

Concept of 'Mens Rea' - Applicability in Penalties & Offences under GST



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Introduction

Like any other taxation law, the GST Law also provides for imposition of penalty and order of punishment for committing offences. The penalty is levied by quasi-judicial authorities and punishment in the form of imprisonment is ordered by the courts. The debate as to whether presence of *mens rea* is essential for imposition of penalty or for ordering punishment is as old as the taxation law itself. In this article, we are analysing GST Law provisions and the judicial pronouncements on this subject delivered in the context of similar provisions in other laws. Our analysis would be in two parts. First will cover applicability of *mens rea* for imposition of penalty and subsequent part will include its applicability in prosecution cases under the GST law. We will also be exploring concept of Reverse Onus provided under Section 135 of CGST Act.

Mens rea and Penalty

A fundamental principle of common law is that an act alone does not amount to a wrong and must be accompanied by a 'guilty mind'. The Latin maxim *actus non facit reum nisi mens sit* means that an act is not wrongful unless accompanied by a wrongful state of mind. Hence, under common law, the general test of guilt requires both, '*mens rea*' (literally translated as

guilty mind) as well as '*actus reus*' (wrongful act). The Supreme Court has held that "*mens rea is a state of mind. Under criminal law, mens rea is considered as the 'guilty intention' and unless it is found that the accused had the guilty intention to commit the crime, he cannot be guilty of committing the crime*".

It is a common understanding that penalty is levied if the violation is intentional. This was the classical view which was adopted by the Hon'ble Supreme Court Way back in 1969, even in the context of taxation law. In *Hindustan Steel Ltd. vs. State of Orissa*², the SC held that the liability to pay penalty under the Orissa Sales Tax Act, 1947, does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party either acted deliberately in defiance of the law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. The Court went on to say that even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty if the breach flows from a *bona fide* belief. The Court also pointed out that penalty will not also be imposed merely because it is lawful to do so.

1. *Director of Enforcement vs. M.C.T.M. Corpn. Pvt. Ltd.* [AIR 1996 SC 1100]

2. [(1969) 2 SCC 627 = 1978 (2) E.L.T. (J159) (S.C.)]

However, subsequently, in the context of taxation laws, the courts have pronounced a legal dictum of 'strict liability' which means that a statute can provide for levy of penalty regardless of any wrong intention of the accused. In case of *R.S. Joshi vs. Ajit Mills Ltd.*³, it was held that, "The classical view that no mens rea, no crime, has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea."

In another case, it was held that though this is a general principle of penal liability, it is a settled principle of law that a statute may expressly or by necessary implication, create an offence which can be established regardless of the state of mind of the accused⁴.

Wherever the law itself provides for existence of mens rea, it is onerous responsibility to prove the intentional act by the Department proposing to impose penalty. In *Union of India vs. Rajasthan Spinning and Weaving Mills*⁵, the Supreme Court held that penalty under Section 11AC is a punishment for the act of deliberate deception by the assessee with intent to evade duty. Therefore, the Court held that unless there was a conscious and deliberate wrongdoing, the provisions of Section 11AC would not get attracted.

There could be situations where the provisions of the law are ambiguous about the presence of mens rea in a penal provision. The Hon'ble Supreme Court in the case of *Commissioner of Sales Tax, U.P. vs. Sanjiv Fabrics*⁶, was concerned with a question whether the requirement of mens rea is an essential ingredient for the levy of penalty under Section 10(b) read with Section 10A of the Central Sales Tax Act, 1956 or not. While dealing with such situation, where upon finding that the imposition of penalty under Section 10A was in lieu of prosecution, the Court

held that in examining whether mens rea is an essential element of the offence created under a taxing statute, regard must be had to (i) the object and scheme of the statute, (ii) the language of the Section, and (iii) the nature of penalty.

In case of *Bharjatiya Steel Industries vs. Commissioner Sales Tax, U.P.*⁷ the SC held that, "An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of mens rea becomes a relevant factor."

The aforementioned judicial analysis elucidate the following principles:

1. Under criminal jurisprudence, presence of mens rea is essential to punish a person.
2. In taxation and economic laws, legislature can make provisions to impose penalty without any requirement of mens rea.
3. Wherever the law provides for penal action for intentional acts like fraud or misstatements, it is essential to prove mens rea before imposition of penalty.
4. Where the law is vague regarding presence of mens rea for imposition of penalty, the factors enumerated in *Sanjay Fabrics (supra)* can be used.
5. If there is discretion to levy penalty absolutely or to vary the penalty amount, in such legal provisions mens rea is implied.

Requirement of proving mens rea for attracting penal provisions under GST Law

Under the GST law, the penal provisions have been enshrined in Sections 122 to 128 which provide for various situations. Section 122(1) enlists and prescribes penalty for 21 offences.

3. AIR 1977 SC 279

4. *Nathu Lal vs. State of Madhya Pradesh* [AIR 1966 SC 43]

5. [(2009) 13 SCC 448 = 2009 (238) E.L.T. 3 (S.C.)]

6. [(2010) 35 VST 1 = 2010 (258) E.L.T. 465 (S.C.)].

7. 2008 (11) SCC 617

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Offences have been specified at a micro-level but there is no discretion as regards to the quantum of penalty which is set at ₹ 10,000/ or amount of tax evaded or input tax credit availed or distributed irregularly, whichever is higher. There is no discretion vested with respect to the quantum of penalty. Some of the illustration of the offences are supply of goods without issue of invoice or issue of invoice without supply of goods or failed to take registration. It is interesting to note that in some of the offences listed therein, there is no ingredient of *mens rea* like intention to evade tax. Such cases are like collection of tax amount but not paid to Government or failing to take registration or transporting goods without cover of document. In such cases whether requirement of proving the *mens rea* should be there or not would be a debatable issue in future. In our view, following the judgement of *Sanjiv Fabrics (supra)* it can be argued that since the quantum of penalty is stringent (equivalent to tax/ITC involved) and these offences have been listed along with other offences where presence of *mens rea* is necessary to impose such heavy penalties, therefore existence of *mens rea* maybe a relevant factor to impose the penalty.

In case of Section 122(2), a distinction between offences where there is a requirement of *mens rea* is evident. A higher quantum of penalty has been prescribed in cases involving fraud, wilful-misstatement or suppression of facts to evade tax. As per this provision any registered person who supplies any goods or services on which tax has not been paid or short paid or erroneously refunded or input tax credit has been wrongly availed or utilised is liable to a penalty of ₹ 10,000 or 10% of tax due whichever is higher. However, in cases which involving fraud, wilful-misstatement or suppression of fact, the penalty prescribed is ₹ 10,000 or 100% of tax due, whichever is higher. Hence, it is evident that in situations not warranting existence of *mens rea*, penalty of 10% of tax dues can be imposed without any requirement of proving the intention to defraud the revenue, as these cases would fall under the category of "strict liability".

Section 122(3) provides for other penalties which may extend up to ₹ 25,000/- in ancillary circumstances. The requirement of *mens rea* can be said to be embedded in such discretionary power in levy of penalty as held in the case of *Bharjatiya Steel Industries (supra)*.

Section 126 provides general principles related to imposition of penalty. Sub-clause (1) of thereof states that no officer shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence. But, this provision has been further watered down by provisions of sub-section (6) thereof which exclude the application of Section 126 in cases where the penalty specified under the CGST Act is either a fixed sum or expressed as a fixed percentage. Effectively, Section 126 is applicable only where discretion has been bestowed upon the officer regarding the quantum of penalty. Thus, the provision is like a toothless tiger which does not even have the power to growl.

Onus to prove existence of *mens rea* for Penal Provisions

Even though provisions of the Indian Evidence Act, 1872 may not be directly applicable for quasi-judicial proceedings but the principles enshrined therein are used in the said proceedings. Therefore, if the tax department is proposing to impose penalty which require existence of culpable mind, in that case, unless contrary is provided in the law, it is the responsibility of the proposer to establish that the act of accused was with intention to evade payment of tax. Section 101 of the Indian Evidence Act provides for the same.

Mens rea and Prosecution

Prosecution is the conducting of legal proceedings against someone in respect of a criminal charge which is generally punishable with imprisonment. Under the CGST Act, 2017, Section 132 lists twelve offences under the Act which are punishable by imprisonment and a fine. The term

of imprisonment under the provision, depends on the amount involved in the offence, and the nature of the offence committed by the offender. As the imprisonment is a serious punishment affecting life and liberty of a person, existence of *mens rea* is a must for the offences made liable to prosecution. However, there are following two acts for which there is no specific mention of existence of *mens rea*:

- (i) collection of any amount as tax but failure to pay the same to the Government beyond a period of three months from the date on which such payment becomes due [clause (d)]
- (ii) failure to supply any information which is required to be supplied under the law [clause (k)]

In a situation where a person had collected GST but could not deposit it with the Government for compelling reasons such as a natural calamity leading to destruction of business or sudden insolvency of his major customer leading to a liquidity crisis, should that person be imprisoned because the law does not require existence of *mens rea* for such an offence. Our view is that in view of judicial pronouncements like in case of *M.C.T.M. Corpn. Pvt. Ltd (supra)*, in any criminal proceedings existence of guilty mind would be necessary and it may be defence of accused to prove his innocence to avoid charges of prosecution. Even the guiding factors enumerated in *Sanjiv Fabrics (supra)* namely the object and scheme of the statute, and the nature of penalty will be determinative factor will lead to conclusion that *mens rea* may be required to be proved to inflict imprisonment to a person in such cases.

Onus to prove existence of *mens rea* in Prosecution cases

"Innocent until proven guilty" is the cornerstone of fairness in criminal jurisprudence. A fundamental principle of criminal jurisprudence is that an accused is presumed to be innocent and the burden lies on the prosecution to prove

8. 2019 (27) G.S.T.L. 161 (All.)

both, *mens rea* and *actus reus*, of the accused beyond reasonable doubt. The Law Commission of India in its 180th Report, on Article 20(3) of the Constitution of India and the Right to silence (May, 2002) has recognised presumption of innocence as one of the factors of the right of the accused to be silent, a derivative of Article 20(3).

Presumption of Culpable mental state under GST Law for Prosecution

The responsibility to prove a fact or facts is called burden of proof. The rules regarding allocation of burden of proof are laid down in Chapter VII of Indian Evidence Act, 1872. Section 101 thereof provides that "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which lie asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." In short, for criminal cases the burden to prove wrong doing lie on the person, normally the State who has launched the prosecution to seek punishment against the accused.

It is interesting to observe that Section 135 of the CGST Act, 2017 makes a significant departure from general law by providing that in any prosecution for an offence under the GST law, which requires a culpable mental state on part of the accused, the court shall presume the existence of such mental state but the onus would be on the accused to prove otherwise. The same does not hold true for offences punishable under the Indian Penal Code where *mens rea* is an essential ingredient. In case of *Govind Enterprises vs. State of U.P.*⁸, the Hon'ble Allahabad High Court made a specific remark that offences punishable under the Indian Penal Code are qualitatively different from offences punishable under the U.P. GST Act, 2017 with reference to the standard of proof.

'Reverse Onus' Principle upheld by Apex Court

Section 135 is a "reverse onus" clause. It is analogous to Section 278E of the Income-tax

Act, 1961, Section 13 and Section 9C of the same is given below

Section 135. Presumption.
In any prosecution for an offence which requires a culpable mental state but it is not necessary to prove the fact that the accused was in possession of such mental state with respect to the offence, the court shall presume the existence of such mental state.

Explanation. - For the purposes of this section, -

- (i) the expression "culpable mental state" means intention, motive, or reason to believe;
- (ii) a fact is said to be proved if the court believes it to exist on the balance of probabilities and not merely by a preponderance of evidence.

Reverse onus clause under Section 135 of the CGST Act, 2017.
"Innocent until proven guilty" is a fundamental principle of criminal law. The reverse onus clause in Section 135 of the CGST Act, 2017 presumes the existence of a culpable mental state. It shall be a defense for the accused to prove that he had no such mental state. The burden of proof is on the accused to prove that he had no such mental state unless rebutted.

The Supreme Court in *State of Punjab vs. State of Punjab* in *State of Punjab vs. State of Punjab* and *Psychotropic Substances Act* (1986). It was held that the reverse onus clause in Section 135 of the NDPS Act, 1986 is valid with regard to the part of the act

9. [2008] 16 SCC 411
10. [2010] 9 SCC 608
11. [2011] 11 SCC 653

Act, 1961, Section 138A of the Customs Act, 1962 and Section 9C of the Central Excise Act, 1944 and various other State VAT Acts. Extract of the same is given below for reference:

Section 135. Presumption of culpable mental state In any prosecution for an offence under this Act which requires a culpable mental state on the part 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. – For the purposes of this section, –

- (i) the expression “culpable mental state” includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;
- (ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Reverse onus clauses, such as contained in Section 135 of the CGST Act replace the principle “Innocent until proven guilty” with “guilty until proven innocent” with regards to *mens rea*. Such reverse onus clause provides that the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state. It dilutes the burden of proof on the prosecution to prove only the *actus reus* while *mens rea* is presumed unless rebutted.

The Supreme Court upheld the constitutionality of reverse onus clauses in case of *Noor Aga vs. State of Punjab*⁹ in reference the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act”). It was held that while Sections 35 and 54 of the NDPS Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden

of proof in this behalf on the accused. A bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. Initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Further, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question.

The Supreme Court in various later decisions clarified the scope of reverse onus clauses. In *Dharampal Singh vs. State of Punjab*¹⁰ and *Bhola Singh vs. State of Punjab*¹¹ it was held that the prosecution must prove initial facts. The prosecution is not required to prove that the accused knowingly committed the offence. In case of *Dharampal*, 65 kg. of opium was recovered from the car owned and driven by the accused. The prosecution was not required to prove that the accused knew that the car had the contraband. The presumption applied as soon as the prosecution proved the material was contraband, and that it was in the car owned and driven by the accused. It was now on the accused to rebut this presumption.

The following observations are important in the context of Section 135 (*supra*):

- The presumption on culpable mental state is wide in its scope as it includes presumption as to intention, motive, knowledge, belief as well as reason to believe.
- The standard of proof required to rebut the presumption is much higher i.e. ‘beyond reasonable doubt’ and not ‘preponderance of probability’.
- The presumption on culpable state of mind extends only to cases of prosecution

9. [2008] 16 SCC 417

10. [(2010) 9 SCC 608]

11. [(2011) 11 SCC 653]

for offences and not to adjudication proceedings.

- Only 'courts' can presume the existence of culpable mental state.

The expression 'proof beyond reasonable doubt' in criminal law requires the prosecution to establish guilt and secure conviction of the accused by proving the charge 'beyond reasonable doubt'. In *Ramakant Rai vs. Madan Rai & Ors.*¹² referring to the expression 'reasonable doubt' in criminal law it was held as under:

"24. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than the truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."

The Supreme Court had not accepted the contention that before the presumption as to culpable mental state is attracted, prosecution must establish basic ingredients of the offence for which charge has been framed. It was held that the legislature having found it difficult to establish the necessary ingredients of evasion of duty or prohibitions and the economic offences having grown in proportion beyond the control, came forward with the presumption under Section 138A of the Customs Act, 1962¹³.

However, the courts have held that in order to rebut the presumption of existence of mental state under Section 138A of the Customs Act, there need not be direct evidence, and the rebuttal can be gathered from the circumstances in the case¹⁴. Accordingly, the Madras High Court accepted that the presumption under section 138A was rebutted in case of a person accused of smuggling gold concealed in handles of briefcases basis his statement and other circumstances of the case.

Conclusion

While there is no room for dispute in provisions where mens rea is a pre-requisite for imposing penalty, the controversy as to the requirement of mens rea for imposing penalty under provisions where there is no specific mention of presence of guilty mind, is likely to invite attention of courts for years to come. It would also be interesting to see whether the courts, while deciding cases of prosecution where mens rea is not a requirement in the statute, relax the said principle if the accused shows good reasons for non-compliance. In such cases, courts are more likely, in our view to follow the course taken under the erstwhile Central Excise and Service Tax regime, wherein principles from the law of evidence were borrowed from and applied to indirect tax disputes. In any case, striking the right balance between requirements of the law and the circumstances of an assessee has more often than not, been a challenge for courts. In this article we have analysed various judicial pronouncements on these very issues. Let us wait and see how the judiciary decides such cases in the context of GST.

12. (2003) 12 SCC 395

13. *Devchand Kalyan Tandel vs. State of Gujarat & Anr.* [(1996) 6 SCC 255]

14. *Assistant Collector of Customs Madras vs. A. Narayana Pillai* [1994 (71) E.L.T. 673 (Mad.)]

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