

## **Irrelevancy of a statement recorded u/s 70 of CGST Act in Adjudication proceedings**

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**IT** is common that the Officers of Customs, Excise, Service Tax and now GST, summon persons and record their statement under Section 14 of the Central Excise Act and now under Section 70 of CGST Act. The word summons is sufficient to create enough tension and pressure on a common man. More so, when such summons is issued by the office of preventive wing of Commissionerate, Anti Evasion Wing, Special Investigation Branch, Director General of Anti Evasion, Department of Revenue Intelligence.

A usual experience is that a person who visits the offices of the aforementioned officers, honouring the summons issued to him, is ignored for hours together and is made to sit on a very uncomfortable wooden bench, which itself is enough for a common man to lose his calmness and sensibility. A person writes a statement after several hours, which he is told can be used against him. This raises a larger question, as to whether such statement which is not given in a free and calm state of mind can be used as evidence. Statements have rampantly been used against the assessee, by the Revenue Department. Be that as it may.

We are conscious that there are hard nuts to crack. There are habitual offenders. Investigating Officers have to use different tricks to bring the truth on record, by recording their statement. But one cannot lose sight of the fact that there are honest and genuine people too.

Such statements of witness are relied upon in the Show Cause Notices, as evidence, to prove the allegations made in such Notice.

This authority of summoning and recording statements that has been given to the Investigating Officers has been balanced very nicely by Section 9D of the Act. It ensures that even if such authority is misused against any assessee, such assessee will have an opportunity to get over it.

## **CENTRAL EXCISE ACT, 1944**

### **SECTION 9D. Relevancy of statements under certain circumstances. -**

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding 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 opinion that, having regard to the circumstances of the case, the statement should be admitted in

## **CGST Act, 2017**

### **SECTION 136. Relevancy of statements under certain circumstances. -**

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

evidence in the interests of justice.	admitted in evidence in the interest of justice.
(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.	

Let us now see how Section 9D protects an assessee from the statements of a witness which may be prejudicial to the assessee. More so, when such statement is extracted by the Investigating Officers under compulsion or threat.

Section 9D(1)(a) of the Act sets out the circumstances in which a statement, made and signed by a person / witness before a Gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. These circumstances are:

- (A) when the person who made the statement is dead,
- (B) when the person who made the statement cannot be found,
- (C) when the person who made the statement is incapable of giving evidence,
- (D) when the person who made the statement is kept out of the way by the adverse party, and
- (E) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

The Adjudicating Authority can come to a finding that the circumstances as narrated above exist and, therefore, the statement is relevant and can be relied upon in the adjudication proceedings. In that case, the Adjudicating Authority has to pass a speaking Order to that effect. Such an Order is amenable to challenge by the assessee, if aggrieved thereby. Assessee can choose to file an Appeal or approach the Writ Court.

If the person whose statement is recorded is available, then Section 9D(1)(b) comes into play and the statement, made by such person during investigation, cannot be treated as relevant for the purpose of proving the facts contained therein, unless the procedure prescribed in Section 9D(1)(b) is followed.

If the Adjudicating Authority wants to rely on the said statement, he has to first admit the statement in evidence in accordance with Section 9D(1)(b).

Adjudicating Authority has to summon the person who had made the statement, examine him as witness in the adjudication proceeding, and arrive at an opinion that, the statement should be admitted in the interests of justice. If the Adjudicating Authority chooses not to examine any witnesses in adjudication, their statements cannot be considered as evidence. [Please see Jindal Drugs P Ltd. - [2016-TIOL-1230-HC-P&H-CX](#)]

A copy of such Examination-In-Chief, of the witness, has to be made available to the assessee. It would, thereafter, be open to the assessee to seek for Cross-Examination of such witness, after Examination-In-Chief is over and the statement has been admitted as evidence by the Adjudicating Authority.

Section 9D(1)(b) has mandated the aforesaid procedure because it is highly possible that the statement recorded during investigation, by the Investigating Officer, is recorded under coercion or compulsion. Investigating Agencies resorts to compulsion in order to extract confessional statements. Procedure mandated by Section 9D(1)(b) seeks to neutralize this possibility. Before admitting such a statement in evidence, Section 9D(1)(b) mandates that the evidence of the witness has to be recorded before the Adjudicating Authority because there will not be any fear or apprehension in the mind of witness, as his advocate will also be present, during such Examination-In-Chief.

These views are supported by series of Judgments in *Ambika International V. UOI* (2016-TIOL-1238-HC-P&H-CX), *Hi Tech Abrasives Ltd. V. CCE, Raipur* ([2018-TIOL-3124-HC-CHHATTISGARH-CX](#)), *Additional Director General (Adjudication) V. Its My Name Pvt. Ltd.* ([2020-TIOL-991-HC-DEL-CUS](#)). Recently, the Hon'ble Bombay High Court has reiterated this view by Order dated 3 rd December 2021, in Writ Petition No. 5753 of 2021, in case of *Prakash Raghunath Autade V. UOI* [[2021-TIOL-2288-HC-MUM-CX](#) ].

Sub-Section (2) of Section 9D, specifically states that provisions of sub-section (1) apply to any proceedings under the Central Excise Act, which includes Adjudication Proceedings.

Conspicuously, Section 136 of the CGST [Act, 2017](#), does not have a provision similar to Sub-Section (2) of Section 9D. Therefore, under GST Law, a Statement made by a person under Section 70 of the CGST Act is relevant only in a prosecution proceeding before the Court and such statement is not relevant in adjudication proceedings and appeals arising there from.

In other words, the Statements recorded under Section 70 cannot be used as evidence by the Revenue Department in adjudication proceedings, because the same are relevant only in prosecution proceedings before the Court.

## **[The views expressed are strictly personal.]**

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