

## No custody, No confiscation-GST Perspective



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**A telling example of what the removal of non obstante clause can do to a provision is the amendment to section 129(1) of the Central GST Act which was given effect from 1 Jan 2022. And another amendment in section 129(6) has excluded confiscation proceedings from section 129 of Central GST Act. These two amendments have brought back into focus the need to understand 'confiscatory' powers in GST.**

### Confiscation cannot be done of 'anything' belonging to offender

**W**hile anything can be seized in section 67(2), it's not true of confiscation in section 130(1) of Central GST Act. Power of confiscation is circumscribed by "where" that has now come to substitute the more potent "notwithstanding anything contained in this Act, if", in the opening words of section 130(1) of Central GST Act. So now, confiscation must operate in harmony, and not in derogation of, other provisions of the Central GST Act. Section 130(1) of Central GST Act contains five 'situations' and only "where" any of these

situations are shown to exist, will the consequences spelt out "then" can be pressed into service.

### Situations 'found to exist' must be 'shown to' exist

It is not an unusual satisfaction of the Proper Officer about the existence of any of the situations listed in section 130(1) of Central GST Act but only when material brought on record establishes all the 'ingredients' listed in each situation, can the exceptional power of confiscation be invoked. Unlike seizure, there is nothing sudden about confiscation. Confiscation is the result of adjudication. And adjudication takes time, it (i) requires Party to be 'put at notice' along with evidence to support the allegations that the ingredients exist and (ii) Party is allowed opportunity to make a reasonable defence (principle of natural justice). Process of adjudication entails opportunity to appeal. And all these remedies take time. Taxpayers need to recognise that confiscation is therefore vastly different from seizure. And clearly confiscation cannot be carried out 'suddenly'.

### One key 'ingredient' for confiscation

Confiscation is not a form of penalty imposed for committing an offence. It is to deny the Party 'title' to the offending articles. It is for this reason that great care is to be exercised in identifying the offending articles and establish the offenders' title to those articles. Confiscation results in the 'passing of title' in offending articles in favour of the State. When title is to be passed, custody must first be held by the State or on behalf of the State by any bailee.



Let's say a person 'X' has supplied certain articles with intent to evade payment of tax and the articles so supplied have reached the recipient 'Y' who has consumed them in their own business. And if, confiscation proceedings were

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to be initiated against 'X' (the offending taxpayer), he could simply withdraw all defence and let the Proper Officer proceed with confiscation. What will the Proper Officer confiscate? Where are the (offending) articles for the State to receive title? Since the title is no longer with 'X', confiscation would be effective against 'Y' who is not the offender in these proceedings at all.

Therefore, where custody is lost, confiscation is barred, that is, 'no custody, no confiscation'. In order to confiscate, the key ingredient is to gain physical custody over articles (allegedly) involved in the said offence. All other ingredients listed in section 130(1) of Central GST Act may be shown to exist but nothing further needs to be done if physical custody is lost. Gaining physical custody, even contrary to taxpayer's wishes, is 'seizure'.

#### Pre-requisites for seizure

Seizure is not limited to 'goods liable to confiscation' in Central GST Act. Seizure is permitted in section 67 and in section 129 of Central GST Act. Pre-requisites to seize any offending articles, are contained in section 67(2)

of Central GST Act where (i) Proper Officer must have 'reasons to believe' that offending articles 'are secreted' and (ii) must issue an authorisation in INS-01 Part C to conduct a search. During the search, if (i) offending articles are found

(ii) secreted in the premises identified in the authorisation issued, then either actual seizure can be done and INS-02 issued or constructive seizure done by issuing prohibitory orders in INS-03.

For purposes of section 67(2) of Central GST Act, 'offending articles' are (a) goods liable to confiscation and (ii) documents, books or things that may be useful for or relevant to any proceedings, and no others. And either of these to be liable to confiscation "must be secreted". But confiscation is only of articles that are liable to such confiscation although seizure is permitted of more.

'Secreted' is the employment of an artificial device or a step that does not have any commercial necessity to exist but does exist only to elude simple observation.

For example, accounting records containing incriminating information / documents found in the cupboard in the accounting department is not 'secreted', but it would

be, if those records were found in the cupboard of the marketing department. Other more ingenious devices for concealment would include all electronic drives or cloud storage spaces that are intended to evade detection by a person of ordinary prudence.

Detention or seizure of goods under section 129 of Central GST Act are limited to 'deviations in documents' prescribed in Rule 138A of Central GST Rules. With the current amendment, proceedings under section 129 operate as a self-contained code independent of section 130 of Central GST Act. Therefore, the 'statutory twins' for lawful seizure and confiscation can be found conjointly in section 67 and then 130 of Central GST Act. It would therefore be safe to say that confiscation is not permissible without proceedings being initiated under section 67(2) of Central GST Act.

#### Provisional release of seized articles

Where offending articles are seized, taxpayer is permitted provisional release under section 67(6) of Central GST Act on execution of bond. Provisional release does not result in loss of custody by the State over the offending articles. It only permits better care and protection by taxpayer without altering constructive custody held by State.

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Provisional release under section 67(6) is no longer a part of the due process in section 129 of Central GST Act. Release of detained goods vide order in MOV-05 is not provisional but actual release subject to continuation of proceedings against consignor / consignee / transporter under section 129 of Central GST Act, secured by the execution of bond in MOV-08.

### Time to issue notice on seizure

Going back to seizure of offending articles, where certain offending articles are seized, Proper Officer is on a clock to complete investigation and issue show cause notice under section 74(1) of Central GST Act. It is not permissible for INS-02/INS-03 to be issued and proceedings left inconclusive. Where 'goods' are seized, show cause notice must be issued within the time permitted in section 74(2) failing which, the demand will abate as provided in section 75(10) of Central GST Act. And once the show cause notice is issued, seized goods being 'documents, books or things', which have not been relied upon for issue of such notice, must be released within 30 days as mandated in section 67(3) of Central GST Act. And where show cause notice is not issued within six months from date of seizure, the seized goods being 'goods liable to confiscation' must be released as per section 67(7) of Central GST Act.

### Situations when confiscation can occur

To understand when goods are liable to confiscation, it is specified that they must be where (i) supplies (outward or inward) of goods have been

made in contravention of Act with intent to evade payment of tax (ii) goods which are liable to tax are left unaccounted (iii) supplies are made without obtaining registration (iv) any other form of contravention of the Act with intent to evade payment of tax or (v) by the use of conveyance to transport goods in contravention of Act.

Unless these situations are shown to exist, Proper Officer's actions will suffer from lack of jurisdiction. Jurisdiction is the bulwark against confiscation as an 'after thought' in any other proceeding even when discrepancies are noticed during audit under section 65 of Central GST Act.

### Seizure v. Confiscation

A quick overview would help lay out the salient features to better appreciate the gulf that lies between seizure and confiscation, namely:

Description	Seizure	Confiscation
Authority for action	67(2) or 129(3)	130(1)
Pre-condition	Authorization by JC in INS-01 Part C	Seizure under 67(2)
Object involved	Secreted articles	Goods listed in 130(1)
Result of action	Custody only with State	Title vests with State
Exercise of authority	Exceptional and sudden exercise without adjudication	After issue of SCN and due adjudication
Appellate remedy	Not allowed	Allowed
Alternate remedy	None	Mandatory option to pay 'redemption fine'
Release of articles	On issuance of SCN	On payment of redemption fine
Rejection of alternate remedy by Taxpayer	Not applicable	Confiscation on finality of order of adjudication

### Discovery of comparable situations in audit

During the course of audit under section 65 of Central GST Act, Proper Officer discovers that there is a shortfall in the

stock of finished goods. As per section 35(6) of Central GST Act, presumption operates in favour of supply to evade payment of tax. Proper Officer issues DRC-1A under section 74(5) of Central GST Act demanding payment of tax along with interest and 15 per cent penalty on the (i) quantity of short-fall (ii) at their open market value (iii) on the prescribed rate and (iv) time and place of supply permitted in law. And then, the taxpayer discharges the same. This ends the proceedings as well as the demand.

If the Proper Officer were to then proceed to issue a show cause notice, proposing action under section 130(1) of Central GST Act, the taxpayer could withdraw from resisting this action and leave the Proper Officer wondering how to go about adjudicating this notice

and then execute the order confirming confiscations. Therefore, just because the situation exists, Proper Officer cannot proceed with confiscation.



### Nature of redemption fine

Taxpayer is allowed, as a matter of right, an option to pay fine “in lieu of” confiscation in section 130(2) of Central GST Act. The expression ‘in lieu of’ can be construed as – option to pay fine – is a ‘substitute’ for confiscation. When taxpayer avails this option, Proper Officer must allow it as there are no exclusions provided in section 130(2) of Central GST Act. After all, State is not a hoarder and if the fine matches the NRV (net realisable value) of the offending articles, the purpose stands served. Therefore, taxpayer must document this ‘election’ to pay fine in lieu of confiscation and prevent haste in conducting auction. Once the election is documented, Proper Officer will carry the burden of safekeeping until restoration of possession. Thus, option to pay fine will ‘redeem’ the offending articles and halt confiscation action.

### Leniency in imposing fine

Fine, by its very nature, cannot

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be nominal and the taxpayer must focus on establishing ‘Net Realizable Value’ during adjudication and not beg for leniency. In fact, State will expect the Proper Officer to impose and collect no less than its NRV when taxpayer elects to pay fine. *Proviso* to section 130(2) of Central GST Act specifies the ‘maximum fine’ that may be imposed on taxpayer and herein lies the limit. And unless it is financially prudent to secure release of offending articles (on payment of fine), taxpayer would consider forfeiting the offending articles. If the experience in Customs law is anything to go by, which holds the grandfather provisions in respect of confiscation in section 111, 113 and 115 of Customs Act, taxpayers have shown a proclivity to avail this option and appeal the quantum of fine imposed.

### Finality of provisional release and payment of fine

Where offending articles are provisionally released, once

taxpayer’s election to pay redemption fine is accepted by Proper Officer, it will become final. However, Proper Officer is allowed up to three (3) months after adjudicating the notice for confiscation to collect fine and only then unequivocally discharge the offending articles from actual or constructive custody. When taxpayer avails the option – to pay redemption fine – but resiles from actually making payment, section 130(6) of Central GST Act permits Proper Officer to withdraw the order of release and repossess the offending articles and proceed with their confiscation.

### Conclusion

Having accepted that when power to do a particular thing is permitted in law, then that thing must be done in that manner only or not at all, Proper Officer cannot rely on ‘secret information’ gathered to proceed with confiscation. Confiscation does not survive without seizure. And with detention on interception of conveyance being separated from confiscation proceedings by the amendment in section 129(6) of Central GST Act, all confiscation proceedings must be traceable to any lawful seizure of offending articles. And lawful seizure is permitted only of ‘offending articles’ which ‘are secreted’, for valid reasons that pre-exist and pre-date the authorisation issued in Form GST INS-01-Part C. In the light of these statutory safeguards, taxpayers will resist any and all unlawful confiscation proceedings attempted in haste or due to misplaced enthusiasm. If for any reason custody is lost, confiscation will remain only a wish! ■■■

