

MONTHLY NEWSLETTER

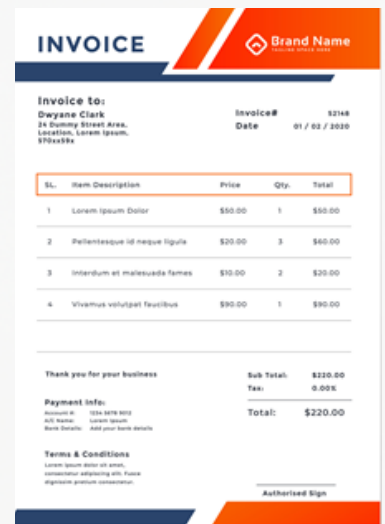
GST TRACKER

ISSUE: APRIL 2021





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EDITOR'S NOTE



Welcoming the New Financial year on a happier note

We ended the financial year with festival of Color “**HOLI – a festival of fervour and joy**” falling on 29th March 2021, against the unusual start in lockdown, during the last week.

Against the unusual start during lockdown i.e. from total uncertainty; to ending the financial year with highest ever collection of GST clearly indicates the economic recovery trend post pandemic, with GST collections closing above INR 1 lakh crore mark for past six months in a row.

We hope that this trend will continue going forward bringing prosperity to our nation.

At the same time, we request our country men to maintain caution and take necessary precautions to avoid the second wave of COVID-19.

Thanks,

Pankaj Kataria

When is a statement recorded under Section 70 under GST CGST Act, 2017 Relevant and Admissible? - Analysis of Section 136 of CGST Act, 2017

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Introduction

Subject matter of this write-up is Section 136 of the Central Goods and Services Tax Act, 2017 (Act). This Section pertains to the relevancy and admissibility of statements made and signed in response to the summons issued under section 70 during the course of any inquiry or proceedings under this Act.

Let us assume a case that departmental officers under the Central Goods and Services Tax Act, 2017 visit a manufacturing unit of Mr. X, and;

- Verifications including stock taking is carried out wherein excess stock raw material and finished goods are found.
- Thereafter, a Statement of Mr. X is recorded under Section 70 of the CGST Act, 2017 (the Act) vide which Mr. X states that M/s ABC has supplied raw material to him without issue of any invoice.
- On the basis of the statement of Mr. X recorded by the Investigating Officer, the department is of the view that M/s ABC has supplied raw material to Mr. X without issue of any invoice.
- The Department initiates prosecution against M/s ABC, and statement of Mr. X (recorded by Investigating Officer) is sought to be relied upon by the Proper Officer of M/s ABC.

Here, the question of law arises as to when such statement of Mr. X, which is recorded during investigation by the Investigating Officer, is admissible during prosecution proceedings by the Proper Officer against M/s ABC?

Mr. X, in the statement, made and signed by him under section 70 has stated the facts that M/s ABC has supplied raw material to him without issue of any invoice. Before this statement of Mr. X, can be considered to be relevant and admissible in prosecution against M/s ABC, for the purpose of proving that M/s ABC have committed an offence of supplying the goods, issue of invoice, it is necessary that statement of Mr. X passes the test of 'being relevant'. This test of relevance is enshrined in Section 136 of the Act and is deliberated under the heading "Test of Relevancy of Statement" in the forthcoming paras.

It is not open for the Proper Officer to straight away treat the statement as relevant and admissible without following the due process of law enshrined in Section 136, which is the subject matter of this Article.

I start with introduction to Section 70 of the CGST Act, 2017.

Statement on Oath

Under Section 70 of the Central Goods and Services Tax Act, 2017 (Act), the proper officer has the power to summon 'any' person whose attendance he may consider necessary. Any person may be summoned either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908. It has also been provided in the Act that every such inquiry shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code.

Any such person may be required to make and sign a statement by appearing in person in response to the summons issued under section 70 during the course of any inquiry or proceedings under this Act.

And we commonly know that, at the time of recording of statement before the departmental authorities, the maker of the statement is not at comfort and is normally under pressure during the recording of his statement. It has also been categorically pointed out by the honorable courts of law that investigating authorities/DRI/DGCEI at times resort to compulsion in order to extract confessional statements.

The very nature of the proceedings under section 70, reeks of fear and threat to any Deponent and cannot be assumed to be freely and fearlessly made.

This statement is NOT to be treated as confessional statement (of maker) but it is to put the investigating officer in a position to further the investigation based on matters arising from such statement. And it is those investigative results (and not those statements themselves) that should support any allegation against taxpayer.

Possibility of fear and threat makes these statements unreliable and weak in evidentiary value. But the discoveries arising out of the information secured in summons will be substantive evidence to support allegations.

Checks and Balance

For the sake of true and natural justice, in order to address this possibility that, before admitting such a statement in evidence, Section 136 of the Act makes it compulsory that the evidence of the witness has to be recorded in accordance with the 'due process' that is available to a Court. And as stated in Adani Enterprises Ltd by Mumbai HC in WP 3818-18, that in the absence of a code of procedure in Customs Act, Courts must fall back on CrPC for the applicable procedures.

Section 164 of CrPC provides that to repel any feeling of fear on the part of the Deponent, the Magistrate must be present to record the statement that will be binding. And section 136 of the Act provides a relief that where such statement cannot be procured without unreasonable delay (or any of the other reasons in clause (a) to section 136) that the Court may 'rely' on the statement already recorded. In other words, where the Court is satisfied that such exceptional circumstances are not present, the statement already recorded, be re-recorded in Court and by the Magistrate.

For this purpose, the legislative scheme under the Act has been drawn as such to make sure that the statement of any person which has been recorded during search and seizure operations or during investigation or in any proceedings would become relevant only when such person is examined by the proper officer and thereafter the proper officer has formed the opinion that the statement should be admitted.

To the above statutory process, there are 5 circumstances given in this scheme of law under which examination of the maker of the statement before considering his statement to be relevant and admissible has been dispensed with, all these are exceptional in nature like death of the maker of the statement.

Analysis

To start with, let us assume a case that departmental officers under the Central Goods and Services Tax Act, 2017 visit a manufacturing unit of Mr. X, and;

- Verifications including stock taking is carried out wherein excess stock raw material and finished goods are found.
- Thereafter, a Statement of Mr. X is recorded under Section 70 of the CGST Act, 2017 (the Act) vide which Mr. X states that one M/s ABC has supplied raw material to him without issue of any invoice.
- On the basis of the statement of Mr. X recorded by the Investigating Officer, the department is of the view that M/s ABC has supplied raw material to Mr. X without issue of any invoice.
- The Department initiates prosecution against M/s ABC, and statement of Mr. X (recorded by Investigating Officer) is sought to be relied upon by the Proper Officer of M/s ABC.

Here, the question of law arises as to when such statement of Mr. X, which is recorded during investigation by the Investigating Officer, is admissible during prosecution proceedings by the Proper Officer against M/s ABC.

Mr. X in the statement made and signed by him under section 70 has stated the facts that M/s ABC has supplied raw material to him without issue of any invoice. Before this statement of Mr. X, can be considered to be relevant and admissible in prosecution against M/s ABC, for the purpose of proving that M/s ABC have committed an offence of supplying the goods issue of invoice, it is necessary that statement of Mr. X passes the test of 'being relevant'. This test of relevance is enshrined in Section 136 of the Act and is deliberated under the heading "Test of Relevancy of Statement" in the forthcoming paras.

It is not open for the Proper Officer to straight away treat the statement as relevant and admissible without following the due process of law enshrined in Section 136, which we will discuss as here-in-below;

“Section 136. A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.”

On dissecting Section 136, in relevant parts, we find that;

- when a statement is made and signed by a person on appearance in response to any summons issued under section 70
- during the course of any inquiry under this Act or during the course of any proceedings under this Act,
- this statement shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, only when;
 - it fulfills the conditions prescribed in clause (a) of Section 136
 - or as the case may be, under clause (b) of Section 136.

Further a fair interpretation of ingredients of the statutory procedure enshrined in clause (a) of Section 136 read with clause (b) thereof clearly brings out that;

- **Section 136 (a)**

The statement may be treated relevant and may be admitted in evidence in the interest of justice, if;

1. the person who made the statement is dead
2. or cannot be found,

3. or is incapable of giving evidence,
4. or is kept out of the way by the adverse party,
5. or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable;

Or

- **Section 136 (b)**

If the above 5 circumstances do not exist, then before the statement is treated relevant and admissible under the law, it is necessary that

1. the maker of the statement is 'not only' required to be present in the proceedings before the adjudicating authority,
2. 'but' the court is also obliged under the law to examine him
3. 'and' the court has to form an opinion
4. that having regard to the circumstances of the case,
5. the statement should be admitted in evidence in the interest of justice.

In Section 136, statement means, a statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act. We shall hereinafter refer it as 'such statement'.

Test of Relevancy of 'Such Statement'

A conjoint reading of clause (a) and clause (b) of Section 136 therefore reveals that 'such statement' may be treated 'relevant' and 'admissible' under the law if the five contingencies like death/non-availability of the maker of the statement do exist 'or' if the person who made the statement is examined as witness in the case before the court and the court forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.

Clause (a) and clause (b) of Section 136 are mutually exclusive and procedural requirements provided wherein are tried to be examined as under;

Procedural Requirement under Clause (a) of Section 136

Clause (a) of Section 136 deals with five contingencies/circumstances which are given therein and if these contingencies or circumstances exist, then the 'such statement' shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains. Meaning thereby, if any of the circumstances exist like, death of the maker of the statement, non-availability of the maker of the statement etc., in such cases the statement may be treated as relevant and shall be admitted in evidence.

If the Proper Officer wants to invoke clause (a) of Section 136, he will have to pass a reasoned and speaking order to the effect that he is satisfied that any of the 5 circumstances exist and he is thus straight away relying upon the statement of the maker without first examining him as witness. For example if the Proper Officer finds that maker of the statement is dead, he will pass a speaking order to this effect relying upon some documentary evidence that the such maker is dead and his statement is relied upon without examination as witness before the proper officer. **(Reference: Honorable Supreme Court in UOI and another vs. GTC India and others in SLP (C) No. 2183/1994 dated 03/01/1995 in context with Section 9D(1) of Central Excise Act, 1944)**

Procedural Requirement under Clause (a) of Section 136

Clause (b) of Section 136 provides that 'such statement' shall be relevant, only when the person, who made the statement is examined as witness before the Court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Thus, before the statement is treated 'relevant' and 'admissible' under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the proper officer is also obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Judicial Precedents

Honorable High Court of Chhatisgarh in TAXC 54/2017 in M/s Hi Tech Abrasives Ltd vs CCE, Raipur on 04.07.2018 has held that, "So for a statement to be treated 'relevant' and 'admissible' under the law 'mere recording' of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice"

In case 'such statement' is straight away treated as relevant and admissible without first verifying the 5 contingencies under Section 136(a) exist or without examining the maker of the statement as a witness and/or without forming an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice, the entire proceedings shall amount to circumventing the statutory laid down procedure of law enshrined in the Act, vitiating the whole procedure of prosecution/adjudication. 'Such statement' would not constitute the 'relevant' and 'admissible' evidence/material at all and as per the law, the said statement will have to be eschewed from consideration, as it would not be relevant for proving the truth of the contents thereof. It will have to be ignored, if in the absence of first establishing the findings about 5 circumstances, without examination of the person as required under Section 136 and opinion formed as mandated under the law, this statement is relied upon in prosecution or adjudication. Honorable High Court of Punjab and Haryana in M/s Jindal Drugs Pvt Ltd and Another Vs Union of India and Another (2016-TIOL-1230-HC-P&H-CX) quotes,

"22. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof."

Also, Honorable Allahabad High Court in C.C.E. V Parmarth Iron Pvt Ltd, 2010 (250) ELT 514 (All), too, unequivocally expound the law by quoting,

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

Applicability in GST

As we have noted that unless it is a practically impossible situation given in Section 136(a), like the case of death of the maker of the statement, for the purpose of admitting into evidence the statement recorded under Section 70, proper officer is statutorily bound to exercise precautions contained in clause (b) of Section 136. Fundamentally, it has been provided in the law, so as to protect the interest of the person against whom, such statement is purported to be used and to take care of the compliance of the principles of natural justice. The necessity of the procedure of law for admitting a statement of a person has been rightly apprehended and implemented by the legislators and its significance can be easily inferred by us, noting that process of law in this regard has been implemented through the statute itself and not through the rules only.

Such rationale was explained in context of Section 9D of Central Excise Act, 1944 (CEA) by Honorable High Court Of Punjab And Haryana in M/S Ambika International Vs Union Of India And Another (*2016-TIOL-1238-Hc-P&H-Cx) on 17.06.2016. It is to be noted that Section 136(a) and (b) and Section 9D(1) are in pari-materia. Honorable Court in this case quotes,

"The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned."

The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to tax, fine or punishment on the basis of certain admissions recorded during investigation which may have been obtained under the police like power of the Investigating authorities by coercion or undue influence.

Conclusion >>

The provisions contained in Section 136 akin to Section 9D of CEA, therefore, have to be construed strictly and held as mandatory and not mere directory.

Therefore, unless the substantive provisions contained in Section 136 are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority.

GSTN updates March 2021

Date of Issue	Subject
16/03/2021	Due dates for filing of Form GSTR-3B from the Tax Period of January, 2021
16/03/2021	Classification of Taxpayers
31/03/2021	Filing GSTR-1 (Q) for Jan-Mar 2021 under QRMP Scheme

Source: www.gst.gov.in

Notifications/Circulars/Orders issued in the month of March 2021

Ø Central Tax Notifications March 2021

Notification Nos.	Date of Issue	Subject
05/2021	08/03/2021	Seeks to implement e-invoicing for the taxpayers having aggregate turnover exceeding Rs. 50 Cr from 01st April 2021.
06/2021	30/03/2021	Seeks to waive penalty payable for non-compliance of provisions of Notification No. 14/2020 dated 21st March 2020.

Ø Central Tax (Rate) Notifications March 2021

No Central Tax (Rate) Notification was issued in the month of March 2021

Ø Integrated Tax Notifications March 2021

No Integrated Tax Notification was issued in the month of March 2021

Ø Integrated Tax (Rate) Notifications March 2021

No Integrated Tax (Rate) Notification was issued in the month of March 2021

Source: www.cbic.gov.in

Notifications/Circulars/Orders issued in the month of March 2021

Ø Circulars

Circular Nos.	Date of Issue	Subject
147/03/2021	12/03/2021	Seeks to clarify certain refund related issues

Ø Orders

No Orders issued in the month of March 2021

Ø Removal of Difficulty Orders March 2021

No order was issued in the month of March 2021

Source: www.cbic.gov.in

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