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# Comparative Analysis of Inspection, Survey, Search, Seizure and Arrest under the CGST Act, 2017, Customs Act, 1962, Prevention of Money Laundering Act, 2002 and NDPS Act, 1985

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## ABSTRACT

*Keeping in view the varied Acts being implemented by officers, a comparative analysis of the provisions of inspection, search, seizure, survey, arrest under CGST ACT, 2017, Customs Act, 1962, Prevention of Money Laundering Act, 2002 and NDPS Act, 1985, discussed in the article, becomes inevitable for proper implementation of these Acts. What is specifically required to be noted that the authority for each of the actions are different under different Acts and the officer exercising the powers are required to make note of the same. Inspection is a new concept introduced in CGST Act, 2017 and while the CGST Act, 2017 is an amalgamation of the provisions of Central Excise Act, 1944, Finance Act, 1994 and the VAT laws, there was no concept of Inspection under any of the Central Acts. Similarly, the powers of search, seize and arrest are different and except for the NDPS Act, 1985, we have a system of quasi-judicial proceedings in all other laws discussed herein. The NDPS Act, 1985 is in many ways different from other Acts discussed herein and requires mandatory compliances of the provisions of the NDPS Act, 1985 and the laws laid down by the Hon'ble Supreme Court of India and various High Courts.*

Of the various Central Acts implemented by the Field Officers falling under the Central Board of Indirect Taxes and Customs, the Customs Act, 1962, the CGST Act, 2017, the Central Excise Act, 1944 (on(a) Petroleum crude (b) High-speed diesel (c) Motor spirit (commonly known as petrol) (d) Natural gas (e) Aviation turbine fuel)) are connected to the area of taxation and are economic legislation while the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act, 1985") is a wholesome criminal legislation.

## ECONOMIC OFFENCES- HOW DETERMINED?

**2.** How is that the Customs Act, 1962, Central Excise Act, 1994, Chapter V of the Finance Act, 1994 (since repealed), the Income Tax Act, 1961, etc. are called economic offences and

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whether the offences falling under NDPS Act, 1985 can be called economic offences?

**2.1** To understand this, we may straightaway make a reference to the Economic Offences (Inapplicability of Limitation) Act, 1974 (Act 12 of 1974). In terms of section 2 to the Act 12 of 1974, we find, *inter alia,* reference to the Customs Act, 1962, Central Excise Act, 1994, Chapter V of the Finance Act, 1994 (since repealed), the Income Tax Act, 1961, etc. It is worth noting that section 2 of the Act 12 of 1974 states as under:

> ***"2. Chapter XXXVI of the Code of Criminal Procedure, 1973 not to apply to certain offences***
>
> *Nothing in Chapter XXXVI of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply to— (i) any offence punishable under any of the enactments 1 or provisions, if any, thereof specified in the Schedule; or (ii) any other offence, which under the provisions of that Code, may be tried along with such offence, and every offence referred to in clause (i) or clause (ii) may be taken cognizance of by the Court having jurisdiction as if the provisions of that Chapter were not enacted."*

**2.1.1** The Customs Act, 1962, the Central Excise Act, 1944, Chapter V of Finance Act, 1994 etc. can be traced to the Schedule to the Act 12 of 1974[2] and is extracted hereunder:

*THE SCHEDULE*

*(See section 2)*

> *"1. The Indian Income Tax Act, 1922 (11 of 1922).*
>
> *2. The Income Tax Act, 1961 (43 of 1961).*
>
> *3. The Companies (Profits) Surtax Act, 1964 (7 of 1964).*
>
> *4. The Wealth-Tax Act, 1957 (27 of 1957).*
>
> *5. The Gift-Tax Act, 1958 (18 of 1958).*
>
> *6. The Central Sales Tax Act, 1956 (74 of 1956).*
>
> ***7. The Central Excises and Salt Act, 1944 (1 of 1944).***
>
> ***7A. Chapter V of the Finance Act, 1994 (32 of 1994).]***
>
> *8. The Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).*

[2] https://legislative.gov.in/sites/default/files/A1974-12.pdf

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***9. The Customs Act, 1962 (52 of 1962).***

*10. The Gold (Control) Act, 1968 (45 of 1968).*

*11. The Imports and Exports (Control) Act, 1947 (18 of 1947).*

*12. The Foreign Exchange Regulation Act, 1947 (7 of 1947).*

*13. The Foreign Exchange Regulation Act, 1973 (46 of 1973).”*

**2.1.2** We further find that Chapter XXXVI of Cr. P.C., 1973[3] contains the following sections

*“467. Definitions.*

*468. Bar to taking cognizance after lapse of the period of limitation.*

*469. Commencement of the period of limitation.*

*470. Exclusion of time in certain cases.*

*471. Exclusion of date on which Court is closed.*

*472. Continuing offence.*

*473. Extension of period of limitation in certain cases”*

**2.1.3** Of all the sections in Chapter XXXVI of Cr. P.C., 1973, section 468 is very important and this section places a bar to taking cognizance after lapse of the period of limitation. The period of limitation has been defined under section 467 of the Cr. P.C., 1973, which means *“the period specified in section 468 for taking cognizance of an offence*.” Hence, it is necessary to understand the period of limitation prescribed under section 468(2) of Cr. P.C., 1973, which is extracted herein as under:

*“(2) The period of limitation shall be—*

*(a) six months, if the offence is punishable with fine only;*

*(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;*

*(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.*

*(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe*

[3] https://legislative.gov.in/sites/default/files/A1974-02.pdf

*punishment."*

**2.2** Esteemed readers may note that the issue of limitation for filing of a prosecution complaint in a competent court of law in a case booked by Directorate of Revenue Intelligence (Hqrs.), New Delhi under the Customs Act, 1962, came to be decided very recently on 25th May 2022 by the Hon'ble High Court in CRL.M.C. 1416/2017 & CRL.M.A. 5836/2017 in the case of **Suresh Chand Gupta**[1] wherein a petition under section 482 of the Code of Cr. P.C, 1973, for quashing of Order dated 5th March 2014 passed by Ld. CMM, Patiala House Courts, New Delhi in CC No. No.75/1/2013 and to quash the CC No.75/1/2013 under sections 132 and 135(1)(a) of the Customs Act, 1962 and also Order dated 29th July 2016 passed by Ld. ASJ, Patiala House Courts, New Delhi in Criminal Revision No. 47/2014, came to be filed.

**2.2.1** The facts of the case, in brief, are that on 26th February 2013 the respondent - Directorate of Revenue Intelligence, Head Quarters, New Delhi (hereinafter referred to as "DRI") filed a criminal complaint Case bearing CC No. 75/1/13 under sections 132 and 135 (1)(a) of the Customs Act, 1962 before the Ld. Trial Court stating therein that intelligence reports received indicated that M/s Elgin Electronics (hereinafter "the firm"), of which petitioner no. 1 is the Proprietor and petitioner no. 2 is the Manager, was in the business of importing public address systems, sound systems for auditorium, etc. without payment of customs duty. On basis of the said inputs, search was conducted on 13th July 2009 by the DRI at the premises of the firm. Goods imported by the said firm were detained and inquiry was made from the said persons named above about the value of the detained goods. The petitioner no. 1 furnished an approximate value of the goods *vide* letter dated 1st September, 2009, but no document regarding the same was given to the DRI. Goods detained were then seized on the reasonable belief that same has been imported without payment of customs duty. It was, *inter alia,* contended before the Hon'ble High Court by the petitioner's counsel that *"there is nothing to show that the petitioners made any false declaration or prepared false documents and therefore, they are not liable to be prosecuted under Section 132 of the Act.* ***The Learned counsel further submitted that the complaint is barred by limitation insofar as per the provision of Section 132 of the Act, the punishment which could have been imposed for violating Section 132 of the Act could have extended for a period of six months or with fine or with both. Limitation in such a case as <u>provided under Section 468 of the Cr. P.C. is only 1 year.</u> In the present case, the complaint was filed by the respondent No.2 on 26th October 2013, whereas the incident in this case pertains to the year 2009 and, therefore, the complaint was admittedly barred by limitation. It is settled law that if the complaint is time barred, for which neither any admissible evidence has been filed nor sufficient reason has been shown for such delay,***

***then the proceedings should be quashed."***

**Emphasis applied**

**2.2.2** The Hon'ble High Court, after hearing the rival submissions, held as under:

> *"22. This Court has perused the aforesaid orders………… The impugned order, passed in the instant case, is bad in law in five folds: ………; thirdly, **the complaint was admittedly barred by limitation**;; ………"*

**2.2.3** The Hon'ble High Court of Delhi went on to quash the criminal complaint bearing CC No.75/1/2013 filed under sections 132 and 135(1)(a) of the Customs Act, 1962 and all proceedings emanating therefrom.

**2.2.4** The SPP for the respondent-DRI failed to submit and bring it to the notice of the Hon'ble High Court that the prosecution complaint is not hit by limitation of time in view of the section 2 of the Act 12 of 1974.

**2.3** On the basis of the above analysis, it can be safely concluded that the Customs Act, 1962, Finance Act, 1994, Central Excise Act, 1944, CGST Act, 2017 (for the purpose of this article), etc. are economic offences. At this juncture, it needs to be specifically recorded herein that the CGST Act, 2017 needs to be incorporated into the Act 12 of 1974.

**3.** Moving forward, we often find that the term 'offence' is used. The word 'offence' has not been defined under the Customs Act, 1962, Central Excise Act, 1944, the CGST Act, 2017, PMLA, 2002 or the NDPS Act, 1985.

**3.1** The dictionary meanings of the term offence have been defined as under:

(i) An **offence**[2] is a crime that breaks a particular law and requires a particular punishment.

(ii) **Offence**[3], crimes. The doing that which a penal law forbids to be done, or omitting to do what it commands; in this sense it is nearly synonymous with crime. (q.v.)

(iii) an illegal[4] act; a crime:

**3.1.1** While defining the term offence, we have reference to the word crime. Crime[5] means illegal activities.

**3.1.2** Having understood the dictionary meaning, we refer to the definition of offence under section 2 of the Cr. P.C., 1973

> *(n) "offence" means* ***any act or omission made punishable by any law for the time***

> ***being in force*** *and includes any act in respect of which a complaint may be made under section 20 of the Cattletrespass Act, 1871 (1 of 1871);*

**3.2** A combined reading of the definition with the dictionary meanings extracted herein would mean that for an act to constitute an offence, there should be an omission and that omission should be punishable under any law.

**3.2.1** To illustrate, we may explain the same with simple examples. A passenger holding an Indian Passport arrives at an International Airport and exercises the option to walk through the Green Channel and is caught, say, with 10 kilograms of gold valued at Rs.3,50,00,000/-(tariff value). The passenger is mandatorily required to declare the gold carried by him. Failure to do so would attract the consequences of non-declaration under the provisions of the Customs Act, 1962 and the Rules made thereunder. This act of non-declaration amounts to an offence under the Customs Act, 1962.

**3.2.2** To illustrate an act of omission under the CGST Act, 2017, we may refer to a taxable person availing of Input Tax Credit (ITC) without physical receipt of goods to the tune of Rs. 10,00,00,000/-. The CGST Act, 2017 mandates that a taxable person is eligible, *inter alia,* to take credit of ITC only on physical receipt of goods. Taxable person, having indulged in goodsless transaction, has committed an offence under the CGST Act, 2017.

**3.2.3** Similarly, we find that cultivation of opium poppy or any cannabis plant is an offence under section 8(b) of the NDPS Act, 1985.

## *QUASI-JUDICIAL* AUTHORITIES

**4.** At this juncture, esteemed readers should note that the economic offences under the Customs Act, 1962, CGST Act, 2017, IGST Act, 2017, SGST Act, 2017, Central Excise Act, 1944 [on (a) Petroleum crude (b) High speed diesel (c) Motor spirit (commonly known as petrol) (d) Natural gas (e) Aviation turbine fuel)], erstwhile Finance Act, 1994, Income Tax Act, 1961, etc. provide for departmental proceedings. Meaning thereby, these statutes confer powers on the departmental authorities of various ranks to raise demand and adjudicate the cases based on the monetary limits prescribed for the purpose. These departmental authorities are called *quasi-judicial* authorities and after following the principles of natural justice, hearing the noticees to the show cause notice, allowing or disallowing cross examination requests and on the basis of binding judgments of the appellate fora, decide the case by issuance of a reasoned and speaking order and these orders are appealable before the Commissioner (Appeals) or before the respective Tribunals (CESTAT or ITAT) or Appellate Tribunal for GST (which is yet to be constituted). The departmental adjudicating authorities and the Tribunals (CESTAT, ITAT,

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etc.) are quasi-*judicial* authorities and by *quasi-judicial* authorities, we mean that they have the trappings of a court but are not court in the real sense and the provisions of Indian Evidence Act, 1872 are inapplicable to the proceedings before them.

**5.** While doing an analysis of any these Acts, certain references to the terms frequently being used are required to be understood in proper perspective.

**6.** Even though the economic legislations referred to herein are primarily aimed at garnering resources, by way of collection of duty or tax, as the case may be, for the country for the country as a whole, at the outset on going through the all these economic legislations, they do have some provisions for arrest of the tax evaders and consequently to prosecute them in the court of law. Meaning thereby, despite being taxing statutes, they have an inbuilt mechanism for arrest and prosecution of such tax evaders. Hence, it becomes essential to understand the terms "*bailable offence*", "*non-bailable offence*", '*cognizable offence*", "*non-cognizable offence*", etc., and these terms have not been defined under these Acts.

**6.1** We find that these aforesaid terms are defined under section 2 of the Cr. P.C, 1973 as under:

> *"(a) "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence;*
>
> *(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;*
>
> *(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.*
>
> *(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;"*

**6.2** With reference to the cases booked under the provisions of the Acts mentioned herein, we see that the offences can be classified as under:

| **Name of the Act** | **Cognizable offences** | | **Non-cognizable offences** |
|---|---|---|---|
| | **Bailable** | **Non-bailable** | **Bailable** |

| | | | |
|---|---|---|---|
| Customs Act, 1962 | ✓ | ✓ | ✓ |
| CGST Act, 2017 | ✓ | ✓ | ✓ |
| NDPS Act 1985 | X | ✓ | X |
| PMLA, 2002 | X | ✓ | X |

## CRIMINAL LIABILITY VERSUS CIVIL LIABILITY

**7.** How do you determine whether a statute is a criminal law one or otherwise? A statute which provides for only penalty by way of adjudication by a *quasi-judicial* authority with no provision for initiation of prosecution in a court of law can be termed as a civil law. It is to be understood here that certain statutes provide for civil imprisonment. Civil imprisonment itself means that the Act is a civil law. To illustrate, we may refer to section 13 and 14 the provisions of Foreign Exchange Management Act, 1999, as it existed prior to 1st April 2015.

> "***Penalties.***
>
> ***13.*** *(1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues."*
>
> ***Enforcement of the orders of Adjudicating Authority.***
>
> *14. (1) Subject to the provisions of sub-section (2) of section 19, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment* ***of such penalty is served on him, he shall be liable to civil imprisonment under this section****.*
>
> *(2)* ***No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date***

> ***specified in the notice and to show cause why he should not be committed to the civil prison**, .....”*
>
> ***Emphasis added***

**7.1** A reading of the aforesaid sections categorically points out that the offences under the FEMA, 1999 were civil in nature and the matter could **not** be taken forward by filing a complaint in a competent court of law.

**7.1.1** However, readers may note that the FEMA, 1999* was amended *vide* Finance Act, 2015 by which the following sub-section stood inserted under section 13 of FEMA, 1999:

> *“(1A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.*
>
> *(1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the **initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director**.*
>
> *(1C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.*
>
> *(1D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).”*
>
> **Emphasis applied**

**7.1.2** Consequent upon the amendment carried out, a Criminal Complaint can be filed for the offence under the amended provisions of the FEMA, 1999.

**8.** Having understood the concept of cognizable and non-cognizable offences, bailable and non-bailable offences, etc., we now turn to individual statutes for a proper understanding and classification of the offences and some of the associated issues in these Acts.

**8.1 It needs to be emphasized that a Civil Liability is created on account of an Order passed by a *quasi-judicial* authority in contradistinction to a Criminal Liability arising out of a judgment passed by a competent Court of Law.**

## CUSTOMS ACT, 1962

### SEARCH OF A PERSON UNDER SECTION 102 OF THE CUSTOMS ACT, 1962

**9.** Chapter XIII of the Customs Act, 1962 deals with searches, seizure and arrest. In terms of section 100 of the Customs Act, 1962, power to search suspected person entering or leaving India has been conferred. Section 100(2) of the Customs Act, 1962 provides the applicability of sub-section under certain circumstances

> *"(a) any person who has landed from or is about to board, or is on board any vessel within the Indian customs waters;*
>
> *(b) any person who has landed from or is about to board, or is on board a foreign-going aircraft;*
>
> *(c) any person who has got out of, or is about to get into, or is in, a vehicle, which has arrived from, or is to proceed to any place outside India;*
>
> *(d) any person not included in clauses (a), (b) or (c) who has entered or is about to leave India;*
>
> *(e) any person in a customs area."*

**9.1** Without prejudice to the above, power to search has been vested to search a person, *"if an officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of Customs, has reason to believe that any person has secreted about his person any goods* i.e. gold, diamonds, manufactures of gold or diamonds, watches or any other class of goods notified by the Central Government, *which are liable to confiscation, or documents relating thereto.* Section 102 of the Customs Act, 1962 deals with search of the person covered under section 100 or 101 of the Customs Act, 1962. It may be seen that sections 100, 101 and 102 of the Customs Act, 1962 have their applicability mostly at the International Airports or in Customs area. Section 102 does not prescribe that a person who is to be searched should be given a notice in writing. Section 102(1) of the Customs Act, 1962 only mandates that the officer of customs, who is going to search a person shall, if such person

so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate. Further, section 102(4) mandates that the search of a person has to be carried out in the presence of independent witnesses, on whom the officer of customs may issue an order in writing to them or any of them so to witness the search.

**9.2** It is emphasized here that it is always better to issue a notice to the person, in writing, giving a gist of the specific information and the necessity of effecting a personal search that the said officer has with him, which in his opinion are the reasons to believe. The said notice issued to a person should be got signed from the person, who is going to be searched and such a notice should also be countersigned by the independent witnesses. The independent witnesses may be procured in the manner laid down in section 100(4) of the Cr. P.C., 1973.

**9.3** It needs to be understood here that search of a person under the Customs Act, 1962 is limited in character in as much as the issuance of a notice under section 102 for search of a person cannot be done in a non-customs area.

**SEARCH OF A PERSON UNDER SECTION 165(5) OF CR.P.C., 1898 (NOW SECTION 165(5) OF CR.P.C., 1973) READ WITH SECTION 105 OF THE CUSTOMS ACT, 1962 IN A NON-CUSTOMS AREA.**

**9.4** What happens in a situation when a person, say, who has smuggled gold through an international airport by way of concealment on his person is to be searched outside the customs area, say in Manish Market in Mumbai or Gaffar Market, Karol Bagh in New Delhi, Section 17C Market in Chandigarh or in Parry's Corner in Chennai. It needs to be understood that in terms of section 2(11) of the Customs Act, 1962, "customs area" has been defined, as under:

> *"customs area" means the area of a customs station or a warehouse and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities;"*

**9.4.1** The places mentioned herein are in the heart of the respective cities and are outside the ambit of the customs area, as defined. In order to act upon the information, it is good that the definite information can be passed on to the jurisdictional officer of customs, say an officer of customs having jurisdiction in the town area (i.e. other than the customs area). The definite information categorically should reveal that say gold is secreted on his person by way of rectum concealment, etc. and or by way of concealment in his belt, which is around, say, 2 kilograms having a tariff value of Rs.70,00,000/-. The said person is identified by the officer of customs having jurisdiction. The next question is how does the officer of customs effect a search of a

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person in a non-customs area? Is there any specific provision for this? To answer this question, we take recourse to section 105(2) of the Customs Act, 1962, which is extracted here under:

> *"(2) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches shall, so far as may be,* ***apply to searches*** ***<u>under this section</u>*** *subject to the modification that sub-section (5) of section 165 of the said Code shall have effect* ***as if for the word "Magistrate", wherever it occurs, the words Principal Commissioner of Customs or Commissioner of Customs were substituted."***

**Emphasis applied**

**9.4.2** Section 105(2) of the Customs Act, 1962 has reference to section 165(5) of Cr. P.C., 1898. At the outset, it is required to be noted that the entire section i.e. section 165 of Cr. P.C., 1898 has been made applicable to the Customs Act, 1962. The provision of section 165 of Cr. P.C., 1898 are *pari materia* with the provisions of section 165 of Cr. P.C, 1973.

**9.4.3** Cr. P.C., 1898 stands repealed and at present we have the Cr. P.C., 1973 in force. As far as this section is concerned, we may take recourse to the provisions of Cr. P.C., 1973, which deals with search by police officer, as extracted herein above.

> *"**165. Search by police officer.**—(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.*
>
> *(2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.*
>
> *(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing*

> *for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.*
>
> ***(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section***
>
> *(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate."*

**9.4.4** A cursory glance of the above provision reveals that it has reference to section 100 of the Cr. P.C., 1973. Sub-section (3) of section 100 of Cr. P.C., 1973 has reference to search of a person. The said sub-section is extracted herein as under:

> *"(3) Where* ***any person*** *in or about such place* ***is reasonably suspected of concealing about his person any article*** *for which search should be made,* ***such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency."***

**9.4.5** This sub-section (i.e. 100(3)) does not talk about issuance of a notice. However, since contraband or incriminating electronic evidences, *kachcha parchas,* etc. are likely to be recovered, it is always better to issue a notice under section 105(2) of the Customs Act, 1962 read with sections 165(5) and section 100(3) of the Cr. P.C., 1973. Any additional compliance on the part of the officer would always be appreciated by the Courts.

**SEARCH OF A PREMISES UNDER SECTION 105 OF THE CUSTOMS ACT, 1962**

**9.6** Search of a premises is covered under section 105 of the Customs Act, 1962 and the proper officer to issue a search authorisation is the Assistant/Deputy Commissioner of Customs.

**CONCEPT OF NOTIFIED GOODS UNDER SECTION 123 OF THE CUSTOMS ACT, 1962 – BURDEN OF PROOF**

**9.7** In terms of section 123 of the Customs Act, 1962, the same applies to gold, and manufactures thereof and watches. Further, in exercise of the powers conferred by sub-section (2) of section 123 of the Customs Act, 1962 and in supersession of the Notification of the Government of India No. 204/84 - Customs dated the July, 1984, the Central Government specified (i) Silver bullion and (ii) cigarettes as the goods under this section. In short, gold, and

manufacturers thereof, watches, silver bullion and cigarettes are the goods on which reverse burden works. In short, when the goods notified under this section and mentioned in section 123 are seized under section 110 of the Customs Officer "*in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -*

*(a) in a case where such seizure is made from the possession of any person, -*

*(i) on the person from whose possession the goods were seized; and*

*(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;*

*(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized."*

**SEIZURE OF GOODS**

**9.8** The reasons for seizure of goods could be numerous – *viz.* mis-declaration of goods, mis-declaration of quantity, mis-declaration of description of goods, non-declaration of goods, wrong availment of exemption under the Notification issued by the Government, non-submission of requisite licence issued by DGFT, CBN, Gwalior, WPC Directorate of Department of Telecommunications, etc. The list could go on. On account of the fact that the proper has reason to believe that the importer or the exporter, having not complied with the provisions of law, as required, he may seize the goods under section 110 of the Customs Act, 1962 and the goods can be provisionally released, subject to the condition that the bond and security for the value fixed by the competent authority are fulfilled. Furthermore, readers may bear in mind that any non-compliance of any restrictions imposed during the course of import, would tantamount to dealing in prohibited goods *vide* Hon'ble Supreme Court's judgement in the case of **Raj Grow Impex LLP AND ORS[6].**

**POWER TO STOP AND SEARCH CONVEYANCES**

**9.9** The word 'conveyance' has been defined under section 2(9) of the Customs Act, 1962 as under:

*"(9) "conveyance" includes a vessel, an aircraft and a vehicle;"*

**9.9.1** The proper officer, on having reason to believe, that any conveyance is used in smuggling of any goods or used in carriage of any goods which have been smuggled, he may, using the provisions of section 106 of the Customs Act, 1962,

*"at any time stop any such vehicle, animal or vessel or, in the case of an aircraft, compel it to land, and -*

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*(a) rummage and search any part of the aircraft, vehicle or vessel;*

*(b) examine and search any goods in the aircraft, vehicle or vessel or on the animal;*

*(c) break open the lock of any door or package for exercising the powers conferred by clauses (a) and (b), if the keys are withheld."*

**PROVISIONAL RELEASE OF SEIZED GOODS**

**9.10** In terms of section 110A of the Customs Act, 1962, the adjudicating authority has been vested with the power to order provisional release of any goods, documents or things seized under section 110 of the Customs Act, 1962, pending the order of the adjudicating authority, to the owner on taking a bond from him in the proper form with such security and conditions as he may require.

**OFFENCES UNDER THE CUSTOMS ACT, 1962**

**9.11** We now turn to the provisions of section 104 of the Customs Act, 1962, which gives the classification of offences. They are tabulated as under:

| S. No. | Nature of offence under the Customs Act, 1962 | Whether cognizable or non-cognizable and the relevant section of the Customs Act, 1962 | Whether offence bailable or non-bailable and the relevant section of the Customs Act, 1962 |
|---|---|---|---|
| 1 | Offence relating to prohibited goods | Cognizable. Section 104(4) refers. | Non-bailable. Section 104(6) refers. |
| 2 | Evasion or attempted evasion of duty exceeding fifty lakh rupees | | |
| 3 | Fraudulently availing of or attempting to avail drawback or any exemption from duty provided under this Act, where the amount of drawback or exemption from duty exceeds fifty lakh rupees | | |

| | | | |
|---|---|---|---|
| 4 | Fraudulently obtaining an instrument for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992.), and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds fifty lakh rupees | | |
| 5 | Offences other than 1 to 4 above | Non-cognizable.<br>Section 104(5) refers. | Bailable.<br>Section 104(7) refers. |

**PERSON CHARGED WITH OFFENCES BECOMES AN ACCUSED ONLY UPON FILING A PROSECUTION COMPLAINT**

**9.12** A person charged with an offence or offences under the Customs Act, 1962 becomes an accused only upon filing a complaint before the competent court of law as held by the Larger Bench of the Hon'ble Supreme Court in the case of **K I Pavuuny[7].** The Hon'ble Supreme Court *vide* judgment dated 3rd February 1997 held as under:

> *"It would thus be clear that the appellant was not a person accused of the offence under the Act when he gave his statement under Section 108 of the Act on December 6, 1980 at 1.00 p.m. in the office of the Superintendent of Customs, PW-2. The question then is: as to when the appellant became an accused of the offence? This court in Veera Ibrahim V/s The State of Maharashtra [(1976) 2 SCC 302] had held in para 9* ***that an accusation which would stamp him with the character of such a person was labelled only when the complaint was filed against him by the Assistant collector of Customs complaining of the commission of the offences under Section 135 (a) and Section 135 (b) of the Act."***

**Emphasis supplied**

**LAUNCHING OF PROSECUTION**

**9.13** The Customs Act, 1962 provides for launching of prosecution for the offences under section 132, 133, 135 135A, 135AA & 136 of the Customs Act, 1962.

**9.13.1** Generally, prosecution is launched subsequent to the adjudication of the case and recommendation for launching prosecution of the adjudicating authority. However, the CBIC's Circular carves out exceptions in certain circumstances. Launching of prosecution is, however, subject to the condition that the show cause notice is issued to a noticee.

**9.13.2** The noticee has the option to get the offences compounded or get its settled by moving the Hon'ble Settlement Commission for the settlement of the case. In the aforesaid situations, the prosecution, if launched, cannot be continued. However, it is required to be noted that the compounding of offences under the Customs Act, 1962 cannot be effected in respect of offences listed therein in terms of proviso to section 137(3) of the Customs Act, 1962.

**9.13.3** Section 137(1) of the Customs Act, 1962 mandates that the court cannot take cognizance of any offence under section 132, section 133, section 134 or section 135 or section 135A or section 135AA without the previous sanction of the Principal Commissioner of Customs or Commissioner of Customs.

**9.13.4** Section 137(2) of the Customs Act, 1962 further stipulates that "*No court shall take cognizance of any offence under section 136,* -

> *(a) where the offence is alleged to have been committed by an officer of customs not lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Central Government;*
>
> *(b) where the offence is alleged to have been committed by an officer of customs lower in rank than Assistant Commissioner of Customs except with the previous sanction of the Principal Commissioner of Customs or Commissioner of Customs."*

## PREVENTION OF MONEY LAUNDERING ACT, 2002

**10.** The Prevention of Money Laundering Act, 2002* has also mechanism put in place for arrest of a person and adjudication of the cases by the Adjudicating Authorities. In terms of section 45 of the PMLA, 2002, **all the offences are cognizable and non-bailable.** The PMLA is a different piece of legislation and the provisions of PMLA would come into force only when there is a "***scheduled offence***" involving ***"proceeds of crime."*** Accordingly, it is necessary to understand the meaning attached to these two terms.

**10.1** Section 2(u ) and section 2(y) of the PMLA, 2002 define "*proceeds of crime"* and *"scheduled offence"* . They are extracted herein as under:

> *"(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled*

*offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;"*

*"(y) "scheduled offence" means-*

*(i) the offences specified under Part A of the Schedule; or*

*(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or*

*(iii) the offences specified under Part C of the Schedule;"*

**10.2 Section 3 of the PMLA, 2002 deals with offence of money laundering, which is extracted herein:**

***"Offence of money-laundering.***

*3. Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering."*

**10.2.1** From a combined reading of sections 2(u), 2(y) and 3 of the PMLA, 2002, it can be gathered that the offence of money laundering is dependent upon other scheduled offences. For the purpose of this article, the "scheduled offences" under the Customs Act, 1962 and NDPS Act, 1985 are as under:

***"PART A***

| | ***PARAGRAPH 2*** |
|---|---|
| | ***OFFENCES UNDER THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (61 OF 1985)*** |
| ***Section*** | ***Description of offence*** |
| *15* | *Contravention in relation to poppy straw.* |
| *16* | *Contravention in relation to coca plant and coca leaves.* |
| *17* | *Contravention in relation to prepared opium.* |

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| | |
|---|---|
| *18* | *Contravention in relation to opium poppy and opium.* |
| *19* | *Embezzlement of opium by cultivator.* |
| *20* | *Contravention in relation to cannabis plant and cannabis.* |
| *21* | *Contravention in relation to manufactured drugs and preparations.* |
| *22* | *Contravention in relation to psychotropic substances.* |
| *23* | *Illegal import into India, export from India to transhipment of narcotic drugs and psychotropic substances.* |
| *24* | *External dealings in narcotic drugs and psychotropic substances in contravention of section 12 of the Narcotic Drugs and Psychotropic Substances Act, 1985.* |
| *25A* | *Contravention of orders made under section 9A of the Narcotic Drugs and Psychotropic Substances Act, 1985.* |
| *27A* | *Financing illicit traffic and harbouring offenders.* |
| *29* | *Abetment and criminal conspiracy.* |
| | ***PARAGRAPH 12*** |
| | ***OFFENCES UNDER THE CUSTOMS ACT, 1962 (52 OF 1962)*** |
| ***Section*** | ***Description of offence*** |
| *135* | *Evasion of duty or prohibitions.* |
| | ***PART B*** |
| | ***OFFENCE UNDER THE CUSTOMS ACT, 1962*** |
| ***Section*** | ***Description of offence*** |
| *132* | *False declaration, false documents, etc.”* |

**10.3** Scheduled Offences under PMLA are classified in to three parts i.e. Part A, Part B and Part C. The offences under the Customs Act, 1962 find mention in Part A and Part B. The false

declaration, false documents, etc. under the Customs Act, 1962 in Part B is a 'schedule offence' **only** *"if the total value involved in such offences is one crore rupees or more"*.

**10.4** The offences, *inter alia,* under the NDPS Act, 1985 and the Customs Act, 1962 have a direct linkage to the PMLA, 2002. Hence, the offences under the NDPS Act, 1985 and the Customs Act, 1962 are **predicate offences** for **initiating action under PMLA, 2002**. The proceedings under the PMLA, 2002 can be initiated once the predicate offences stand detected. As already mentioned in para *supra*, there could be situations where the offences under the Customs Act, 1962 could come to an end because the noticee has an option to get it settled by filing an application before the Hon'ble Settlement Commission and upon settling the case, no case of prosecution would lie against the said noticee under the Customs Act, 1962. He can get the offences compounded too. Even if prosecution is launched, the person against whom the complaint is lodged may get acquitted or discharged.

**10.5** Notwithstanding this, can a proceeding initiated under the PMLA, 2002 survive when even after investigation into the scheduled offences comes into a close, as stated above by virtue of the fact that the Ld. Trial Court discharges or acquits the accused?

**10.5.1** We see that *vide* Finance Act 2019, an explanation was added to section 44(1)(d) to PMLA, 2002 which is as follows:

> "*Explanation.- For the removal of doubts, it is clarified that,-*
>
> *(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;*
>
> *(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not."*

**10.6** A number of judgments have come be passed on this issue. We may refer to the judgment of the Hon'ble High Court of Bombay in the case of **Babulal Verma[8] .**The counsel for the petitioner vehemently argued as under:

*"8. Mr. Aggarwal therefore, submitted that, the moment Predicate/Scheduled offence comes to an end, the offence lodged by Respondent No. 1 on the basis of the said Predicate Offence also comes to an end and does not remain in existence. He submitted that, it is a settled legal proposition that, if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact situation, the legal maxim sublato fundamento cadit opus meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case. In support of his contention, he relied on the decision of the Supreme Court in the case of State of Punjab v. Davinder Pal Singh Bhullar, reported in (2011) 14 SCC 770. By relying on a decision of the Hon'ble Supreme Court in the case of Sanjaysingh Ramrao Chavan v. Dattatray Gulabrao Phalke reported in (2015) 3 SCC 123 and in particular para No. 17, Mr. Aggarwal submitted that, therefore once the 'crux' goes, the superstructure also falls, lacking in legs. Hence, prosecution becomes a futile exercise, as the materials available do not show that an offence is made out as against the accused.*

*9. He therefore, vehemently submitted that, once the Scheduled Offence lodged against the Applicants is compromised/compounded by the Complainant therein, the structure of the present crime registered by ED falls on ground, as it does not survive and is non-est. He submitted that, in view thereof, the offence registered by the Respondent No. 1 under the PMLA now stands wiped out from the record and therefore, there is no question of Applicants being remanded to further custody and therefore, the Applicants are entitled to be released on bail.*

*10. He further submitted that, in the case of Om Prakash Nogaja v. K. Nageshwar Rao decided by the learned Single Judge of this Court, on 10th August, 2009, in Criminal Application No. 3360 of 2009, it is held that, it is only when property is derived or obtained as a result of criminal activity relating to the Scheduled Offence, then and then alone the offence under Section 3 of PMLA could be committed by indulging any process or activity connected with the proceeds of crime and by projecting it, as untainted property. He therefore, at the cost of repetition submitted that, as the Scheduled Offence in the present case, has been compounded and the learned*

*Magistrate has accepted "C" Summary Report, the prosecution initiated by the Respondent No. 1 under PMLA does not survive.*

*11. Mr. Aggarwal submitted that, the Respondent No. 1 in Para No. 2.3 of its reply has stated that, after recording the case under PMLA, inquiry, investigation and trial under the said Act is totally independent from the investigation and Orders of the Scheduled Offence. He submitted that, the Explanation inserted to Section 44(1)(d) of PMLA will not change the basic provision of Section 44(c) and Explanation (i) thereto. In support of his contention, he relied on the decision of the Hon'ble Supreme Court in the case of Hardev Motor Transport v. State of Madhya Pradesh reported in (2006) 8 SCC 613. He submitted that, it has been held therein that, by inserting an explanation in Scheduled of the Act, main provisions of the Act cannot be defeated. He submitted that, hence the explanation to Section 44(1)(d) cannot be read in a manner so as to defeat the basic purpose for which the PMLA was introduced.*

*12. Mr. Aggarwal further contended that, even this Court in an earlier round of litigation i.e. in Criminal Revision Application No. 22 of 2021 in its Order dated 8th February, 2021, has observed that, on the basis of a Scheduled Offence i.e. FIR No. 109 OF 2020, the present crime has been registered by the Respondent No. 1 on 16th December, 2020. He submitted that, as the Predicate/Scheduled Offence itself is not in existence, the existence of a crime under PMLA is wiped out.*

*13. Mr. Aggarwal submitted that, the reasoning given by the Special Court while passing impugned Order dated 15th February, 2021 is fallacious. He submitted that, the impugned Orders are wholly erroneous and needs to be quashed and set aside."*

**10.6.1** The Ld. ASG appearing for the respondent-ED repelled the arguments. The Hon'ble High Court of Bombay, after hearing the rival submissions, held as under:

*"20. Section 2(1) of the PMLA defines various terms. Sub-section (n) defines 'intermediary'; (na) defines 'investigation'; (p) defines 'money-laundering'; (u) defines 'proceeds of crime' and (y) defines 'Scheduled Offence'. Section 3 of the Act defines Offence of money-laundering. Section 4 prescribes*

*punishment for money-laundering and Section 5 of the Act prescribes attachment of property involved in money-laundering.*

*21. A conjoint reading of Sections 2(1)(n)(na)(p)(u)(y), 3, 4 and 5 with the Statement of Object in enacting the PMLA would clearly indicate that, it has been enacted with an avowed object to investigate into the offence of money-laundering and to punish the accused for commission of the said offence. It also provides for attachment of property involved in money-laundering.*

*22. It is the settled position of law by a catena of judgments that, a statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. A statute is to be construed according to the intent of them, that make it and the duty of judicature is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature, in other words the 'legal meaning' or 'true meaning' of the statutory provision. The statute must be read as a whole in its context. It is now firmly established that the intention of the Legislature must be found by reading the statute as a whole.*

*23. The statute to be construed to make it effective and workable and the Courts strongly lean against a construction which reduces a statute to futility. A statute or any enacting provision therein must be so construed as to make it effective and operative. The Courts should therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inaccuracy or inexactness in the language used in a provision. Every provision and word must be looked at generally and in the context in which it is used. Elementary principle of interpreting any word while considering a statute is to gather the intention of the legislature. The Court can make a purposeful interpretation so as to effectuate the intention of the legislature and not a purposeless one in order to defeat the intention of the legislature wholly or in part.*

*24. At the time of debate in Rajya Sabha, while introducing Amendment to the Finance Act on 17th December, 2012, the then Finance Minister has categorically made the aforestated statements as reproduced in para No. 5*

*page No. 8 above. From the statement of the Finance Minister, it can be clearly discerned that, for lodgement for an offence under the PMLA, there must be a Predicate Offence and it is dealing with the proceeds of a crime. The information published by Respondent No. 1-ED pertaining to FAQs, for an answer to question No. 13 therein, it has been specifically stated that, every Scheduled Offence is a Predicate Offence. The Scheduled Offence is called Predicate Offence and the occurrence of the same is prerequisite for initiating investigation into the offence of money-laundering.*

*25. The Hon'ble Supreme Court, in the case of P. Chidambaram (Supra) while considering various provisions of PMLA and in particular Section 2(1)(y), which defines "Scheduled Offence" has held that, "Scheduled Offence" is a sine qua non for the offence of money-laundering which would generate the money that is being laundered. It is held that, PMLA contains schedules, which originally contained three parts namely, Part-A, Part-B and Part-C.*

*26. The Division Bench of this Court in the case of Radha Mohan Lakhotia (Supra) in para No. 13 has held that, Sections 3 and 4 of the Act deal with the offence of money-laundering and punishment for money-laundering respectively. That, both these provisions, even on strict construction, plainly indicate that, the person to be proceeded for this offence need not necessarily be charged of having committed a Scheduled Offence. For the Expression used is "whosoever". The offence of money-laundering under Section 3 of the Act is an independent offence. It is committed if "any person" directly or indirectly attends to indulge or knowingly assists or knowingly is a party or is actually involving any process or activity connected with the proceeds of crime and projecting it as untainted property. The Division Bench thus in unequivocal terms has held that, the offence of money-laundering under Section 3 of the PMLA is an independent offence.*

*27. The Division Bench of Madras High Court in the case of VGN Developers P. Ltd. (Supra) has relied upon the decision in the case of Radha Mohan Lakhotia (Supra). The Madras High Court accepted the contention of the learned Additional Solicitor General appearing therein, that, the PMLA is self-contained and stand alone and thus, independent of predicating offence. It has been held that, it cannot be stated that, a mere closure by the CBI would provide a death knell to the proceedings of the Respondent (i.e. ED therein).*

*That, in a given case, the complaint may emanate from a registration of a case involving scheduled offence. But the fate of the investigation in the said scheduled offence cannot have bearing to the proceedings under the PMLA. From the reading of the said decision it is clear that, mere filing of closure report by the Investigating Agency will not create any impediment or hurdle in the process of investigation by the ED of an offence registered under PMLA and being investigated by it.*

***28. It is thus absolutely clear that, for initiation/registration of a crime under the PMLA, the only necessity is registration of a Predicate/Scheduled Offence as prescribed in various Paragraphs of the Schedule appended to the Act and nothing more than it. In other words, for initiating or setting the criminal law in motion under the PMLA, it is only that requirement of having a predicate/Scheduled crime registered prior to it. Once an offence under the PMLA is registered on the basis of a Scheduled Offence, then it stands on its own and it thereafter does not require support of Predicate/Scheduled Offence. It further does not depend upon the ultimate result of the Predicate/Scheduled Offence. Even if the Predicate/Scheduled Offence is compromised, compounded, quashed or the accused therein is/are acquitted, the investigation of ED under PMLA does not get affected, wiped away or ceased to continue. It may continue till the ED concludes investigation and either files complaint or closure report before the Court of competent jurisdiction.***

***29. The language of Sections 3 and 4 of PMLA, makes it absolutely clear that, the investigation of an offence under Section 3, which is punishable under Section 4, is not dependent upon the ultimate result of the Predicate/Scheduled Offence. In other words, it is a totally independent investigation as defined and contemplated under Section 2(na), of an offence committed under Section 3 of the said Act.***

***30. PMLA is a special statute enacted with a specific object i.e. to track and investigate cases of money-laundering. Therefore, after lodgment of Predicate/Scheduled Offence, its ultimate result will not have any bearing on the lodgment/investigation of a crime under the PMLA and the offence under the PMLA will survive and stand alone on its own. A Predicate/Scheduled Offence is necessary only for registration of***

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***crime/launching prosecution under PMLA and once a crime is registered under the PMLA, then the ED has to take it to its logical end, as contemplated under Section 44 of the Act."***

**Emphasis applied**

**10.6.2** While major issues with reference to various sections of PMLA, 2002 was vehemently argued and discussed post the rendering of the judgment. What has not caught the attention of the majority of the readers is as to whether a case booked by ED on the basis of the predicate offence would survive notwithstanding the acquittal or discharge of the accused by the Ld. Trial Court?

**10.6.3** The Larger Bench of the Hon'ble Supreme Court in **Vijay Madanlal Choudhary and Others**[9] held as under:

*"33. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished.* ***Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now."***

**Emphasis applied**

**10.6.4** On the issue of Explanation inserted *vide* Finance Act, 2018, the Hon'ble Supreme Court held as under:

> *"40.* ***The Explanation as inserted in 2019, therefore, does not entail in expanding the purport of Section 3 as it stood prior to 2019, but is only clarificatory in nature.*** *Inasmuch as Section 3 is widely worded with a view to not only investigate the offence of money-laundering but also to prevent and regulate that offence. This provision plainly indicates that any (every) process or activity connected with the proceeds of crime results in offence of money-laundering. Projecting or claiming the proceeds of crime as untainted property, in itself, is an attempt to indulge in or being involved in money-laundering, just as knowingly concealing, possessing, acquiring or using of proceeds of crime, directly or indirectly. This is reinforced by the statement presented along with the Finance Bill, 2019 before the Parliament on 18.7.2019 as noted above."*

**10.6.5** In view of the aforesaid Larger Bench judgment of the Hon'ble Supreme Court, the same becomes binding on all the subordinate courts to it and on all quasi-judicial authorities by virtue of Article 141 of the Constitution of India. Effectively, it overrules the Hon'ble High Court of Bombay's judgment rendered in the case of **Babulal Verma[8] and other like judgments** on the issue.

**10.6.6** In the case of **Parvathi Kollur & Another**, post the rendering of the judgment in the case of **Vijay Madanlal Choudhary and Others[9]**, the Division Bench of the Hon'ble Supreme Court following the ratio of the judgment of the Larger Bench in the case of Vijay Madanlal Choudhary and Others(*supra*)[#] held as under:

> *"Learned ASG appearing for the respondent, in all fairness, does not dispute the above position of law declared by this Court.*
>
> *The result of the discussion aforesaid is that the view as taken by the* ***Trial Court in this matter had been a justified view of the matter and the High Court was not right in setting aside the discharge order despite the fact that the accused No. 1 had already been acquitted in relation to the scheduled offence and the present appellants were not accused of any scheduled offence****.*
>
> ***In view of the above, this appeal succeeds and is allowed. The impugned judgment and order dated 17.12.2020 is set aside and the order***

> ***dated 04.01.2019 as passed by the Trial Court, allowing discharge application of the appellants, is restored."***

**10.6.7** Further we find that the Ld. Special Judge under PMLA, Gr. Bombay was seized of this very issue in in PMLA SPL. Case N0.377 of 2021 in the case of **Babulal Mulchand Varma & Ors v. Directorate of Enforcement, Mumbai**[9B]. Vide Common Order dated 24th August 2022 the Ld. Special Judge relying on the judgment of the Hon'ble Supreme Court in **Vijay Madanlal Choudhary and Others**[9] held as under:

> " *I carefully studied the guidelines of the Hon'ble High Court and arguments of both sides. Since 08.06.2022 stage of this case is for discharge under Sec.227 Cr.P.C. This fact is evident from the previous Rojnamas. Admittedly, when previous similar application (Exh.8) was moved, it was the stage of investigation. Now, the complaint was already filed on 26.03.2022 and the then Ld. Court has taken cognizance thereof on 30.03.2022. There can't be any dispute that when the said previous application (Exh.8) was rejected there was no verdict of the Hon'ble Supreme Court in Vijay Madanlal Choudhary (supra), wherein the Hon'ble Supreme Court clearly held that PMLA Madanlal Choudhary (supra) has laid down is necessary to be reproduced as follows, (quoted para 33, 52 and 182(v)(d) of the Vijay Madanlal Choudhary judgment)*
>
> *32. So, it is clear that now the Hon'ble Supreme Court has held contrary opposite to what had been laid down by the Hon'ble High Court in Criminal Application (APL) No.201 of 2021 with Criminal Bail Application No.974 of 2021 in paragraph 11 (cited supra). Therefore, what has been laid down by the Hon'ble High Court in Criminal Application (APL) No.201 of 2021 with Criminal Bail Application No.974 of 2021*, has to be read in accordance and in the background of this recent Landmark Authority of the Hon'ble Supreme Court in Vijay Madanlal Choudhary (supra). So these applications at the subsequent stage questioning triability of the PMLA case based on the recent Law of the Land are certainly maintainable.*
>
> *33. The Hon'ble Supreme Court in this recent Landmark Authority everywhere referred Legislative Intent, Object of the PML Act referring to the speech of the then Finance Minister and considering all this, laid down the guidelines in paragraphs 33, 52, 187(v)(d) in Vijay Madanlal Choudhary (supra). Even*

*laudable object of the PML Act discussed by the Hon'ble High Court in Criminal Application (APL) No.201 of 2021 with Criminal Bail Application No.974 of 2021* is also discussed by the Hon'ble Supreme Court in the whole authority and in paragraphs 52, 53, 54, 55 of Vijay Madanlal Choudhary (supra). Even after taking into consideration the same, the Hon'ble Supreme Court laid down guidelines in paragraphs 33, 52 and conclusion 187(v)(d) in Vijay Choudhary (supra). Therefore, with great respect law laid down by the Hon'ble High Court in Criminal Application (APL) No.201 of 2021 with Criminal Bail Application No.974 of 2021*, has to be read in accordance with the recent guidelines and law laid down by the Hon'ble Supreme Court in Vijay Choudhary (supra).*

*34. The Hon'ble Supreme Court in this recent Landmark Authority succinctly and in concise manner held as referred in paragraphs 33, 52, 187(v)(d). On this issue these guidelines and conclusions drawn by the Hon'ble Apex Court are 'Precedent'. The Precedents established by the Hon'ble Supreme Court are the leading sources of declared law. 'Precedent' is an earlier event or action that is regarded as an example or guide to be considered in subsequent similar circumstances. Article 141 of the Constitution of India stipulates that, the law declared by the Hon'ble Supreme Court shall be binding on all Courts within territory of India. Thus, the general principles laid down by the Hon'ble Supreme Court are binding on each individual including those who are not party to an order. The decision in a judgment of the Hon'ble Supreme Court cannot be assailed on the ground that, certain aspects (eventualities) were not considered or the relevant provisions were not brought to the notice of the Hon'ble Supreme Court, as argued by the ED. When the Hon'ble Supreme Court decides a Principle, it would be the duty of this Court as well as Prosecution to follow it. "The law declared by the Hon'ble Supreme Court is the law of the land; it is Precedent for itself and for all the Courts, Tribunals and Authorities in India".*

*35. Article 141 of the Constitution of India imposes a binding authority upon all subordinate Courts within India to consider the Judgment of the Hon'ble Supreme Court as Declared Law. Hence, all Authorities relied upon by the Ld. SPP Mr. Hiten Venegaonkar including the judgment dt.16.03.2021 in Criminal Application (APL) No.201 of 2021 with Criminal Bail Application*

*No.974 of 2021* of the Hon'ble High Court, will have to be read in the background of recent Law of the Land in Vijay Choudhary (supra). If arguments of Ld. SPP Mr. Hiten Venegaonkar are considered that, "C" Summary is an outcome of compounding-compromising Scheduled Offence and such eventuality has not been considered by the Hon'ble Supreme Court in any of the categories mentioned in paragraphs 33, 52 and 187(v)(d) r.w. Sec.320(8) Cr.P.C., horrific consequences thereof are nothing but keeping both accused languishing in jail for uncertain period by denying their legitimate right under Art.141 of the Constitution of India r.w. 'C' Summary and Sec.320(8) Cr.P.C., that too, for a trial of PMLA offence which is basically not maintainable even under Sec.44(1)(a)(c) of the PML Act read with the guidelines laid down by the Hon'ble Supreme Court in Vijay Choudhary (supra). Duty is cast on the Court to identify this situation and apply principles-guidelines laid down by the Hon'ble Supreme Court in this recent Authority, Vijay Choudhary (supra). If this Court fails to do so, certainly it will lead to a situation "Sun is there but light has gone".*

*36. Considering the peculiar facts as now and henceforth, the PMLA case against both accused cannot proceed. That being so, detention of both accused becomes illegal. The Court – Judge is not only 'repository' but also a 'Custodia legis' of rights of the citizen particularly that of under trial prisoners. The vital power to continue the judicial custody is entrusted in him (it). If this power is exercised in utter disregard to the mandate of law, the right of life and liberty enshrined under Art.21 of the Constitution of India will be in danger of extinction, And, in this process, the Court who is the protector of the rights of citizens (under trial prisoners) will become 'predator' of the rights. Over all, where it is expedient the Court should not hesitate to exercise the power to issue interim release of the accused, as done in this case. Such exercise of the power will effectively deter abuse of the process of Criminal Law for objects extraneous to its cause. So, interim release of both accused deserves to be made absolute by allowing both applications (Exh.145 and 146) finally by holding them maintainable.*

*38. I wish to add that, the introduction of logical deduction from the reasoning in the context of one case cannot be reasonably be adopted in the peculiar facts and circumstances of another case, as it would lead to absurd result. The*

*most important question herein is as to whether prosecution of the instant PMLA case continues even in the absence of the Scheduled Offence? That too, when there is complete shut down of the case relating to Scheduled Offence. In none of the above authorities there is any issue as such as to whether the PMLA case continues even after non-existence of Scheduled Offence. These ratios and parameters laid down in all above authorities will have to be read with the recent Landmark Authority of the Hon'ble Supreme Court in Vijay Choudhary (supra). It would not be out of place to mention that, slight differences in the facts of the case and particularly in criminal matters, the ratio becomes inapplicable.*

*40. I have already noted above, how the Hon'ble High Court in Criminal Application (APL) No.201 of 2021 with Criminal Bail Application No.974 of 2021* held that, even if the Predicate/Scheduled Offence is compromised, compounded, quashed or the accused therein is/are acquitted, the investigation of ED under PMLA does not get affected, wiped out or ceased to continue. It may continue till the ED concludes investigation and either files complaint or closure report before the Court of the competent jurisdiction. Here the stage of the matter is of discharge under Sec.227 Cr.P.C. and not that of investigation. The law laid down by the Hon'ble Supreme Court in Vijay Choudhary (supra) paragraphs 33, 52, 187(v)(d) regarding triability of the PMLA case is contrary to the observations made by the Hon'ble High Court. Therefore law laid down by the Hon'ble High Court in Criminal Application (APL) No.201 of 2021 with Criminal Bail Application No.974 of 2021* has to be read with and in the background of the true spirit of the ratio in the Authority of the Hon'ble Supreme Court in Vijay Choudhary (supra).*

*41. It is evident from the Purshish (Exh.155) alongwith copies of order dt.18.08.2022 passed by the Hon'ble High Court allowing withdrawal of Bail Application No.4178/2021 and 4179/2021 by reserving liberty to file fresh bail applications and screenshot of the website of the Hon'ble Supreme Court indicating SLP (Crl.) No.5720 of 2022 has been dismissed as withdrawn and disposed of on 23.08.2022. It is therefore clear that there is no matter pending before the Hon'ble Supreme Court as well as the Hon'ble High Court. Ld. SPP Mrs. Kavita Patil submitted that, in view of the withdrawal of SLP (Crl.) No.5720 of 2022, the contention of the ED based on Criminal Application*

*No.201 of 2021 with Criminal Bail Application No.974 of 2021* remains confirmed. I have already discussed this aspect in detailed. I have also noted that, the judgment dt.16.03.2021 in Criminal Application No.201 of 2021 with Criminal Bail Application No.974 of 2021* will have to be read with the law laid down by the Hon'ble Supreme Court in Vijay Madanlal Choudhary (supra). Now no matter is pending before the Hon'ble Supreme Court and the Hon'ble High Court. Therefore, contention of ED that matter being subjudice before the Hon'ble Supreme Court –Hon'ble High Court, has no legal basis. Hence, the contention of ED that, this Court is debarred to entertain these applications, is not legally justified.*

*42. I have already noted that when the order dt.16.03.2021 in Criminal Application No.201 of 2021 with Criminal Bail Application No.974 of 2021* was passed, the stage of matter was investigation. 51. As per Sec.44(1)(a)&(c) of PML Act the trials of Scheduled Offence and PMLA offence have to be conducted by the Special Judge after commitment of the case relating to the Scheduled Offence. In that event also the instant trial cannot proceed as the Scheduled Offence is not in existence. Hence, I am of the opinion that, the PMLA case relating to both accused in the background of peculiar facts referred above cannot continue to their extent. Therefore, both accused (A3,A4) made out strong prima-facie case that there is not sufficient ground for proceeding against them in respect of trial of the instant PMLA case. Hence, both of them shall have to be discharged. ....”*

**10.6.8** The nutshell of the judgments referred to above is when there is no scheduled offence, the proceedings under PMLA, 2002 cannot continue.

**SURVEY, SEIZURE, SUMMONS, UNDER PMLA, 2002**

**10.7** Survey, seizure and summons are dealt in Chapter V of the PMLA, 2002. Section 16 to section 24 form part of Chapter V of PMLA, 2002 and they are under

*“ Chapter: V*

*Summons, Searches and Seizures, Etc.*

*Section 16: Power of survey.*

*Section 17: Search and seizure.*

*Section 18: Search of persons.*

*Section 19: Power to arrest.*

*Section 20: Retention of property.*

*Section 21: Retention of records.*

*Section 22: Presumption as to records or property in certain cases.*

*Section 23: Presumption in inter-connected transactions.*

*Section 24: Burden of proof."*

**10.8** It may be seen that section 16 provides for power of survey bestowed upon the Authorities. The Authorities specified in section 48 of the PMLA, 2002 are

*"a) Director or Additional Director or Joint Director,*

*(b) Deputy Director,*

*(c) Assistant Director, and*

*(d) such other class of officers as may be appointed for the purposes of this Act."*

**10.8.1** Any of the authority, as above, on the basis of material in his possession, has reason to believe to be recorded in writing that an offence under section 3 of PMLA, 2002 has been committed, has been empowered to enter upon any place within the limits of the area assigned to them or in respect of which, has been specifically authorised for the purposes of section 16 of PMLA, 2002 by the competent authority, for inspection of records or other matters. It is required to be noted here that in CGST Act, 2017, the term Inspection under section 67(1) of CGST Act, 2017 is akin to 'Survey' in section 16 of PMLA, 2002

**10.8.2** A contrasting feature is to be observed with reference to search and seizure, which is covered under section 17 of PMLA, 2002. Section 17 of PMLA, 2002 is restrictive in nature and permits only the Director or any other officer not below the rank of Deputy Director authorised by the Director to exercise that power on the basis of information in his possession and having reason to believe that any person has committed some act which constitutes money laundering or is in possession of proceeds of crime involved in money-laundering, including the records and property relating to money-laundering. The difference between steep is required to be carefully noted.

**10.8.3** Power to arrest under PMLA, 2002 is covered under section 19. It states that *"If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order,* ***has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any***

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***person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest."***

**10.8.3.1** It is required to be noted that each of the authority has been vested with power to arrest a person on the basis of material in his possession. Readers may note that in CGST, 2017 and Customs Act, 1962, the power to order arrest is vested with the Principal Commissioner/Commissioner of Central Tax and Principal Commissioner/Commissioner of Customs respectively and the Arresting Officer, hence, cannot *suo moto* arrest any person accused of an offence under these Acts. However, the officers of Customs and Central Tax, while implementing the provisions of NDPS Act, 1985 can arrest the accused without obtaining any approval from the Principal Commissioner/Commissioner of Central Tax and Principal Commissioner/Commissioner of Customs, as the case may be. It is worth noting that Government of India, Ministry of Finance's Notification S.O. 3901(E) dated 30th October 2019 issued from F. No. N/11011/1/2019-NC-II[$] empowers officers of and above the rank of Inspectors in the Central Board of Indirect Taxes and Customs to exercise the powers and perform the duties specified in section 42 of NDPS Act, 1985 within the area of their respective jurisdiction and also authorise the said officers to exercise the powers conferred upon them under section 67 of the NDPS Act, 1985. Since, CGST officers come under CBIC, they are empowered officers for sections 42 and 67 of the NDPS Act, 1985.

## TRANSFER OF CASES OF SCHEDULED OFFENCES TO PMLA COURT

**10.9** In terms of section 44(1)(a) of PMLA, 2002, "*an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed*"

## NDPS ACT, 1985

**11.** In India, a comprehensive legislation, *viz.* the Narcotic Drugs and Psychotropic Substances Act, 1985 was enacted to strengthen the control measures over drug trafficking and for deterrent punishment for drug trafficking offences. The title of the Act gives an indication that it deals with Narcotic drugs and Psychotropic substances. But in actuality there is a trifurcation and apart from the above two, it also deals with controlled substance.

**11.1** The Narcotic Drugs and Psychotropic Substances Act, 1985 prohibits the following activities:

- ❖ Cultivation of any coca plant or gathering any portion of coca plant;
- ❖ Cultivation of the opium poppy or any cannabis plant;

❖ Production, manufacture, possession, sale, purchase, transportation, warehousing, use or consumption, import inter-state, export inter-state, import into India, export from India or transhipment, of narcotic drugs or psychotropic substances except for medical or scientific purposes in accordance with the terms and conditions of licence, permit or authorisation granted under the rules or orders made under the Act;

❖ Dealing in any activities in narcotic drugs or psychotropic substances other than those activities referred above;

❖ Handling or letting out any premises for the carrying on of any of the prohibited activities, including dealing, referred above;

❖ Financing, directly or indirectly, any of the aforementioned prohibited activities;

❖ Abetting or conspiring in the furtherance of or in support of doing any of the aforementioned prohibited activities;

❖ Harbouring persons engaged in any of the aforementioned prohibited activities;

❖ External dealings in narcotic drugs and psychotropic substances;

❖ Acquiring any property by means of any income or earnings attributable to contravention of any provisions of the Act or holding such illegally acquired property;

❖ Certain activities relating to property derived from an offence committed under the Act or under any other corresponding law of any other country

**11.2** Under the NDPS Act, 1985, all the offences are cognizable and non-bailable. It is necessary to record here that the offences under the NDPS Act, 1985 are classified on the basis seized quantity and the neutral substances is also to be included *vide* Larger Bench judgment of the Hon'ble Supreme Court in the case of **Hira Singh**[10] **.**

**11.3** The NDPS Act, 1985 recognises two types of quantity (i) small quantity and commercial quantity. The term 'intermediate quantity' came to be used in a situation where the quantity seized is above 'small quantity' but below 'commercial quantity'. As in the case of PMLA, 2002, all the offences are to be tried in Special Court, which is Court of Sessions. However, it is to be noted that since the offences for small quantity is punishable for one year, the same is triable in the Metropolitan Magistrate or its equivalent. Since, the punishment that can be inflicted is only one year, the Court of Metropolitan Magistrate have granted bail in these cases.

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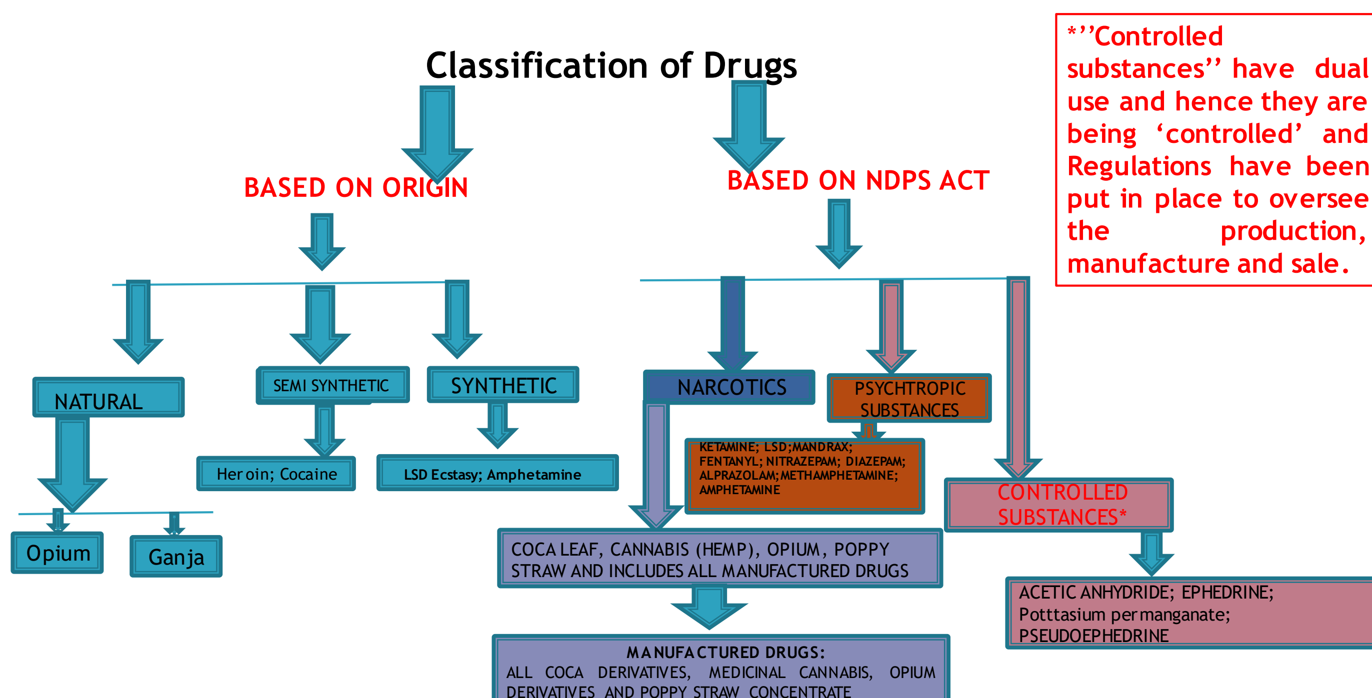
It is the Court of Sessions (Special Court) which is competent to decide seizure of ‘intermediate quantity’ and ‘commercial quantity’.

### DIAGRAMATIC CLASSIFICATION OF DRUGS




**11.3.1** It is important to note here that by grant of bail by an arresting officer *vis a vis* grant of bail by a competent court is different. To illustrate, under the Customs Act, 1962, if a person is caught smuggling gold, whose tariff value is Rs. 10,00,000/-, he can be arrested and offered bail by the arresting officer on the terms and conditions he may set out. In contrast, if a person is accused of conscious possession of small quantity of 3 grams of heroin, the arresting officer **cannot grant bail on his own** as all the offences are cognizable and non-bailable. However, the competent court i.e. Court of Magistrate is empowered to release him on bail as the subject offence attracts punishment, which may extend up to one year.

**11.4** How it becomes bailable in a court of law is the next question? The rigours of section 37 of the NDPS Act, 1985 are not attracted in cases involving small and intermediate quantity and the Ld. Trial Courts are empowered to grant bail in such cases booked by the empowered departments/officers under the NDPS Act, 1985, if the situation/case so warrants. Which court is competent to adjudicate the case under the NDPS Act, 1985 for small quantity and intermediate & commercial quantity, we have to go Part II of Schedule to the Cr. P.C., 1973, which is as under:

*"Offences under other laws*

| ***Description of offence*** | ***Cognizable*** | ***Bailable*** | ***Triable by*** |
| --- | --- | --- | --- |
| *If punishable with death, imprisonment for life, or imprisonment for more than 7 years* | *Yes* | *No* | *Session* |
| *If punishable with imprisonment for less than 3 years or with fine only* | *No* | *Yes* | *Magistrate"* |

**11.5** Intermediate quantity is punishable up to 10 years and commercial quantity being punishable with a minimum sentence of 10 years. Hence, it is the court of sessions, which can inflict such punishment as per the Table above.

**11.6** Out of the all the Acts discussed herein, the NDPS Act, 2002 stands on a different footing. The NDPS Act, 1985 **does not provide for *quasi-judicial* proceedings,** as is the case in Customs Act, 1962 or in CGST Act, 2017 or in the PMLA, 2002.

**11.7** The empowered officers have been held to be 'police officers' by the Hon'ble Supreme Court in **Tofan Singh**[11] **.**They file complaint/charge sheet in the court of law and the proceedings are initiated in the respective Courts only(i.e. the Magistrate's Court for small Quantity while for intermediate quantity and commercial quantity in the Court of Sessions).

**11.8** Further, in respect of seizure of 'small quantity' and 'intermediate quantity', the time limit for filing a complaint/charge sheet is 60 days while in commercial quantity, the time limit has been set out as 180 days, which can be extended by the Ld. Trial Court up to one year upon an application being filed by the Public Prosecutor, albeit well in advance, giving the progress of the investigation and the reasons for extension. The Ld. Court, after hearing the accused and the Public Prosecutor, may or may not extend the time limit.

**11.9** All the offences are cognizable and non-bailable. An accused can be arrested under section 42, 43 and 44 of the NDPS Act, 1985. The statement of an accused is recorded under section 67 of the NDPS Act, 1985 and in view of the judgment of the Hon'ble Supreme Court in the case of **Tofan Singh**, a statement tendered by an accused wherein he nominates another person/identifies another person (from whom no recovery is effected) cannot be used as a piece of evidence to arrest the said nominated person. The situation, post the judgment of **Tofan Singh,** the statement recorded under section 67 of the NDPS Act, 1985 is similar to the statement recorded by an Inspector of Customs under section 107 of the Customs Act, 1962.

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**11.10** In case, the complaint/charge sheet is not filed well within the time limit or extended time limit, as the case may be, the accused is entitled to default bail under the provisions of section 167(2) of the Cr. P.C, 1973. For a detailed analysis, refer to the extensive analysis on the issue by the author by visiting https://doij.org/10.10000/IJLMH.112886.

**11.11** The Hon'ble Supreme Court, had in **Vijay Madanlal Choudhry**[9], analysed the issue as to whether the statement tendered by a person under the NDPS Act, 1985 *vis a vis* statement PMLA 2002 is hit by Article 20(3) of the Constitution of India. It was held as under:

> *"168. The petitioners, however, have pressed into service exposition of this Court in the recent decision in Tofan Singh, which had occasion to deal with the provisions of the NDPS Act wherein the Court held that the designated officer under that Act must be regarded as a police officer. The Court opined that the statement made before him would be violative of protection guaranteed under Article 20(3) of the Constitution. This decision has been rightly distinguished by the learned Additional Solicitor General on the argument that the conclusion reached in that judgment is on the basis of the legislative scheme of the NDPS Act, which permitted that interpretation. However, it is not possible to reach at the same conclusion in respect of the 2002 Act for more than one reason. In this decision, the Court first noted that the Act (NDPS Act) under consideration was a penal statute. In the case of 2002 Act, however, such a view is not possible. The second aspect which we have repeatedly adverted to, is the special purposes and objects behind the enactment of the 2002 Act.* ***As per the provisions of the NDPS Act, it permitted both a regular police officer as well as a designated officer, who is not a defined police officer, to investigate the offence under that Act. This has resulted in discrimination****. Such a situation does not emerge from the provisions of the 2002 Act. The 2002 Act, on the other hand, authorises only the authorities referred to in Section 48 to investigate/inquire into the matters under the Act in the manner prescribed therein.* ***The provision inserted in 2005 as Section 45(1A) is not to empower the regular police officers to take cognizance of the offence. On the other hand, it is a provision to declare that the regular police officer is not competent to take cognizance of offence of money-laundering, as it can be investigated only by the authorities referred to in Section 48 of the 2002 Act. The third aspect which had weighed with the Court in Tofan Singh is that the police officer investigating an offence***

***under the NDPS Act, the provisions of Sections 161 to 164 of the 1973 Code as also Section 25 of the Evidence Act, would come into play making the statement made before them by the accused as inadmissible. Whereas, the investigation into the same offence was to be done by the designated officer under the NDPS Act, the safeguards contained in Sections 161 to 164 of the 1973 Code and Section 25 of the Evidence Act, will have no application and the statement made before them would be inadmissible in evidence. This had resulted in discrimination****. No such situation emerges from the provisions of the 2002 Act. Whereas, the 2002 Act clearly authorises only the authorities under the 2002 Act referred to in Section 48 to step in and summon the person when occasion arises and proceed to record the statement and take relevant documents on record. For that, express provision has been made authorising them to do so and by a legal fiction, deemed it to be a statement recorded in a judicial proceeding by virtue of Section 50(4) of the 2002 Act. A regular police officer will neither be in a position to take cognizance of the offence of moneylaundering, much less be permitted to record the statement which is to be made part of the proceeding before the Adjudicating Authority under the 2002 Act for confirmation of the provisional attachment order and confiscation of the proceeds of crime for eventual vesting in the Central Government. That may entail in civil consequences. It is a different matter that some material or evidence is made part of the complaint if required to be filed against the person involved in the process or activity connected with moneylaundering so as to prosecute him for offence punishable under Section 3 of the 2002 Act. The next point which has been reckoned by this Court in the said decision is that in* ***the provisions of NDPS Act, upon culmination of investigation of crime by a designated officer under that Act (other than a Police Officer), he proceeds to file a complaint; but has no authority to further investigate the offence, if required. Whereas, if the same offence was investigated by a regular Police Officer after filing of the police report under Section 173(2) of the 1973 Code, he could still do further investigation by invoking Section 173(8) of the 1973 Code. This, on the face of it, was discriminatory****.*

*169. Notably, this dichotomy does not exist in the 2002 Act for more than one reason. For, there is no role for the regular Police Officer. The investigation*

*is to be done only by the authorities under the 2002 Act and upon culmination of the investigation, to file complaint before the Special Court. Moreover, by virtue of Clause (ii) of Explanation in Section 44(1) of the 2002 Act, it is open to the authorities under this Act to bring any further evidence, oral or documentary, against any accused person involved in respect of offence of money-laundering, for which, a complaint has already been filed by him or against person not named in the complaint and by legal fiction, such further complaint is deemed to be part of the complaint originally filed. Strikingly, in Tofan Singh the Court also noted that, while dealing with the provisions of the NDPS Act, the designated officer has no express power to file* ***a closure report unlike the power bestowed on the police officer, if he had investigated the same crime under the NDPS Act.*** *Once again, this lack of authority to file closure report is not there in the 2002 Act. For, by the virtue of proviso in Section 44(1)(b), after conclusion of investigation, if no offence of money-laundering is made out requiring filing of a complaint, the Authority under the Act expected to file such complaint, is permitted to file a closure report before the Special Court in that regard.* ***In that decision, while analysing the provisions of the Section 67 of the NDPS Act, the Court noted that the statement recorded under Section 67 of that Act was to be held as inadmissible in all situations. That renders Section 53A of the same Act otiose. Section 53A of the NDPS Act is about relevancy of statement made under certain circumstances. Realising the conflicting position emerging in the two provisions, the issue came to be answered.***

*170.* ***However, in the case of provisions of the 2002 Act, there is no similar provision as Section 53A of the NDPS Act. As a result, even this deficiency noticed in that judgment has no application to the provisions of the 2002 Act. The Court also noted in that decision that unlike the provisions of in the Customs Acts, 1962, Central Excise Act, 1944 and Railway Property (Unlawful Possession) Act, 1966, in the case of NDPS Act prevention, detection and punishment of crime cannot be said to be ancillary to the purpose of regulating and exercising of control over narcotic drugs and psychotropic substances.***

*171. We have already adverted to the purposes and objects for enacting the 2002 Act. It is a sui generis legislation, not only dealing with the prevention,*

*detection, attachment, confiscation, vesting and making it obligatory for the banking companies, financial institutions and intermediaries to comply with certain essential formalities and make them accountable for failure thereof, and also permits prosecution of the persons found involved in the money laundering activity. Keeping in mind the sweep of the purposes and objectives of the 2002 Act, the reason weighed with this Court while dealing with the provisions of the NDPS Act, will have no bearing whatsoever. In that decision,* ***this Court also noted that the offences under the NDPS Act are cognizable as opposed to other statutes referred to above. The scheme of the NDPS Act, including regarding making offences under that Act as cognizable by the designated officer as well as the local police, and the scheme of the 2002 Act is entirely different.***

*171A. Indeed, in the original 2002 Act, as enacted, the offence of money-laundering was made cognizable as a result of which confusion had prevailed in dealing with the said crime when the legislative intent was only to authorise the Authority under the 2002 Act to deal with such cases. That position stood corrected in 2005, as noticed earlier. The fact that the marginal note of Section 45 retains marginal note that offences to be cognizable and non-bailable, however, does not mean that the regular Police Officer is competent to take cognizance of the offence of money-laundering. Whereas, that description has been retained for the limited purpose of understanding that the offence of money-laundering is cognizable and non-bailable and can be inquired into and investigated by the Authority under the 2002 Act alone.*

*172. In other words, there is stark distinction between the scheme of the NDPS Act dealt with by this Court in Tofan Singh and that in the provisions of the 2002 Act under consideration.* ***Thus, it must follow that the authorities under the 2002 Act are not Police Officers. Ex-consequenti, the statements recorded by authorities under the 2002 Act, of persons involved in the commission of the offence of money-laundering or the witnesses for the purposes of inquiry/investigation, cannot be hit by the vice of Article 20(3) of the Constitution or for that matter, Article 21 being procedure established by law.*** *In a given case, whether the protection given to the accused who is being prosecuted for the offence of money laundering, of Section 25 of the*

*Evidence Act is available or not, may have to be considered on case-to-case basis being rule of evidence.*

*173. We may note that the learned Additional Solicitor General was at pains to persuade us to take the view that the decision in Tofan Singh is per incuriam. For the reasons already noted, we do not deem it necessary to examine that argument."*

**DIFFERENCE BETWEEN SECTION 41(2) AND SECTION 42 OF NDPS ACT, 1985**

**11.12** Section 41(1) gives power to Magistrates to issue warrant for the arrest of a person or for the search while subsection (2) of section 41 of the Act gives power to Gazetted Officers of the empowered departments to go to the spot and to arrest a person or to conduct search by themselves. Further, they have been vested with the powers to issue authorisation to an officer subordinate to them or to conduct search or arrest a person themselves. The officers mentioned in section 42, have not been vested with such powers. Section 41(2) empowers Gazetted rank of the empowered departments, if he has reason to believe from personal knowledge or from information regarding the offence under this Act, may himself arrest the person and search of the building, conveyance or place both in the day time and in the night time or authorize any officer subordinate to him who is superior to a Constable. On the contrary, section 42 of the NDPS Act, 1985, any officer above the rank of a Peon or Sepoy or Constable of the empowered departments can exercise the power, subject to the compliances required under this section.

**11.12.1** In short, the power conferred on the Gazetted Officers of the empowered department as per section 41(2) is that on information they can themselves go and search any place and arrest any person at any time. But this special power has not been conferred on the officers mentioned in section 42. Under section 42, it is obligatory on the part of the officers concerned to reduce the information in writing and send/forward the said information to the immediate superior officer and search the building, conveyance or enclosed place only during the day time. The main difference between section 41(2) and section 42(1) and (2) is that the superior officials like Gazetted Officers under section 41(2) even without sending the information in writing to their superior officer could go to the spot at any time and search any place, whereas the non-Gazetted Officers under section 42 cannot go to the specified places mentioned in the said section without writing the information and without sending the same to the superior officers.

**DIFFERENCE BETWEEN SECTION 42 AND SECTION 43 OF THE NDPS ACT, 1985**

**11.13** Explanation to section 43 shows that a private vehicle would not come within the

expression "public place" as explained in section 43 of the NDPS Act, 1985. We explain this with a case decided by the Hon'ble High Court of Bombay.

**11.14** In the case **Folarin Abdullaseez Andoyin[12] ,** an application was moved by the applicant under section 439 of the Cr. P.C., 1973 in Crime No. 616 of 2019 registered with Police Station Chaturshrungi, Pune, for offences punishable under section 8(c) and 21(c) of the NDPS Act, 1985 read with section 65(E) of Maharashtra Prohibition Act and under section 14 of Foreigner Act, 1946. **The petitioner was found alighting from a silver Honda CRV bearing number MH 43 R9 245 parked on the side of on public road, in front of Mahi Rose Nursery**. After apprising him of his statutory right of search, to which he declined, the raiding party carried out the search in presence of panchas and found **488 grams and 490 milligrams white cocaine powder in a white transparent plastic bag worth Rs. 48,62,800/-**. The car was also searched and cash of Rs.8,39,490/- along with other articles was found. The counsel for the applicant advanced that there was total non-compliance of mandatory provisions of section 42 of the NDPS Act, 1985 and relied upon the case laws **(i) Sarija Banu @ Janarthani @ Janani and another[13] and (ii) Boota Singh & Ors[14]** both decided by the Hon'ble Supreme Court.

**11.14.1** The Hon'ble High Court, after hearing the rival submissions **held that there was no compliance of section 42 with regard to writing down the information received and thereafter sending a copy thereof to superior officer, which should normally precede the entry, search and seizure by the officer. It was also noted that there were no special circumstances, involving any** emergent situation, the recording of the information in writing and sending a copy thereof to the officer superior may get postponed by a reasonable period, i.e. after the search, entry and seizure. **Furthermore, the petitioner was found in silver Honda CRV bearing number MH 43 R9 245 which by no stretch of imagination can be termed as a public conveyance and does not fall within the ambit of the "public place'' in terms of Explanation to section 43 of the NDPS Act, 1985 and accordingly enlarged the petitioner on bail.**

**11.14.2** It is important to classify the offence under the NDPS Act, 1985 properly and comply with the mandatory provisions of law**.**

## SEARCH AND SEIZURE OF A CONVEYANCE/ANIMAL UNDER THE NDPS ACT, 1985

**11.15** Section 42 and 43 of the NDPS Act, 1985 refers. The empowered officer, under section 42(1)(c ) of the NDPS Act, 1985 empowers to seize *"any animal or conveyance for which he has reason to believe to be liable to confiscation under this Act and any document or other*

*article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act". Similarly, we find that section 43 of the Act empowers the empowered officer to "**seize in any public place or in transit**, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any **animal or conveyance** or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act"*

## SEARCH OF A PERSON UNDER SECTION 50 OF THE NDPS ACT, 1985

**11.16** Search of a person is effected under section 50 of the NDPS Act, 1985. For a detailed analysis, refer to the extensive analysis on the issue by the author by visiting https://doij.org/10.10000/IJLMH.112916

## CONSCIOUS POSSESSION UNDER THE NDPS ACT, 1985

**11.17** Conscious possession is a concept that is required to understood for implementation of the provisions of NDPS Act, 1985.

**11.17.1** The NDPS Act, 1985 itself does not use the term 'conscious possession'. The term has its origins in a catena of Supreme Court and High Court judgements, which have held that the term 'possession' under the NDPS Act, 1985 must mean conscious or mental state of possession and not merely physical possession. The courts have laid down that 'possession' consists of two elements- physical control and second the intent. Courts have drawn this element of mental state from section 35 of the NDPS Act, 1985 which deals with the presumption of mental state of accused.

**11.17.2** In the case of **Mohan Lal[15],** the Division Bench of the Hon'ble Supreme Court held as under:

> *"11. When one conceives of possession, **it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody"**. Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word "possession". The classical theory of the English law on the term "possession" is fundamentally dominated by Savigny-ian "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between*

*"corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word "possession" can be usefully defined and understood with reference to the contextual purpose for the said expression.* ***The word "possession" may have one meaning in one connection and another meaning in another.***

***12. The term "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control. One of the definitions of "possession" given in Black's Law Dictionary is as follows:***

***"Possession.—Having control over a thing with the intent to have and to exercise such control. Oswald v. Weigel [219 Kan 616 : 549 P 2d 568 at p. 569 (1976)] . The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.***

***The law, in general, recognizes two kinds of possession : actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint."***

***In the said Dictionary, the term "possess" in the context of narcotic drug laws means:***

***"Term 'possess', under narcotic drug laws, means actual control, care and management of the drug. Collini v. State [487 SW 2d 132 at p. 135 (Tex Cr***

***App 1972)] . Defendant 'possesses' controlled substance when defendant knows of substance's presence, substance is immediately accessible, and defendant exercises 'dominion or control' over substance. State v. Hornaday [105 Wash 2d 120 : 713 P 2d 71 at p. 74 (Wash 1986)] ."***

***And again:***

***"Criminal law.—Possession as necessary for conviction of offense of possession of controlled substances with intent to distribute may be constructive as well as actual, United States v. Craig [522 F 2d 29 at p. 31 (6th Cir 1975)] ; as well as joint or exclusive, Garvey v. State [176 Ga App 268 : 335 SE 2d 640 at p. 647 (1985)] . The defendants must have had dominion and control over the contraband with knowledge of its presence and character. United States v. Morando-Alvarez [520 F 2d 882 at p. 884 (9th Cir 1975)] .***

***Possession, as an element of offense of stolen goods, is not limited to actual manual control upon or about the person, but extends to things under one's power and dominion. McConnell v. State [48 Ala App 523 : 266 So 2d 328 at p. 333 (1972)] .***

***Possession as used in indictment charging possession of stolen mail may mean actual possession or constructive possession. United States v. Ellison [469 F 2d 413 at p. 415 (9th Cir 1972)] .***

***To constitute 'possession' of a concealable weapon under statute proscribing possession of a concealable weapon by a felon, it is sufficient that defendant have constructive possession and immediate access to the weapon. State v. Kelley [12 Or App 496 : 507 P 2d 837 at p. 837 (1973)] ."***

13. In Stroud's Dictionary, the term "possession" has been defined as follows:

> *"'Possession' [Drugs (Prevention of Misuse) Act, 1964 (c. 64), Section 1(1)]. A person does not lose 'possession' of an article which is mislaid or thought erroneously to have been destroyed or disposed of, if, in fact, it remains in his care and control (R. v. Buswell [(1972) 1 WLR 64 : (1972) 1 All ER 75 (CA)] ).*
>
> *16. Coming to the context of Section 18 of the NDPS Act, it would have a reference to the concept of conscious possession. The legislature while*

*enacting the said law was absolutely aware of the said element and that the word "possession" refers to a mental state as is noticeable from the language employed in Section 35 of the NDPS Act. The said provision reads as follows:*

*"35.Presumption of culpable mental state.—(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

*Explanation.—In this section 'culpable mental state' includes intention, motive, knowledge, of a fact and belief in, or reason to believe, a fact.*

*(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."*

*17. On a perusal of the aforesaid provision, it is plain as day that it includes knowledge of a fact. That apart, Section 35 raises a presumption as to knowledge and culpable mental state from the possession of illicit articles. The expression "possess or possessed" is often used in connection with statutory offences of being in possession of prohibited drugs and contraband substances. Conscious or mental state of possession is necessary and that is the reason for enacting Section 35 of the NDPS Act.*

**11.17.3** Elaborating on the concept of conscious possession, we see another beautiful analysis by the Division Bench of the Hon'ble Supreme Court in the case of **Mohd. Nawaz Khan**[16] wherein it was held as under:

*"24. In the present case, the High Court while granting bail to the respondent adverted to two circumstances, namely, (i) absence of recovery of the contraband from the possession of the respondent; and (ii) the wrong name in the endorsement of translation of the statement under Section 67 of the NDPS Act.*

*25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is punishable under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic*

*substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In Madan Lal v. State of H.P. [Madan Lal v. State* of H.P., (2003) 7 SCC 465 : 2003 SCC (Cri) 1664] this Court held that : (SCC p. 472, paras 19-23 & 26)

> *"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.*

*20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.*

*21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.*

*22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] to work out a completely logical and precise definition of "possession" uniform[ly] applicable to all situations in the context of all statutes.*

***23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended**.*

***26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption***

***available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles**."*

*26. What amounts to "conscious possession" was also considered in Dharampal Singh v. State of Punjab [Dharampal Singh v. State of Punjab, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431] , where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case.* ***The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another****. In Mohan Lal v. State of Rajasthan [Mohan Lal v. State of Rajasthan, (2015) 6 SCC 222 : (2015) 3 SCC (Cri) 881] , this Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.*

*34.3. The quantity of contraband found in the vehicle is of a commercial quantity.*

*34.4. The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.*

*36. The High Court has clearly overlooked crucial requirements and glossed over the circumstances which were material to the issue as to whether a case for the grant of bail was established. In failing to do so, the order of the High Court becomes unsustainable. Moreover, it has emerged, during the course of the hearing that after the respondent was enlarged on bail he has consistently remained away from the criminal trial resulting in the issuance of a non-bailable warrant against him. The High Court ought to have given due weight to the seriousness and gravity of the crime which it has failed to do."*

**11.17.3.1** The crux of the judgment is that a person travelling in a public transport, who is accused of conscious possession *vis a vis* travelling in a private vehicle, wherein the driver and the co-traveller are known to each other and proved by Call Detail Records (as in this case) would be different. The concept of conscious possession is key to the NDPS Act, 1985.

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**PUNISHMENT FOR VEXATIOUS ENTRY, SEARCH, SEIZURE OR ARREST UNDER NDPS ACT, 1985**

**11.18.** In respect of the violations of the provisions of the NDPS Act, 1985, we find that section 58 and 59 of the NDPS Act, 1985 deal with the issue. The essence of the provisions is that under section 58 of the NDPS Act, 1985, a person empowered under section 42, 43 or 44 of the NDPS Act, 1985 who, *inter alia,* vexatiously detains, searches or arrests any person, he shall be punishable with imprisonment for a term which "***may extend to six months or with fine which may extend to one thousand rupees, or with both***.". However, section 59 of the NDPS Act, 1985 provides for more stringent punishment to any officer on whom, *inter alia,* any duty has been imposed , *"and who willfully aids in, or connives at, the contravention of any provision of this Act or any rule or order made thereunder, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees." However, in terms of section 59* (3) of the NDPS Act, 1985, *"No court shall take cognizance of any offence under sub-section (1) or sub-section (2) except on a complaint in writing made with the previous sanction of the Central Government, or as the case may be, the State Government."* The obtaining of previous sanction of the Central Government/Statement Government has not been envisaged under section 58 of the NDPS Act, 1985.

**11.19** For securing a conviction under the NDPS Act, 1985, it is essential that the mandatory procedural compliances envisaged for search, seizure and arrest under section 41,42, 43,50 & 57 are scrupulously followed, failing which the prosecution would not be in a position to secure a conviction. It is a settled law that higher the punishment, stricter would be scrutiny of evidences. It is emphasized here that the quantum of seizure in a NDPS case is of no consequence. What is important is the fact that the mandatory compliances in each of the section is scrupulously adhered to and the binding judgments of the Hon'ble Supreme Court and that of the Hon'ble High Courts are strictly followed.

**CGST ACT, 2017**

**12.** Moving further, we find that there are powers to Inspect, Search, Seize and Arrest under the provisions of CGST Act, 2017. Under the Customs Act, 1962, the Central Excise Act, 1944(leviable on (a) Petroleum crude (b) High speed diesel (c) Motor spirit (commonly known as petrol) (d) Natural gas (e) Aviation turbine fuel) or the erstwhile Finance Act, 1994 there is/was no provision for Inspection. The concept of Inspection has been introduced in CGST

Act, 2017. The relevant provisions are contained in Chapter XIV of CGST Act, 2017 and are as under:

***"Chapter: XIV***

***INSPECTION, SEARCH, SEIZURE AND ARREST***

*Section 67 : Power of inspection, search and seizure.*

*Section 68 : Inspection of goods in movement.*

*Section 69 : Power to arrest.*

*Section 70 : Power to summon persons to give evidence and produce documents.*

*Section 71 : Access to business premises.*

*Section 72 : Officers to assist proper officers."*

Provisions for Search and Seizure are provided in the Tax Statutes to protect the primary interest of the department i.e. Customs, CGST, SGST, Income Tax, Central Excise (on (a) Petroleum crude (b) High speed diesel (c) Motor spirit (commonly known as petrol) (d) Natural gas (e) Aviation turbine fuel). This is also a tool to segregate a genuine and honest tax payer *vis a vis* a tax evader.

**12.1** Esteemed readers may note that in the indirect tax regime prior to 1st July 2017, there was no legal provision for Inspection. Inspection has been introduced for the first time *via* Section 67(1) of the CGST Act, 2017. Needless to mention that the power to exercise Inspection, Search and Seizure is not a normal tool and has to be only in exceptional circumstances and as a last resort. Thus, to ensure that these provisions are used properly, effectively and the rights of taxpayers are also protected, it is stipulated that Inspection, Search or Seizure can only be carried out by a proper officer as per the procedure laid down i.e. when an officer not below the rank of Joint Commissioner has 'reasons to believe' that

> *"(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or*
>
> *(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods*

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*which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act,*

*he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place."*

**12.2** Section 67(2) of the CGST Act, 2017 reads as under:

*"(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has* ***reasons to believe*** *that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:*

*Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:*

*Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act."*

## DIFFERENCE BETWEEN INSPECTION AND SEARCH

**12.3** Moving into the core issue, it is necessary to understand the difference between Inspection and Search. Readers may kindly note that the term 'Inspection' in CGST Act, 2017 is akin to the term 'Survey' used in section 16 of PMLA, 2002. Under both the Acts, there should be reason to believe by the officer (Joint Commissioner for CGST Act, 2017 & an Authority, as per section 48 of PMLA, 2002) before the Inspection or Survey, as the case may be, is put to use.

**12.3.1** Inspection' is a milder provision than search which enables officers to access any place of business of a taxable person or of a person engaged in transporting goods or who is an owner or an operator of a warehouse or godown.

**12.4** In contrast, 'Search' under section 67(2) denotes an action of to go, look through or examine carefully a place, area, person, materials, etc. in order to find something concealed or for the purpose of discovering evidence of tax evasion. Under CGST Act, 2017 and the Rules made thereunder, inspection, as well as search, can be carried out only after authorization by a proper officer not below the rank of Joint Commissioner and such proper officer must have reason to believe the existence of exceptional circumstances to justify invoking provisions of Search and Seizure. Sections 67 to 72 of the CGST Act, 2017 read with rules 139 to 141 of CGST Rules, 2017 deal with powers and procedure of Inspection, Search, Seizure & Arrest. In short, the issuance of a Search Authorisation under sub-section (1) or under sub-section (2) should reflect the application of mind and in any way should not be construed as toeing the line of the officers down below or simply acceding to the requests received from other formations. Alternatively put, the exercise of issuance of a Search Authorisation should fall well within the four corners of law.

**12.5** Furthermore, the proper officer to issue a Search Authorisation under the NDPS Act, 1985 is a Gazetted Officer of the empowered department (i.e. Superintendent of Customs, Superintendent of Central Tax). In the case of the Customs Act, 1962, the Assistant Commissioner of Customs is the proper officer to issue a Search Authorisation.

## APPLICABILITY OF PROVISIONS OF CR.P.C. 1973 TO SEARCH AND SEIZURE UNDER CGST ACT, 2017

**12.6** Section 67(10) of CGST/SGST Act prescribes that search must be carried out in accordance with the provisions of Code of Criminal Procedure, 1973. Section 100 of the Code of Criminal Procedure, 1973 describes the procedure for search.

## REASON TO BELIEVE – Explained

**12.7** In order to issue a Search Authorisation, there should be reasons to believe.

'Reasons to believe' has not been defined under the CGST Act, 2017. Neither it has been defined under the NDPS Act, 1985 or the PMLA, 2002. However, the same has been defined under section 26 of Indian Penal Code, 1860, as under:

> *'Reason to believe — A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.'*

## WHAT ARE 'REASONS TO BELIEVE' UNDER CGST ACT, 2017?

**12.7.1** Reason to believe would come into force when

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a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act.

## DIFFERENCE BETWEEN REASONS TO BELIEVE AND REASONS TO SUSPECT

**12.7.1.1** The phrase used in section 67 of CGST Act, 2017 is **'reason to believe'** and not '**reason to suspect'.** Both the phrases are not interchangeable. Reason to suspect is subordinate to reason to believe and cannot be equated with reason to believe. In other words, reasons to believe is on a higher pedestal in contradistinction to reasons to suspect. The information received, by anonymous letters, complaints from rivals, pseudo complaints, etc. is at best allegations only, which can raise suspicion in the mind of the authorities. Based on the above, an enquiry can be triggered to find out the actuality as to whether there is any material leading to formation of reason to believe. The proper officer needs to undertake independent inquiry, due diligence to convert the information in to reason to believe. The inquiry necessitates analysis of information as well as collection of additional material that would make him believe that the information in his possession can lead to reason to believe. While issuing a Search Authorisation, the Joint Commissioner's belief must be an honest and reasonable one which should be invariably based upon the relevant and legally sustainable materials and circumstances. The satisfaction has to be of the Proper Officer not below the rank of Joint Commissioner. The Proper Officer should have, *inter alia,* reasons to believe that a taxable person has suppressed any transaction relating to supply of goods or services or both

## ISSUANCE OF SEARCH AUTHORISATION WITHOUT APPLICATION OF MIND

**12.7.2** In case of **M/s R J Trading Company**[17]**, the issue in this case was as to whether, the authorization for conducting search and seizure at RJT's premises had been given bearing in mind, the pre-requisites provided in section 67(2) of the CGST Act, 2017**? The Additional Commissioner, CGST Delhi North Commissionerate exercised his powers for according authorization to conduct search and seizure, at RJT's premises, even though the jurisdictional ingredients were absent. The request of Joint Commissioner (AE), Gautam Budh Nagar conveyed through the communication dated 05.03.2021, was only to ascertain as to whether

RJT, which was the L2 supplier of M/s Mridul Tobie Inc., was in existence. It was held by the Hon'ble High Court of Delhi that there was no independent application of mind by the Additional Commissioner, CGST Delhi North Commissionerate.

**WRONG EXERCISE OF POWER UNDER S67(2) – HIGH COURT MAKING THE OFFICER A RESPONDENT IN THE PROCEEDINGS BEFORE IT**

**12.7.2.1** In the case of **Prakashsinh Hathisinh Udavat**[18], the impugned petition challenged the order of seizure dated 25th October 2018 passed by Shri B.B. Pandor, Assistant Commissioner of State Tax (1) (Enforcement), Division-1, Ahmedabad whereby the vehicle of the petitioner bearing No.GJ-01-RX-0477 and two phones were seized. Such order of seizure was made in exercise of power under sub-section (2) of section 67 of the Central Goods and Services Tax Act/ Gujarat Goods and Services Tax Act, 2017. The learned Assistant Government Pleader, upon a perusal of the record of the case, was not in a position to point out any authorisation having been issued by a person not below the rank of Joint Commissioner for carrying out search in accordance with the provisions of sub-section (2) of section 67 of the CGST/ GGST Act, 2017. The Hon'ble High Court held that *"the impugned action of the said Officer appears to be totally without any authority of law''* **and made Shri B.B. Pandor as respondent No.4 in these proceedings, with directions to explain as to under what circumstances and in exercise of which powers he had issued the impugned order.**

**EXISTENCE OF REASONS TO BELIEVE IS A CONDITION PRECEDENT TO THE ISSUANCE OF A SEARCH AUTHORISATION**

**12.7.2.2** In Writ Petition (St.) NO.97165 of 2020 in the case of **M/s AJE India Private Limited**[19]**, the** Division Bench of the Hon'ble Bombay High Court in para 21 of the subject case held as under:

> *"21. A conjoint reading of the relevant provisions of section 67 and section 83 of the CGST Act would indicate that the proper officer must have reasons to believe that the taxable person has suppressed any taxable transaction to evade payment of tax. It is not necessary for us at this stage to delve into the meaning of the expression reasons to believe employed in section 67 which has its own connotation in fiscal statutes. Suffice it to say, requirement of section 67(1)(a) is that the proper officer should have reasons to believe that the taxable person has suppressed any taxable transaction to evade payment of tax''*

**USE OF PROVISIONS OF SECTION 67(12) OF THE CGST ACT, 2017**

**12.7.3** Section 67(12) of the CGST Act, 2017 reads as under:

> *"The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.''*

**PURPOSE OF TEST PURCHASE**

**12.7.4** The concept of Test Purchase is a new concept introduced into CGST Act, 2017 and such a provision was not there in any of the indirect tax legislations. The main purposes of the Test Purchase are:

(i) To ensure compliance in issuing tax invoice / bill of supply by the taxable person.

(ii) To prevent composition taxable persons/unregistered persons from collecting tax from the customers.

(iii) Thereby prevent possible evasion of tax.

**SELECTION OF CASES FOR TEST PURCHASE**

**12.7.5** The Test Purchase is an important tool in the detection of evasion of CGST/SGST. The selection of the cases should be based on valid parameters and should be directly linked to evasion. To illustrate, the selection of cases can be on the basis of the following criteria:

1. Tax Payers who are doing business in large volume, but paying very meagre amount of tax, as cash.

2. Unregistered persons who are doing business and whose turnover is suspected to be higher than the threshold mentioned in the Act, warranting registration, but, who have not obtained registration under the Act.

3. Specific complaints containing the details in writing or on dedicated email/web portal received from the public, if any.

4. Evasion prone commodities and retail business, for which, mostly estimation slips are issued, like, Cement, Tiles, Construction Materials, Granite, Hardware, Paints, Electrical Goods, Electronic Goods, Iron & Steel, Timber, Jewellery, House Hold

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Articles, Furniture, Automobile Spare Parts, Edible Oil, FMCG, Groceries, Bakery products, Medicines, etc.,

5. All Services offered in Hotels, Restaurants, Sweet Stalls, Amusement Parks, etc.,

6. Personal Services, Hair Salons, Spas, Gyms, Watertank cleaning services, AC/Fridge and electronic gadget repair and maintenance services, Rental Services, etc.,

7. Unregistered taxable persons against whom complaints have been received, along with valid supporting documentary evidences. Unregistered units deliberately underreporting their turnover or splitting up or opening new units in the name of the employees, showing them as proprietor, etc.

8.In respect of complaints received against unregistered taxable persons, without valid supporting documentary evidences, test purchase can be done after making discreet enquiry.

**12.7.5.1** If properly worked upon, the same can result into detection of cases of evasion of Central Tax under CGST Act, 2017 and State Tax under respective UTGST/ SGST Act, 2017.

**DETENTION, SEIZURE AND RELEASE OF GOODS AND CONVEYANCES IN TRANSIT**

**12.8** The aforesaid provisions are covered under section 129 of the CGST Act, 2017. This section empowers the proper officer to detain or seize goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance. Section 129 of the CGST Act, 2017 further mandates that the goods or conveyance shall not be seized/detained without serving an order of detention or seizure on the person transporting the goods. The manner of dealing with the goods or conveyance has to be done in the manner laid down under section 129 of the CGST Act, 2017.

**DIFFERENCE BETWEEN DETENTION AND SEIZURE**

**12.9** Under Section 129 of CGST Act, 2017, an officer has power to detain goods along with the conveyance (like a truck or other types of vehicles) transporting the goods. This can be done for such goods which are being transported or are stored in transit in violation of the provisions of CGST/SGST Act. Goods which are stored or are kept in stock but not accounted for can also be detained. Such goods and conveyance shall be released after payment of applicable tax or upon furnishing security of equivalent amount. Denial of access to the owner of the property or the person who possesses the property at a particular point of time by a legal order/notice is called detention. Seizure is taking over of actual possession of the goods by the department.

Detention order is issued when it is suspected that the goods are liable to confiscation. Seizure can be made only on the reasonable belief which is arrived at after inquiry/investigation that the goods are liable to confiscation.

**12.9.1** An amendment has been made in Explanation 1(ii) of section 74 of the CGST Act, 2017 so as to make seizure (Section 129 of the CGST Act) and confiscation of goods and conveyances in transit (Section 130 of the CGST Act), a separate proceeding from recovery of tax under Section 73 (determination of tax in non-fraud cases) or Section 74 (determination of tax in fraud cases) of the CGST Act, 2017.

**DIFFERENCE BETWEEN INSPECTION AND SEARCH & SEIZURE**

**12.10.** Inspection is a new concept introduced in the CGST Act, 2017 and there is/was no concept of Inspection in any of indirect taxation statutes prior to CGST Act, 2017 coming into force. The difference between Inspection under section 67(1) of the CGST Act, 2017 and search and seizure under section 67(2) of the CGST Act, 2017 is as under:

| **Section 67(1) of the CGST Act, 2017** | **Section 67(2) of the CGST Act, 2017** |
|---|---|
| Deals with Inspection | Deals with Search and Seizure |
| Deals with taxable person.<br><br>"Taxable person'' has been defined under s2(107) of the CGST act, 2017 to be a person who is registered or liable to be registered under section 22 or section 24. | Does note explicitly speak of taxable person or otherwise. Since there is a reference to sub-section (1) of s67 of the CGST Act, 2017, this sub-section covers the taxable person as defined under s2(107) of the CGST Act, 2017 |
| Inspection' is a softer provision than search which enables officers to access any place of business of a taxable person or of a person engaged in transporting goods or who is an owner or an operator of a warehouse or godown. | Search', in simple language, denotes an action of government machinery to go, look through or examine carefully a place, area, person, object, etc. in order to find something concealed or for the purpose of discovering evidence of a crime.<br><br>'Search' involves an attempt to find something or discover something. Search, in tax/legal parlance, is an action of a government official (a tax officer or a police |

| | |
|---|---|
| | officer, depending on the case) to go and look through or examine carefully a place, person, object, etc. in order to find something concealed or to discover evidence of a crime. The search can only be done under the proper and valid authority of law. |
| **The provisions of the Code of Criminal Procedure, 1973 will not apply to inspection**. | **The provisions of the Code of Criminal Procedure, 1973 will apply to search and seizure.** |
| Inspection does not lead to taking over of any goods or documents. On the basis of Inspection, it can be concluded that a case of evasion of GST exits or on account of non-maintenance of proper records, the same indicating evasion, can be detected. | The term 'seizure' has not been specifically defined in GST. In legal parlance, seizure is the act of taking over something by force through legal process, such as the seizure of evidence found at the time of visit of the Officers. It generally implies taking possession forcibly against the wishes of the owner. |
| Inspection may immediately result in search and seizure and not vice versa. | Not allowing the owner any access to the seized goods by a legal order/notice is called detention. However, the ownership & possession of goods still lie with the owner. It is issued when it is suspected that the goods are liable to confiscation.<br><br>Seizure is taking over or actual possession of the goods by the department. But the ownership is still with the owner. Seizure can be made only after inquiry/investigation that the goods are liable to confiscation. |
| | The proper officer will give an order of seizure in FORM GST INS-02. |

| | |
|---|---|
| | If it is not practicable to seize the goods, the proper officer will order the owner not to remove these goods without prior permission of the officer. The officer will issue an order of prohibition in FORM GST INS-03. |
| | The officer will keep the books and documents as long as it is necessary for examination and inquiry. Other books which are not relevant to the issue of notice will be returned within 30 days from the date of notice. The seized goods can be released on a provisional basis against a bond for the value of the goods in FORM GST INS-04. The owner must also furnish a security in the form of a bank guarantee for the amount due (applicable tax, interest and penalty payable). If the owner fails to produce the provisionally released goods at the appointed date and place then the security will be encashed and adjusted against the amount due. |

**12.11** In order to appreciate the areas of similarity and difference between the seizure and confiscation (in terms of section 130 of the CGST Act, 2017), the same can be summed up as under: -

| **Criteria** | **Seizure (section 67(2) of the CGST Act, 2017** | **Confiscation (section 130 of the CGST Act, 2017)** |
|---|---|---|
| **Applicability** | Any goods, documents, books or things | Only offending goods |
| **Manner** | Actual custody or constructive custody | Actual custody |
| **Authority** | Held in trust, no change of ownership | Held in trust, no change of ownership unless adjudication completed |

| **Duration of holding** | Until required for examination / inquiry / proceedings. If no notice issued, 6 months (and a further period of 6 months if extended by proper officer) | Until issue of notice for adjudication and opportunity to pay penalty-in-lieu of confiscation |
|---|---|---|
| **Conclusion** | Return articles that are not 'offending articles' | Title to pass and vest with Central Government as per order of adjudication |

**WHETHER "PLACE OF BUSINESS'' INCLUDES A PLACE NOT DISCLOSED TO THE REVENUE?**

**12.12** The place of business has been defined under s2(85) of CGST Act, 2017 in such a way that it would include both the disclosed place/s of business and the undisclosed place/s of business of a taxable person.

**WHETHER THE POWER TO SEIZE "THINGS'' INCLUDE CASH?**

**12.13** The term 'money' has not been defined under the CGST Act, 2017. However, we see that in the case of **Smt. Kanishka Matta**[20], the core issue was whether or not the expression "things" under section 67(2) of CGST Act 2017 covers within its meaning 'cash' or not. The petitioner's contention was that the word "money" was not included in section 67(2) and, therefore, once the "money" is not included under section 67(2), the Investigating Agency / Department is not competent to seize the same.

**12.13.1** At this stage, it is essential to extract the definition of the term "goods" under the Customs Act, 1962, which is as under:

> "(22) "goods" includes -
>
> (a) vessels, aircrafts and vehicles;
>
> (b) stores;
>
> (c) baggage;
>
> (d) **currency and negotiable instruments; and**
>
> (e) any other kind of movable property;"

**12.13.2** It may be seen that "currency and negotiable instruments" form part of the definition of the term goods under section 2(22) of the Customs Act, 1962. In contrast, the term "money" has been defined under section 2(75) of CGST Act, 2017 as under:-

> *"(75) "money" means **the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange**, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognised by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value;"*

**12.13.3** Be that as it may, the Division Bench of the Hon'ble Madhya Pradesh High Court held that it **is a cardinal principle of interpretation of statute that unreasonable and inconvenient results are to be avoided, artificially and anomaly to be avoided and most importantly a statute is to be given interpretation which suppresses the mischief and advances the remedy**. In interpreting the word "thing", **money has to be included and it cannot be excluded as prayed by the petitioner from section 67(2) of the CGST Act, 2017.** It was held that the authorities had rightly seized the amount from the husband of the petitioner and unless and until the investigation is carried out and the matter is finally adjudicated, the question of releasing the amount did not arise.

**BASIC REQUIREMENTS TO BE OBSERVED DURING SEARCH OPERATIONS**

**12.14** The search operations are conducted in all the statutes under reference. The procedure and basic requirements to be observed during search operations are the same for all the statutes. It is required to be noted that the provisions of Cr. P.C., 1973 have been made applicable to various statutes. Hence, unless a contrary intention is expressed in the statute, the provisions of Cr. P.C., 1973 would be applicable to all the statutes under reference. It is emphasized here that a Search Authorisation is different from a Search Warrant. Search Warrant is always issued by a Judicial Officer while a Search Authorisation is issued by an officer, with whom the power is vested under the respective statutes under reference. The following should be observed scrupulously observed by the all the officer armed with a Search Authorisation issued by the Proper Officer/Empowered Officer (under NDPS Act, 1985) or Search Warrant issued by the Judicial Magistrate (in NDPS Act, 1985). No search of a premises should be carried out without a valid search authorisation issued by the proper officer under the CGST Act, 2017 & Customs Act, 1962 and by the empowered Gazetted Officer of the empowered department under the NDPS Act, 1985.

(i) All the parts of the residential place, godown, warehouse, manufacturing place should be checked thoroughly. Officers to note for specially created cavity for

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storing records. Officers to watch out for electronic devices i.e. laptops, desktops, smart phones (mobile phones).

(ii) There should invariably be a lady officer accompanying the search team to residence.

(iii) In case of search undertaken under the provisions of the NDPS Act, 1985, it should be ensured that only the empowered officer under the NDPS Act, 1985 conducts the search of the person and that too after issuance of a Notice under section 50 of the NDPS Act, 1985. Failure to adhere to this would vitiate the trial proceedings.

(iv) The search of the lady has to be done by the lady officer after adhering to strict rules of decency and privacy.

(v) Pardahnashi ladies are eligible to withdraw before the search party enters.

(vi) Children can be allowed to go to school, subject to their school bags being checked.

(vii) The officers before starting the search should disclose their identity by showing their identity cards to the person in-charge of the premises.

(viii) The panch witnesses should be accompanied at the time of visit. They should be introduced to the person in charge or owner of the premises or authorised signatory of the firm/company, etc.

(ix) The search should be made in the presence of at least two independent witnesses of the locality. If no such inhabitants are available /willing, the inhabitants of any other locality should be asked to be witness to the search. The witnesses should be briefed about the purpose of the search.

(x) The search authorisation should be executed before the start of the search by showing the same to the person in-charge of the premises and his signature should be taken on the body of the search authorisation in token of having seen the same.

(xi) The signatures of at least two witnesses should also be taken on the body of the search authorisation.

(xii) The Officers should not take recourse to stock witnesses and using stock witness creates problems at a later point of time.

(xiii) Before the start of the search proceedings, the team of officers conducting the search and the accompanying witnesses should offer themselves for their personal search to the person in-charge of the premises being searched. Similarly, after the completion of search all the officers and the witnesses should again offer themselves for their personal search.

(xiv) Religious sentiments shall be respected of the persons found in the visiting premises.

(xv) All elderly people and woman of the house are to be respected and should any of the occupants require any medical assistance, the medical practitioner may be called.

(xvi) The loose papers, *kachcha* papers, estimates, ledgers, note books or any documents having entries regarding clandestine removal of goods, mis-declaration of goods by undervaluation, wrong classification, mis-declaration of quantity, etc. should be carefully studied and segregated.

(xvii) Loose papers/kachcha papers evidencing evasion by any methods, as mentioned above, is required to be taken over and placed in a made-up file and should be serially numbered and signed by the signatories to the panchnama on all the pages of the loose papers.

(xviii) In respect of bound books/ledger/notebook and similar documents, the first and last page should be signed by the signatories to the panchnama. It should be categorically mentioned in the panchnama that the pages are written from page no. one to page No. XXX and page No. YYY to Page No. ZZZ are blank.

(xix) Electronic evidences should be collected in the manner laid down under the respective Acts under reference read with provisions of section 65B of the Indian Evidence Act, 1872.

(xx) The search authorisation should be returned to the issuing officer by making necessary remarks on the reverse of the same i.e. whether executed or not and if executed, the outcome of the same, etc. and the officers who participated in the same.

**TYPES OF OFFENCES, INCLUDING WHETHER COGNIZABLE OR NON-COGNIZABLE, UNDER SECTION 132 OF CGST ACT, 2017?**

**12.15** Differences types of offences under the CGST Act, 2017 have been classified into cognizable and non-cognizable offences and they are tabulated as under:-

| **Type of offences listed** | **Cognizable** | **Non-cognizable** |
|---|---|---|
| (a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax; | Yes. Punishable under clause(i) of section 132(1) of CGST Act, 2017 | - |
| (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax; | | - |
| (c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill; | | - |
| (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due; | | - |
| (e) evades tax or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d); | - | Non-Cognizable |
| (g) obstructs or prevents any officer in the discharge of his duties under this Act; | - | Non-Cognizable In terms of section 132 (4) of the CGST Act, 2017 all |
| (h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to | - | |

| | | |
|---|---|---|
| confiscation under this Act or the rules made thereunder; | | offences under this Act, except the offences referred to in sub-section (5), shall be non-cognizable and bailable. |
| (i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder; | - | |
| (j) tampers with or destroys any material evidence or documents; | - | |
| (k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or | - | |
| (l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section | - | |

**COGNIZANCE OF COMPLAINT**

**12.16** In terms of section 134 of the CGST Act, 2017, it has been mandated that no court shall take cognizance of any offence punishable under the CGST Act, 2017 or the rules made thereunder except with the previous sanction of the Commissioner. This section further lays down that no court inferior to that of a Magistrate of the First Class can try offences under the CGST Act, 2017.

**12.16.1** Further, in terms of section 133(2) of the CGST Act, 2017 *"Any person-*

*(a) who is a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Government;*

*(b) who is not a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner."*

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**FILING OF COMPLAINT– TIME FRAME**

**12.17.** Arresting a person for the offence committed is the start point of a case for a prosecuting agency. The prosecuting agency is required to file the complaint within the time limit, failing which the person shall be entitled to default bail. The time limits applicable for the offences under different statutes are as under:

| Name of the Act | No of days required for filing of a complaint/chargesheet from the date of arrest |
|---|---|
| NDPS Act, 1985 | Small Quantity and Intermediate Quantity = 60 days |
| | Commercial Quantity = 180 days<br>In terms of proviso to section 36A(4) of the NDPS Act, 1985, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days. |
| Customs Act, 1962 | 60 days |
| CGST Act, 2017 | 60 days |
| PMLA, 2002 | 60 days – where the punishment prescribed is three years but which may extend to seven years under section 4(1) |
| | 90 days - paragraph 2 of Part A of the Schedule.<br>Paragraph 2 of Part A of the Schedule deal with offences under the NDPS Act, 1985, where punishment may extend to ten years.<br>Note:<br>1. **In terms of section 36A(4) of the NDPS Act, 1985, in respect of offences involving commercial quantity, the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety** |

| | **days", where they occur, shall be construed as reference to "one hundred and eighty days", which is extendable up to one year on the report of the Public Prosecutor by the Ld. Court under proviso to section 36A(4) of the NDPS Act, 1985.**<br>2. No extension of time by the Court is envisaged under any of the Acts referred to herein except NDPS Act, 1985. |
|---|---|

**OFFENCES UNDER NDPS ACT, 1985 *VIS A VIS* OFFENCES OTHER ACTS AND ITS IMPACT**

**12.18.** On the basis of the aforesaid discussion on various aspects of various legislations dealt with herein, the NDPS Act, 1985 is the most powerful one, which provides power to an empowered officer of the rank of constable and above to search, seize and arrest under section 42, 43 and 44 of the NDPS Act, 1985. Since in commercial quantity, the minimum punishment prescribed is 10 years and in intermediate quantity, the punishment may be up to 10 years, it is always advisable to implement the provisions of the NDPS Act, 1985 properly and correctly.

**12.18.1** To illustrate we may refer to the **case of Novafor Samuel Inoamaobi[21] .**The facts of the case, in brief, are that on the basis of specific information received that a Nigerian would be coming on the given spot at the given time to sell cocaine, a team was formed by the ATS and raid was conducted. The action of the applicant was alleged to be suspicious and on conducting his personal search, the alleged contraband purported to be cocaine concealed in blue coloured plastic bag weighing around 116.19 grams and a transparent plastic pouch containing saffron coloured heart shape pills weighing around 40.73 grams and some pink coloured Ecstasy tablets weighing around 4.41 grams were recovered. He was arrested on 23rd October 2020 and FIR No.7/2020 came to be lodged. The seized substances were sent to FSL, Kalina for Chemical Examination and vide report dated 8th February 2021, received from the Forensic Science Laboratory, Kalina when the seized material stated that Exhibit-1, a white powder in a press-closed polythene bag was reported to have contained Lidocaine and Tapentadol and pink colour tablets were found to be Caffeine. The aforesaid documents in form of "Examination Report" dated 8th February 2021 was held to be sufficient to charge the bail applicant under sections 8(c ), 20, 22 of NDPS Act, 1985. The Assistant Director realized the mistake committed by him while issuing his report dated 8th February 2021 and he addressed a communication to the Sr. PI, ATS, Thane informing him that while issuing the report, he had committed a mistake in submitting, that Exhibit-1 falls under NDPS Act, 1985. It was clarified

that this was a typing mistake and he expressed his apology. He issued a corrigendum dated 4th August 2022, the sum and substance of which are that *"Lidocaine and Tapentadol are detected in exhibit no. (1). Tapentadol and Caffeine are detected in exhibit no. (2). Caffeine is detected in exhibit no. (3)."* The Hon'ble High Court of Bombay, after hearing the counsel for the petitioner, held as under:

> *"5 In the wake of the aforesaid corrigendum, it is clear that the substance which was alleged to be contraband and recovered from the applicant at the time when the raid was conducted, do not fall within the purview of The Narcotic Drugs and Psychotropic Substances Act.*
>
> *6 Needless to state that the* ***applicant deserve his release on bail.***
>
> *7* ***The error, which is sought to be explained and projected as a typing error, is a blatant mistake, which is admitted by the Assistant Director after more than a year,*** *of incarceration of the applicant. It deserve to be looked at seriously, but for the said report, the applicant could not have been detained.*
>
> *8 Liberty of an individual is of paramount importance and it is the fulcrum of the Indian democracy. Recognized as a fundamental right, enshrined in Article 2, it is available to every person, citizens and foreigners alike.*
>
> *The incarceration of the applicant, with the above clarification, has therefore, become unlawful, as, but for this report, no offence could have been made out against him.*
>
> *9 The State Authorities, though supreme and in-charge of the law and order situation, which includes implementation of various statutes intended to achieve specific purpose and particularly a special statute like NDPS are expected to behave in a responsible manner.*

**12.18.2** In this case, the Hon'ble High Court of Bombay on 12th August 2022, *suo moto* directed the Government of Maharashtra to pay Rs. 2 lakhs as compensation within 6 weeks to the accused for wrongful incarceration after the State submitted that it does not have a policy for compensation.

**12.19** Similarly, we find in **the case of Khurshid Ahmad Dar[22]** that on 9th Feburary 2020, the police intercepted a vehicle bearing No.JK03F-2341 that was proceeding from Qazigund to Bijbehara. The petitioner was in-charge of the vehicle at the relevant time and upon search of the vehicle, 35 strips of Sposmo Proxyvan capsules were recovered and in all, 840 capsules were

found in these 35 strips. The petitioner could not produce any authorization or document as regards the possession of the aforesaid drug. FIR No.08/2020 for offences under Section 21/22 of the NDPS Act, 1985 came to be registered with Police Station, Bijbehara and the accused was taken into custody. The recovered capsules were seized and sample thereof was sent to the FSL, Srinagar, for its examination. After completion of the investigation, offences under section 21/22 of the NDPS Act were found established.

**12.19.1** The main ground that has been urged by the learned counsel for the petitioner in both these petitions is that as per the FSL report, "Tapentadol" was detected in the sample of the capsules that were sent by the investigating agency to the FSL for examination. According to the learned counsel for the petitioner, the aforesaid drug does not find its mention in the Schedule to the NDPS Act, 1985, as such, the petitioner against the petitioner and the challan was laid before the trial court could not have been charged for offences under section 21/22 of the NDPS Act , 1985 and consequently the rigor of Section 37 of the NDPS Act in the matter of grant of bail to the petitioner could not have been invoked by the learned trial court while rejecting his bail applications.

**12.19.2** It may be seen from para 20 of the judgment, the **Hon'ble High Court had pulled up the Ld. Trial Court too *"for exceeding its jurisdiction."***

**12.19.3** The Hon'ble High Court, after hearing rival submissions, held as under.

> *"15) In the light of the aforesaid legal position, let us now advert to the facts of the instant case. As already noted, the drug allegedly recovered from the petitioner is 'Spasmo Proxyvan-T Plus' and as per the report of the FSL, the said drug contains the substance 'Tapentadol'. The notification issued by the Ministry of Finance, Government of India, mentioning the name of the manufactured drugs does not include the name of the substance 'Tapentadol'. Even in the Schedule to the NDPS Act, 1985, 'Tapentadol' does not figure. Thus, it is clear that the drug recovered from the possession of the petitioner neither qualifies to be a manufactured drug/narcotic drug nor does it qualify to be a psychotropic substance.*
>
> *16) The learned trial court has, while framing charges against the petitioner and while rejecting his bail application on the ground that commercial quantity of psychotropic substance has been recovered from him, held that the drug recovered from the petitioner is not listed in the Schedule to the NDPS Act, but has gone on to observe that as per the FSL report, the drug in question*

*causes addiction and that the search undertaken through Google, shows that it is more aggressive than 'Tremadol' (sic). On this basis, the learned trial court has concluded that there are grounds for presuming that the petitioner has committed offences under Section 21/22 of the NDPS Act and that commercial quantity of the psychotropic substance has been recovered from him, thus, he does not deserve the concession of bail.*

*17) As has been already noted, it is only possession of those drugs which qualify to be either the manufactured drug/narcotic drug or psychotropic substance that has been made punishable by the provisions of the NDPS Act. The possession of any other drug or substance, unless it is notified to be a 'manufactured drug' or a 'psychotropic substance' even if it has adverse effects on its consumers or it causes addiction to its consumers, is not punishable under the provisions of the NDPS Act. The possession of any such drug which is neither a manufactured drug/narcotic drug nor a 'psychotropic substance' without a license or authority may be an offence under the Drugs and Cosmetics Act or J&K Excise Act but it does not qualify to be an offence under the provisions of the NDPS Act. 18) For the foregoing discussion, it is clear that the learned trial court has, while framing charges against the petitioner, landed itself into an error and it has again committed a grave illegality by invoking the provisions of Section 37 of the NDPS Act while rejecting the bail applications of the petitioner even on the basis of the material on record it could not have been, even prima facie, stated that the petitioner is involved in commission of an offence under the provisions of the NDPS Act.*

*20) It is a settled law that a trial court while framing charge against an accused has not to act as a post office but it has to apply its mind to the material produced on record by the investigating agency and frame its independent opinion upon consideration of the same. The trial court is not bound by the opinion of the investigating agency. In the instant case, the material on record, more particularly the report of the FSL, in clear cut terms shows that the drug recovered from the petitioner contain the substance 'Tapentadol' which has neither been notified as 'manufactured drug' nor the same has been included in the Schedule to the NDPS Act. In the presence of such clinching material on record,* ***it was not open to the trial court to just go***

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> ***by the opinion framed by the investigating agency, while framing charge against the petitioner and invoke the provisions of the NDPS Act while deciding his bail applications. The kind of drug that has been recovered from the possession of the petitioner may have an adverse impact on its consumers or even it may cause addiction but then it is for the Government to consider these aspects and having regard to the available information as to its nature, include it in the list of 'manufactured drugs' or 'psychotropic substances'. The Courts cannot enter into this arena and make a declaration that a particular drug is a 'manufactured drug' or a 'psychotropic substance'. This is exactly what the learned trial court has done, thereby exceeding its jurisdiction.***
>
> *21) For the forgoing reasons, both the petitions are allowed. The impugned order passed by the learned trial court framing charge against the petitioner under Section 21/22 of the NDPS Act is set aside. The matter is remanded back to the trial court to consider the question of framing of charges afresh and to determine as to whether the petitioner is prima facie involved in commission of any offence under any other statute, whereafter the trial court shall proceed in that matter in accordance with the law."*

**12.20.** In nutshell, while the proper officer or the empowered officer, as the case may be, implementing any of the Acts is required to implement it with due care and caution and while doing so cannot play with the liberty of an individual and that liberty of an individual conferred under Article 21 of the Constitution of India is of paramount importance and that cannot be taken away by wrong application of law and hence the need to be implement these Acts properly and correctly and with due application of mind.

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9B. Common Order dated 24th August 2022 passed by the Ld. Special Judge Under the PML Act, Gr. Bombay in PMLA SPL. Case N0.377 of 2021 in the case of Babulal Mulchand Varma & Ors v. Directorate of Enforcement, Mumbai

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11. Tofan Singh v. State of Tamil Nadu - (2021) 4 SCC 1

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13. Sarija Banu @ Janarthani @ Janani and another v. State Through Inspector of Police - (2004) 12 SCC 266

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15. Mohan Lal v. State of Rajasthan (2015) 6 SCC 222

16. Union of India v. Mohd. Nawaz Khan - 2021 SCC OnLine SC 1237

17. M/s R J Trading Company v. Commissioner of CGST North And Ors in Writ Petition WP (C) No. 4847/2021 decided on 20th July 2021 by the Hon'ble High Court of Delhi -2021-TIOL-1552-HC-DEL-GST

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