only if proceedings are pending before the authority concerned under the Income-Tax Act’.

The decision in *Barium Chemical Ltd and Anr V Sh. A.J. Rana and Ors*⁵ was beneficially quoted in *In New Central Cotton Mills V Dwijendralal Brahmachari*⁶. Summons was issued under Section 131 of the Income-tax Act, 1961, by the Income-tax Officer on the Registrar of Companies requiring him to produce all the seized documents. The validity and the propriety of this summons were challenged in the application under Article 226 of the Constitution. It is held that the Assessing Officer must have some knowledge of the contents of the documents to be able to judge whether they are required for the purpose of the Act. In *CIT V Mool Chand Salecha*⁷, for the production of the books of accounts and account books of earlier years, summonses under section 131(1) were issued to the assessee on 6-12-1994, but no compliance was made by the assessee. The income tax department proceeded with further actions and carried out assessment. All the actions subsequent to the issue of the summons were challenged by the assessee in the High Court. The Rajasthan High Court, in its judgment dated 22.03.2002 held that ‘Thus, for invoking provisions of section 131 (1), there must be application of mind by the Assessing Officer concerned to the requirement of documents for the purpose of the assessment and there must be evidence that there were materials from which such relevancy of the documents etc., have been considered by the Assessing Officer before passing the order’.

Also, the case law establishes that the summoning of witnesses are not a unilateral act by the Assessing Officer. Summons are to be issued on the request of the party to the proceedings/ Assessee. Witnesses can be summoned and can appear and be examined for the assessee. In *Cf. Food Corporation of India V Provident Fund Commissioner*⁸, the appellant corporation requested the respondent Commissioner to summon the contractors to produce the respective lists of workers engaged by them. However, the appellant-commissioner did not summon the contractors, nor the lists maintained by them. The Supreme Court in its judgment dated 26.10.1989 held that ‘The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person’.

No good reason is found to why the above findings are not applicable to the summons under Section 70 of the Central Goods and Services Tax Act, 2017. The power to summon in the same manner as provided in the Code of Civil Procedure, 1908 indicate that the conditions precedent, format, conditions and limitations, form and substance as applicable for similar processes in this Code will bind the summons under Section 70 of Central Goods and Services Act, 2017 as much as it binds the summons under Section 131(1) of Income Tax Act, 1961.

Under Order 16 of the Code of Civil Procedure, 1908, the Civil Court has power to allow parties to bring persons without issue of Summons (Rule 1-A), has power to require persons present in Court to give evidence or produce documents (Rule 7), has power to examine the witness under oath and has power to enforce attendance by arrest or by attachment of properties or by ordering to furnish security or by appropriate proclamation as laid out in the Code. These powers are conspicuous by their absence under Section 70 of the Central Goods and Services Tax Act, 2017.

In Central Goods and Services Tax Act, 2017, in case any person is to be examined, necessarily a summon has to be issued for him to testify as no provision is there for anyone to come forward voluntarily to testify. Further, in case of Central Goods and Services Tax Act, 2017, there is no express provision to compel attendance or to examine under oath. Coming to Income Tax Act, 1961, compelling attendance and examining under oath is provided for. As far as the power for 'issuing of the summon' the law as provided in Section 70 of Central Goods and Services Tax Act, 2017 is substantially the same as that power under Section 131 of Income Tax Act, 1961. However, there are quite a lot of difference with respect to powers after the summon is served or answered. In the case of Central Goods and Services Tax Act, 2017, the power is the 'power to summon in the same manner as provided in the case of a Civil Court under the provisions of Code of Civil Procedure, 1908'. However, in case of Income Tax Act, 1961, the power is the entire 'powers of Civil Court while trying a suit' in respect of the specified matters.

It can be noted that various powers such as those available under Section 131(1) of Income Tax 1961, namely, (a) discovery and inspection; (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath, (c) compelling the production of books of account and other documents; and (d) issuing commissions are found missing in the Central Goods And Services Act, 2017. The same is the case with the Finance Act 1994 and Central Excise Act, 1944. Also, power to take statements during search as provided in Section 132 (4) of Income Tax Act is not provided in the Central Goods and Services Tax Act, 2017. When these powers are conferred, they act as additional machinery provisions for the purpose of enforcing the summons and also for adducing evidence during any inquiry or proceedings. When these powers are missing, it implies that the powers under Section 70 of Central Goods and Services Act, 2017 is a much-reduced subset of powers mentioned in Section 131(1) of Income Tax Act, 1961. This is illustrated in the Table 2.

Table 2: Comparison between Income Tax Act, 1961 and Central Goods and Services Act, 2017

Description of Power Vested in Code of Civil Procedure Code	Income Tax Act, 1961	Central Goods and Services Act, 2017
Power to Summon any person in any Inquiry in the same manner as provided in the case of civil court under Code of Civil Procedure, 1908	NO	YES
Same power as vested in Civil Court while trying a Civil Court under Cod of Civil Procedure, 1908	YES	NO
Power to Compel Attendance	YES	NO
Power to Compel Production of Documents	YES	NO
Power to take Evidence on Oath	YES	NO
Production of Witness without Summon	NO	NO

Source: *Lawmann's Income Tax Act – 68th Edition (2023)* and *Commercial Law Publishers Bare Act of Central Goods and Services Tax Act, 2017(2023)*.

It is pertinent to note here that powers similar to that provided in Sections 131(1) of Income Tax Act, 1961 cannot be assumed under any other enactments unless specifically granted through the Statute. An authority has no inherent coercive power to compel the attendance of witnesses or production of documents in the absence of statutory provisions to that effect. In *Nehru Motors Transport Co- Operative Society Ltd. V State of Rajasthan*⁹, the objectors wanted to lead evidence in a matter related to Section 69 D or Motor Vehicles Act, 11939. They did produce some witnesses but some witnesses to whom summonses were issued did not turn up and the objectors wanted the issue of coercive processes against them. The Legal Remembrancer however refused this on the ground that he had no power to issue coercive process. The Supreme Court in its judgment dated 14.12.1962 held that “In proceedings of this kind, it may very well be concluded when a witness is summoned and does not appear, that he does not wish to give evidence, and that may be the reason why no provision is made in the Rules for any coercive process”. It is upto the witness summoned and his sweet will to attend or not to attend or produce documents or not. Also, powers conferred under Section 105 of Central Goods and Services Tax Act, 2017 with respect to summoning any person are not conferred in Section 70 of the Act. It is to be noted that these powers with respect to enforcement of summons are conferred in a graded manner in different statutes as per the intent of the Parliament.

It is important here to analyse how and when summons is issued by civil court. Section 30(b) and Rr 1, 6, 14 of Order 16 read with Rule 1 of Order 14 and Appendix B – Process No: 13, by and large, hold the ground with respect to issue of summons. Pursuant to settlement of issues, the parties are required to present list of witnesses whom they propose to call either to

give evidence or to produce documents and obtain summonses to such persons for their attendance in the Court. Further, the party has to file an application in Court for issue of Summons stating therein the purpose for which the witness is proposed to be summoned (Rule 1). Wheels of issue of summons start rolling only after the Issues are settled and application for summons are filed. 'settled issues' are very important to the further conduct of the '*lis*'. It implies that the authority will confine itself within the four walls of the issues and will not be allowed to transgress and extend to other issues which may come out by chance during the evidence stage and thus to continue to wind issues up and down to other impromptu issues. If deviations are permitted, it is as if the parties do not have the notice of the allegations that he has to meet.

When it is said that the power to summon in the same manner as provided in the case of Civil Court under Code of Civil Procedure, 1908, the conditions precedent, limitations and conditions applicable, the format of issue of summon and the method of service of summon are necessarily required to be similar to the provisions as laid out in Code of Civil Procedure, 1908. Having a cursory look at the Form No: 13, it is clear that the witness is summoned on behalf of 'a party'. The mention of the travelling allowance and subsistence allows indicate that the witness so called is primarily not the party against whom the liability is being proposed.

This clarifies the point that there are settled issues, adversarial parties and an application to the Court to summon Witnesses by either party. There is a controversy with respect to material proposition of facts, affirmed by one party and denied by the other party, on the basis of which, some right/liability is asserted or denied by opposing parties. This controversy will be determined on the basis of evidence given by witnesses on either side in relation to matters of fact under inquiry. As per this scheme of things, all evidence is to be made or produced during the Inquiry itself. All evidence by witnesses is to be made necessarily during examination-in-chief alone. Further, these witnesses are amenable to be cross examined, but be cross examined only after completion of examination in chief.

The Income Tax Authorities were held to be judicial or quasi-judicial bodies in *Suraj Mall Mohta & Co. v. A. V. Visvanath Sastry*¹⁰. The principal question canvassed in this case was whether certain sections of the Taxation on Income (Investigation Commission) Act, 1947, i.e., Act XXX of 1947, have become void from the date of the commencement of the Constitution of India by reason of article 14 of the Constitution. The Supreme Court compared certain procedures under this Act with procedures under Section 37 of Indian Income Tax Act, 1922. It was held by the Supreme Court in its judgment dated 28.05.1954 that "under the provision of Section 37 (corresponding to section 131 of the Income-tax Act, 1961) the proceedings before the Income Tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at. In other words, assessee would have a right to inspect the records and all relevant documents before he is called

upon to lead evidence in rebuttal. This right has not been taken away by any express provision of the Income-tax Act”.

As mentioned above, there is a sea of difference between the law on summons under Income Tax Act, 1961 and Central Goods and Services Act, 2017. However, a quantum movement forward is visible when we compare Central Excise Act, 1944 (repealed), Service Tax Act/Finance Act, 1994 (omitted) on the one hand and Goods and Services Tax Act, 2017 on the other hand in respect of power to summon any person. There is absolutely no mention about the Civil Court or Code of Civil Procedure, 1908 in the former three statutes. In these set of statutes, a legal duty is fastened to the person so summoned to state the truth, make statement or to produce documents failing which he will be exposed to punishments under Sections 174, 175 and 177 of IPC, 1860. This difference or rather the moving forward in respect of provisions of summons in the case of Central Goods and Services Tax Act, 2017 is a very important and conscious act of the Parliament. One way, this can be seen as conferring vast powers in the Central Goods and Services Tax regime. At the same time, it can be seen as regulating/ restricting/limiting the powers to be exercised by the Proper Officer so as to bring these powers to the minimum standard of Judicial Proceedings.

Now, it can be subtly observed that in the earlier indirect tax statutes, the power granted in proceedings pursuant to summons are much less than that is provided in Income Tax Act, 1961. A mere insertion of a deeming provision, that is, the inquiry shall be deemed as ‘Judicial Proceedings’ within the meaning of Sections 193 and 228 of IPC, 1860 is not sufficient to grant any powers not expressly granted. Powers are conferred in a graded/graduated manner to different authorities as per legislative intent in each of the Statutes. But, with the enactment of Central Goods and Services Tax Act, 2017, producing the witnesses and examining them are no longer a unilateral thing or a one-way traffic to facilitate the revenue but the same right is conferred on to the Assessee on whom the Inquiry is initiated. It is settled law (under Income tax Act) that the existence of a proceeding is the condition precedent to issue summons. It is a witness that is being summoned. When it is said that the power is in the ‘same manner as provided in the case of a civil court under Code of Civil Procedure, 1908 it necessarily implies the conditions precedent, the conditions and limitations and the formalities attached to summons as in the case of Civil Court has to apply to such summons in Section 70 of Central Goods and Services Tax Act. In *Mettur Chemicals and Industrial Corporation Ltd Vs Their Workers*¹¹, the industrial tribunal ordered inspection of the accounts mentioned in the order and the Court was called upon to decide whether the industrial tribunal acted in excess of its jurisdiction. Madras High Court in its order dated 13.10.1954 held that powers under section 30 of Code of Civil Procedure, 1908 is controlled by the limitations and conditions prescribed by the relevant rules in the Orders. It is stated at paragraph 7 of the Judgment,

“The power conferred by Section 30 is subjected by that section itself to “such conditions and limitations as may be prescribed.” The rules in Order XI, C.P.C., prescribe certain conditions and limitations subject to which a civil court has to exercise the power conferred on it by Section 30, C.P.C. Rules 1 to 11 of Order XI deal with interrogatories. Rules 12 and 13 deal with discovery of documents. Rule 14 deals with productions of documents. What I am concerned with in this case is the limits if any on the powers of an industrial tribunal to order inspection of documents.”

The same principle was enunciated by Privy Council in the illustrious case of *Nazir Ahmad v. King Emperor*¹², wherein it was held that *“that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.”*

5.0 Follies of the Present Practice Followed by GST Authorities

Practically what the GST Authorities do is to continue to do what they had been doing under the Service Tax regime. They summon the assessee by issuing some veiled threat of adverse actions under the Act and also warn them that non-compliance is an offence under Section 174 and 175 of IPC, 1860, (which is not provided in the Statute) or action under Section 73/74 shall be initiated against them. On attending as per the summon, they interrogate the assessee, record their statements and obtain their signatures. At times, they ask for some documents to be submitted or information to be provided, all under the garb of Section 70 of the Central Goods and Services Tax Act, 2017. The form and substance of the Summons is totally removed from the Process No:13 of Appendix B to Code of Civil Procedure, 1908. The form in use as of now as per the circular No: 128 /47/2019 - GST dated 23.12.2019 is the very same form that were being used in the case of Summons under Service Tax. No change has been made even though law on this regard has changed. This form of Summon may be correct during the Service Tax regime. What is contemplated in the case of Service Tax is an investigation which is to be done prior to issue of Show Cause Notice (SCN) under Section 73 of the Act. This was clarified by the Delhi High Court National *Building Construction Company V Union of India*¹³.

The petitioner had prayed for the quashing of summons issued to them under the Service Tax Act on the ground that there were no proceedings pending before the authority. The High Court held that the provisions of Income Act have not been made applicable to Service Tax Act. The High Court also held that *“The sequitur is that Section 73 of the Fin Act like Section 11A of the CE Act postulates that the authorities are empowered to conduct investigation, collect and examine documents, record statements etc. before they form their opinion whether or not to issue show cause notice under Section 73(1) of the Fin Act. This issue of notice under Section 73 of the Fin Act like Section 11A of the CE Act becomes a*

starting point for further proceedings and the adjudication order which decides the show cause notice". In such a context, the investigating officers were insulated from the burden of having to act judicially.

Having summoned a person using powers conferred under Section 70 of the Central Goods and Services Tax Act, 2017 to collect evidence even before a Show Cause Notice (SCN) is issued or before allegations are formulated and communicated to him and to further use this evidence against the very same person in proceedings under Sections 73, 74, 61, 62 or 107 or under any other section will open up a dichotomy. In case the revenue depends on the evidence produced by the same person pursuant to summon under Section 70, which evidence will the tax payer be able to controvert during the proceedings? Whose witness will the tax payer be in such a scenario, that is, whether he will be witness on behalf of himself or witness on behalf of the revenue? Who will be examiner-in-chief before he is cross examined? In this scenario, the evidence provided by the tax payer against himself during examination pursuant to summon shall be given to him in the SCN as evidence collected. What will happen if the assessee does not wish to offer himself as a witness?

What is the status of the pleadings or evidence given by the assessee during the proceedings which is contrary to his earlier statements taken pursuant to summons? Will it amount to retraction? Will such retraction be permissible? How can the person earlier called for the purpose of collecting evidence under Section 70 obtain natural justice in this case? It can easily be understood that such a lacuna/ dichotomy/contradiction could not have been schemed in any Central Tax Statutes. There is a presumption that the Statute is constitutionally valid. As a corollary to this principle, the various provisions will be read down in such a way that the statute conforms to constitutionality and natural justice. While we attempt to resolve this dichotomy, it will become important to note that there is no provision similar to sub section 2 of Section 9D of CE Act, 1944 (bar to evidentiary value in proceedings under the Act – which is applicable to Service Tax Act owing to Section 83 of Service Tax Act) inserted in Section 136 of the Central Goods and Services Tax Act, 2017 or in any other section of this Act. This indicate that recording of evidence/statements is not to be resorted to from the assessee during any pre adjudication investigation in respect of the same assessee, be it pursuant to Summons under section 70 of the Act or during Search under Section 67 of the Act.

6.0 Whether Summons are Necessary during Assessment and Adjudication Proceedings?

Another point to ponder over is that Supreme Court as well as various tribunals have already stated in a catena of decisions that the revenue is required to examine the witnesses who deposed against the tax payer/ assessee and the taxpayer/ assessee is entitled to cross examine such witness. Reliance may usefully be placed on para 16 of the judgment of the

Allahabad High Court in its Commissioner of Central Excise. V Parmarth Iron Pvt Ltd¹⁴. The assessee was issued Show Cause Notice under Section 11 A of Central Excise Act, 1944 alleging evasion of excise duty. The issue before the division bench of Allahabad High Court was whether the assessee was entitled for cross examining of persons whose statements were relied upon in the SCN.

The Allahabad High Court, in its judgement dated 29.11.2010 unequivocally expounded the law thus: “If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross examination for the evidence or statement to be considered.” Further, as per the ratio laid down in [Cf. Food Corporation of India V Provident Fund Commissioner, (1990) 1 SCC 68, 71, (SC)], the request of the Tax Payer/ Assessee to call witnesses on his behalf is to be granted. This leads us to another point. Attendance of a witness can be secured only by sending a summon by the adjudicating authority within the powers granted in Section 70 of the Central Goods and Services Tax Act, 2017 or through similar powers in case of other statutes. In the Civil Procedure Code, 1908, there are provisions to bring witnesses without issue of summons but such provisions are not found in this Act of 2017. This establishes that in consistent with the Act, summons is liable to be issued during the adjudication proceeding or assessment proceedings alone, that too, as a witness, to persons other than the ones to whom the SCN is issued/ assessment proceedings are undertaken. There is no way to accommodate the view that summons can be issued any time other than during the quasi-judicial proceedings.

7.0 Conclusion

It is very important to note that irrespective of extent of powers granted in various statutes mentioned above, the summons mandated in all statutes except Finance Act, 1994, and Central Excise Act, 1944 are part of ‘Adversarial’ system and not part of ‘Inquisitorial’ system. As a corollary, the party to the dispute is immune to be examined unless he wishes to be examined.

Referring to Code of Civil Procedure, ‘Summon to give evidence’ implies already existing imputations and ‘issues settled’ that are to be decided through further proceedings by an impartial adjudicator. Hence, ‘evidence’ implies that evidence is adduced either to support or to deny those imputations and also adduced during such a proceeding.

Further, it may be noted that taking evidence in proceedings pursuant to summons in adversarial system implies the following characteristics, namely, Evidence is amenable to cross examination – It is witnesses being summoned - It is examination of Witness who asserts/ supports or denies or repel imputation (or a matter of Inquiry) – It happens during hearing –

Such Hearing pursuant to summon is adjudicatory/ quasi-judicial proceeding – Prior Supply of evidence/documents containing imputations and Opportunity to Cross Examine are built into/ read into such hearing pursuant to summons - Witness for either side of the dispute who wishes to call witness to assert/ deny any fact or matter under inquiry, may be called – Natural Justice is read into such proceedings - In the ultimate analysis, proceedings pursuant to summons shall have all or some of the trappings of a Judicial Proceeding. No threat or coercion or warning to the effect that proceedings under Section 72,73,74, 75 etc or under Section 122 or 132 of the Act will be invoked cannot be imposed/ invoked or any such intimidation cannot be made out during proceedings pursuant to summon.

In view of the above the power to summon is to be used precisely in the same manner as provided in the case of a civil court under the provisions of Code of Civil Procedure, 1908. Any deviation from this position and to make the summon to be used for an inquisitorial process as it was done during Service Tax Regime will be retrograde action resulting into a tyranny growing into monstrous onslaught on to the rights of the Tax Payer. This is more so since the safeguard as provided in sub section 2 of Section 9D of Central Excise Act, 1944 is absent in section 136 of Central Goods and Services Tax Act, 2017.

However, additional powers are conferred to proper officers in Central Goods and Services Tax Act, 2017 to enable them to collect evidence. Section 67 (1) is such a provision wherein omnibus powers to conduct search is conferred on Proper Officers not below the rank of Joint commissioner. Also, powers under sub sections 2 to 12 of Section 67 are available to such officer. These provisions except those akin to sub sections 2 and 10 were not available under Service Tax regime. So, there is no room to assume that the authorities under the Central Goods and Services Act have any less power compared to previous Service Tax regime. Only thing that can be safely said is that the scheme of law for investigations and for adjudication are quite different under both these Acts. Also, there is no room to consider that Summons under Central Goods and Services Tax Act, 2017 are for the purpose of some follow up or filling the gap of Searches under the relevant provisions of Search mentioned above.

Endnotes

1. (2019) 417 ITR 82 (Punj)
2. (1993) 204 ITR 454, 458 (Cal)
3. (1986) 162 ITR 331 (Bom)
4. (2000) 241 ITR 446, 450-51 (Bom)
5. AIR 1972 SC 591
6. 1973) 90 ITR 467 (Cal)
7. (2002) 256 ITR 730, 744 (Raj), (2002) 174 CTR Raj 1
8. (1990) 1 SCC 68, 71, (SC)

9. AIR 1963 SC 1098.
10. 1954 AIR 545: 1955 SCR 448
11. (1955) ILLJ 27 Mad
12. 1936 SCC Online PC 41
13. Writ Petition No: W.P. (C) 1144/2016: Date of decision - 16.11. 2018
14. 2010 (250) ELT 514 (All)