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Body

INSTRUCTION No. 04/2022-23 [GST - Investigation], Dated 01st September, 2022

SUBJECT: GUIDELINES FOR LAUNCHING OF PROSECUTION UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017 -reg.

Prosecution is the institution or commencement of legal proceeding; the process of exhibiting formal charges against the offender.

2. Section 132 of the Central Goods and Services Tax Act, 2017 (CGST Act, 2017) codifies the offences under the Act which warrant institution of criminal proceedings and prosecution. Whoever commits any of the offences specified under sub-section (1) and sub-section (2) of section 132 of the CGST Act, 2017, can be prosecuted.

3. Sanction of prosecution:

3.1 Sanction of prosecution has serious repercussions for the person involved, therefore, the nature of evidence collected during the investigation should be carefully assessed. One of the important considerations for deciding whether prosecution should be launched is the availability of adequate evidence. The standard of proof required in a criminal prosecution is higher than adjudication proceeding as the case has to be established beyond reasonable doubt. Therefore, even cases where demand is confirmed in adjudication proceedings, evidence collected should be weighed so as to likely meet the above criteria for recommending prosecution. Decision should be taken on case-to-case basis considering various factors, such as, nature and gravity of offence, quantum of tax evaded, or ITC wrongly availed, or refund wrongly taken and the nature as well as quality of evidence collected.

3.2. 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. Further, the evidence collected should be adequate 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. It follows, therefore, that in the case of public limited companies, prosecution should not be launched indiscriminately against all the Directors of the company but should be restricted to only persons who oversaw day-to-day operations of the company and have taken active part in committing the tax evasion etc. or had connived at it.

4. Decision on prosecution should normally be taken immediately on completion of the adjudication proceedings, except in cases of arrest where prosecution should be filed as early as possible. Hon'ble Supreme Court of India in the case of Radheshyam Kejriwal [2011 (266) ELT 294 (SC)] has, inter-alia, observed the following:-

- (i) Adjudication proceedings and criminal proceedings can be launched simultaneously;
- (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;
- (iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;
- (iv) The findings against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;
- (v) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and
- (vi) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

In view of the above observations of Hon'ble Supreme Court, prosecution complaint may even be filed before adjudication of the case, especially where offence involved is grave, or qualitative evidences are available, or it is apprehended that the concerned person may delay completion of adjudication proceedings. In cases where any offender is arrested under section 69 of the CGST Act, 2017, prosecution complaint may be filed even before issuance of the Show Cause Notice.

5. Monetary limits:

5.1 Monetary Limit: Prosecution should normally be launched where amount of tax evasion, or misuse of ITC, or fraudulently obtained refund in relation to offences specified under sub-section (1) of section 132 of the CGST Act, 2017 is more than Five Hundred Lakh rupees. However, in following cases, the said monetary limit shall not be applicable:-

(i) Habitual evaders: Prosecution can be launched in the case of a company/taxpayer habitually involved in tax evasion or misusing Input Tax Credit (ITC) facility or fraudulently obtained refund. A company/taxpayer would be treated as habitual evader, if it has been involved in two or more cases of confirmed demand (at the first adjudication level or above) of tax evasion/fraudulent refund or misuse of ITC involving fraud, suppression of facts etc. in past two years such that the total tax evaded and/or total ITC misused and/or fraudulently obtained refund exceeds Five Hundred Lakh rupees. DIGIT database may be used to identify such habitual evaders.

(ii) Arrest Cases: Cases where during the course of investigation, arrests have been made under section 69 of the CGST Act.

6. Authority to sanction prosecution:

6.1 The prosecution complaint for prosecuting a person should be filed only after obtaining the sanction of the Pr. Commissioner/Commissioner of CGST in terms of subsection (6) of section 132 of CGST Act, 2017.

6.2 In respect of cases investigated by DGGI, the prosecution complaint for prosecuting a person should be filed only after obtaining the sanction of Pr. Additional Director General/Additional Director General, Directorate General of GST Intelligence (DGGI) of the concerned zonal unit/ Hqrs.

7. Procedure for sanction of prosecution:

7.1 In cases of arrest(s) made under section 69 of the CGST Act, 2017:

7.1.1 Where during the course of investigation, arrest(s) have been made and no bail has been granted, all efforts should be made to file prosecution complaint in the Court within sixty (60) days of arrest. In all other cases of arrest, prosecution complaint should also be filed within a definite time frame. The proposal of filing complaint in the format of investigation report prescribed in Annexure-I, should be forwarded to the Pr. Commissioner/Commissioner, within fifty (50) days of arrest. The Pr. Commissioner/ Commissioner shall examine the proposal and take decision as per section 132 of CGST Act, 2017. If prosecution sanction is accorded, he shall issue a sanction order along with an order authorizing the investigating officer (at the level of Superintendent) of the case to file the prosecution complaint in the competent court.

7.1.2 In cases investigated by DGGI wherever an arrest has been made, procedure as detailed in para 7.1.1 should be followed by officers of equivalent rank of DGGI.

7.1.3 The Additional/ Joint Commissioner or Additional / Joint Director in the case of DGGI, must ensure that all the documents/ evidence and list of witnesses are kept ready before forwarding the proposal of filing complaint to Pr. Commissioner/ Commissioner or Pr. ADG/ ADG of DGGI.

7.2 In case of filing of prosecution against legal person, including natural person:

7.2.1 Section 137 (1) of the Act provides that where an offence under this Act has been committed by a company, every person who, at the time offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Section 137 (2) of the Act provides that where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Thus, in the case of Companies, both the legal person as well as natural person are liable for prosecution under section 132 of the CGST Act. Similarly, under sub-section (3) of section 137, the provisions have been made for partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a Trust.

7.2.2 Where it is deemed fit to launch prosecution before adjudication of the case, the Additional/Joint Commissioner or Additional/Joint Director, DGGI, as the case may be, supervising the investigation, shall record the reason for the same and forward the proposal to the sanctioning authority. The decision of the sanctioning authority shall be informed to the concerned adjudicating authority so that there is no need for him to examine the case again from the perspective of prosecution.

7.2.3 In all cases (other than those mentioned at para 7.2.2 and arrests where prosecution complaint has already been filed before adjudication), the adjudicating authority should invariably indicate at the time of passing the order itself whether it considers the case fit for prosecution, so that it can be further processed and sent to the Pr. Commissioner/ Commissioner for obtaining his sanction of prosecution.

7.2.4 In cases, where Show Cause Notice has been issued by DGGI, the recommendation of adjudicating authority for filing of prosecution shall be sent to the Pr. Additional Director General/Additional Director General, DGGI of the concerned zonal unit/ Hqrs.

7.2.5 Where at the time of passing of adjudication order, no view has been taken on prosecution by the Adjudicating Authority, the adjudication branch shall re-submit the file within 15 days from the date of issue of adjudication order to the Adjudicating Authority to take view on prosecution.

7.2.6 Pr. Commissioner/ Commissioner or Pr. Additional Director General/ Additional Director General of DGGI may on his own motion also, taking into consideration inter alia, the seriousness of the offence, examine whether the case is fit for sanction of prosecution irrespective of whether the adjudicating authority has recommended prosecution or not.

7.2.7 An investigation report for the purpose of launching prosecution should be carefully prepared in the format given in Annexure-I, within one month of the date of receipt of the adjudication order or receipt of recommendation of Adjudicating Authority, as the case may be. Investigation report should be signed by an Deputy/Assistant Commissioner, endorsed by the jurisdictional Additional/ Joint Commissioner, and sent to the Pr. Commissioner/ Commissioner for taking a decision on sanction for launching prosecution. In respect of cases booked by DGGI, the said report shall be prepared by the officers of DGGI, signed by the Deputy/ Assistant Director, endorsed by the supervising Additional/ Joint Director and sent to the Pr. Additional Director General/ Additional Director General of DGGI for taking a decision on sanction for launching prosecution. Thereafter, the competent authority shall follow the procedure as mentioned in para 7.1.1.

7.2.8 Once the sanction for prosecution has been obtained, prosecution in the court of law should be filed as early as possible, but not beyond a period of sixty days by the duly authorized officer (of the level of Superintendent). In case of delay in filing complaint beyond 60 days, the reason for the same shall be brought to the notice of the sanctioning authority i.e., Pr. Commissioner/ Commissioner or Pr. Additional Director General/ Additional Director General, by the officer authorised for filing of the complaint.

7.2.9 In the cases investigated by DGGI, except for cases pertaining to single/multiple taxpayer(s) under Central Tax administration in one Commissionerate where arrests have not been made and the prosecution is not proposed prior to issuance of show cause notice, prosecution complaints shall be filed and followed up by DGGI. In other cases, the complaint shall be filed by the officer at level of Superintendent of the

jurisdictional Commissionerate, authorized by Pr. Commissioner/ Commissioner of CGST. However, in all cases investigated by DGGI, the prosecution shall continue to be sanctioned by appropriate officer of DGGI.

8. Appeal against Court order in case of inadequate punishment/acquittal:

8.1 The Prosecution Cell in the Commissionerate shall examine the judgment of the Court and submit their recommendations to the Pr. Commissioner/ Commissioner.

Where Pr. Commissioner/ Commissioner is of the view that the accused person has been let off with lighter punishment than what is envisaged in the Act or has been acquitted despite the evidence being strong, filing of appeal should be considered against the order within the stipulated time. Before filing of appeal in such cases, concurrence of Pr. CC/CC should be obtained. Sanction for appeal in such cases shall, however, be accorded by Pr. Commissioner/ Commissioner.

8.2 In respect of cases booked by DGGI, the Prosecution Cell in the Directorate shall examine the judgment of the court and submit their recommendations to the Pr. Additional Director General/ Additional Director General who shall take a view regarding acceptance of the order or filing of appeal. However, before filing of appeal, concurrence of DG or Pr. DG (for cases booked by HQ Unit) should be obtained.

9. Procedure for withdrawal of prosecution:

9.1 Procedure for withdrawal of sanction-order of prosecution:

9.1.1 In cases where prosecution has been sanctioned but complaint has not been filed and new facts or evidence have come to light necessitating review of the sanction for prosecution, the Commissionerate should immediately bring the same to the notice of the sanctioning authority. After considering the new facts and evidence, the sanctioning authority, if satisfied, may recommend to the jurisdictional Pr. Chief Commissioner/ Chief Commissioner that the sanction for prosecution be withdrawn who shall then take a decision.

9.1.2 In the cases investigated by DGGI, such withdrawal of sanction order may be made with the approval of Director General of DGGI of concerned sub-national unit. In the cases booked by DGGI, Hqrs., Pr. Director General shall be competent to approve the withdrawal of sanction order.

9.2 Procedure for withdrawal of complaint already filed for prosecution:

9.2.1 Attention is invited to judgment of Hon'ble Supreme Court on the issue of relation between adjudication proceedings and prosecution in the case of Radheshyam Kejriwal, supra. Hon'ble Supreme Court in para 43 have observed as below:-

"In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court."

The said ratio is equally applicable to GST Law. Therefore, where it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings and such order has attained finality, Pr. Commissioner/ Commissioner or Pr. Additional Director General/ Additional Director General after taking approval of Pr. Chief Commissioner/ Chief Commissioner or Pr. Director General/ Director General, as the case may be, would ensure filing of an application through Public Prosecutor in the court to allow withdrawal of prosecution in accordance with law. The withdrawal can only be affected with the approval of the court.

10. General guidelines:

10.1 It has been reported that delay in the Court proceedings is often due to nonavailability of the records required to be produced before the Court or due to delay in drafting of the complaint, listing of the exhibits etc. It shall be the responsibility of the officer who has been authorized to file complaint, to take charge of all documents, statements and other exhibits that would be required to be produced before a Court. The list of exhibits etc. should be finalized in consultation with the Public Prosecutor at the time of drafting of the complaint. No time should be lost in ensuring that all exhibits are kept in safe custody. Where a complaint has not been filed even after a lapse of 60 days from the receipt of sanction for prosecution, the reason for delay shall be brought to the notice of the Pr. Commissioner/ Commissioner or the Pr. Additional Director General/ Additional Director General of DGGI by the Additional/ Joint Commissioner in charge of the Commissionerate or Additional/ Joint Director of DGGI, responsible for filing of the complaint.

10.2 Filing of prosecution need not be kept in abeyance on the ground that the taxpayer has gone in appeal/ revision. However, to ensure that the proceeding in appeal/revision are not unduly delayed because the case records are required for the purpose of prosecution, a parallel file containing copies of essential documents relating to adjudication should be maintained.

10.3 The Superintendent in-charge of adjudication section should endorse copy of all adjudication orders to the prosecution section. The Superintendent in charge of prosecution section should monitor receipt of all serially numbered adjudication orders and obtain copies of adjudication orders of missing serial numbers from the adjudication section every month. In respect of adjudication orders related to DGGI cases, Superintendent in charge of adjudication section should ensure endorsing a copy of adjudication order to DGGI. Concerned Zonal Units/ Hqrs. of DGGI shall also follow up the status of adjudication of the case from the concerned Commissionerate or adjudicating authority.

11. Publication of names of persons convicted:

11.1 Section 159 of the CGST Act, 2017 grants power to the Pr. Commissioner/Commissioner or any other officer authorised by him on his behalf

to publish name and other particulars of the person convicted under the Act. It is directed that in deserving cases, the department should invoke this section in respect of all persons who are convicted under the Act.

12. Monitoring of prosecution:

12.1 Prosecution, once launched, should be vigorously followed. The Pr. Commissioner/Commissioner of CGST or Pr. Additional Director General/ Additional Director General of DGGI should monitor cases of prosecution at monthly intervals and take the corrective action wherever necessary to ensure that the progress of prosecution is satisfactory. In DGGI, an Additional/ Joint Director in each zonal unit and DGGI (Hqrs) shall supervise the prosecution related work and take stock of the pending prosecution cases. For keeping a track of prosecution cases, entries of all prosecution cases should promptly be made in DIGIT/ Investigation Module, within 48 hours of sanction of prosecution and the entries must be updated from time to time. Additional/ Joint Commissioner or Additional/ Joint Director, in-charge of supervising prosecution cases shall ensure making timely entries in the database.

13. Compounding of offence:

13.1 Section 138 of the CGST Act, 2017 provides for compounding of offences by the Pr. Commissioner/ Commissioner on payment of compounding amount. The provisions regarding compounding of offence should be brought to the notice of person being prosecuted and such person be given an offer of compounding by Pr. Commissioner/ Commissioner or Pr. Additional Director General/Additional Director General of DGGI, as the case may be.

14. Transitional Provisions:

14.1 All cases where sanction for prosecution is accorded after the issue of these instructions shall be dealt in accordance with the provisions of these 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.

15. Inspection of prosecution work by the Directorate General of Performance Management:

15.1 Director General, Directorate General of Performance Management and Pr. Chief Commissioners/Chief Commissioners, who are required to inspect the Commissionerates, should specifically check whether instructions in this regard are being followed scrupulously and make a mention of the implementation of the guidelines in their inspection report apart from recording of statistical data. Similarly exercise should also be carried out in DGGI.

16. Where a case is considered suitable for launching prosecution and where adequate evidence is forthcoming, securing conviction largely depends on the quality of investigation. It is, therefore, necessary for senior officers to take personal interest in the investigation of important cases of GST evasion and in respect of cases having money laundering angle and to provide guidance and support to the investigating officers.

17. To ensure proper training to the officers posted for prosecution work, the Pr. Director General, National Academy of Customs, Indirect Taxes and Narcotics (NACIN), Faridabad, should organize separate training courses on prosecution/arrests etc. from time to time and should incorporate a series of lectures on this issue in the courses organized for investigation. The Pr. Commissioner / Commissioner or Pr. ADG/ ADG of DGGI should judiciously sponsor officers for such courses.

18. These instructions/guidelines may be circulated to all the formations under your charge for strict compliance. Difficulties, if any, in implementation of the aforesaid instructions/guidelines may be brought to the notice of the Board.

19. Receipt of this Instruction may please be acknowledged. Hindi version will follow.

(Vijay Mohan Jain)
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Annexure-I

F. No.

INVESTIGATION REPORT FOR THE PURPOSE OF LAUNCHING PROSECUTION AGAINST _____
COMMISSIONERATE/ DGGI DIVISION/ZONAL UNIT/ Hqrs. DGGI _____

1. Name & address of the person(s), including legal person(s):
2. GSTIN (If any):
3. Nature of offence including commodity/ Service:
4. Charges:
5. Period of offence:

6. Amount involved
7. Particular of persons proposed to be prosecuted :
- a. Name:
 - b. Father's Name:
 - c. Age : Sex:
 - d. Address:
 - e. Occupation:
 - f. Position held in the Company/Firm:
 - g. Role played in the offence:
 - h. Material evidence available against the accused (please indicate separately documentary and oral evidence):
 - i. Action ordered against the accused in adjudication:

8. Brief note why prosecution is recommended:

(Deputy/Assistant Commissioner, CGST_____)/

(Deputy/ Assistant Director, DGGI_____)

Place:

Date:

9. I have carefully examined the Investigation Report and find it in order for filling criminal complaint under section 132 of the CGST Act, 2017.

(Additional/ Joint Commissioner, CGST_____)/

(Additional/ Joint Director, DGGI _____)

Place:

Date:

1. The proposal should be made in the above form in conformity with the guidelines issued by the Board. Regarding Sl. No. 4 above, all the charging sections in the CGST Act, 2017 and other allied Acts should be mentioned. Regarding Sl. No. 7, information should be filled separately for each person sought to be prosecuted.

2. A copy of the Show Cause Notice as well as the Order of Adjudication (wherever SCN or adjudication order has been issued) should be enclosed with this report.

3. If any appeal has been filed, then this fact should be specifically stated.