

Chapter 16

Demands and Recovery

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Statutory Provisions**73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts.**

- (1) *Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.*
- (2) *The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.*
- (3) *Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.*
- (4) *The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.*
- (5) *The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*
- (6) *The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.*
- (7) *Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.*
- (8) *Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of*

show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

- (9) *The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.*
- (10) *The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.¹*
- (11) *Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.*

Extract of the CGST Rules, 2017

²[142. Notice and order for demand of amounts payable under the Act. -

- (1) *The proper officer shall serve, along with the*
- (a) *notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GST DRC-01,*
 - (b) *statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof electronically in FORM GST DRC-02, specifying therein the details of the amount payable.*
- ³[(1A) *The ⁴[proper officer shall may], before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, ⁵[shall] communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.]*
- (2) *Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with*

¹ Also refer to Notf No. 13/2022 CT dt. 05.07.2022.

² Substituted vide Notf No. 16/2019- CT dated 29.03.2019, w.e.f. 01.04.2019.

³ Inserted vide Notf No. 49/2019 - CT dated 09.10.2019.

⁴ Substituted vide Notf No. 79/2020 – CT dt. 15.10.2020 before it was read as "proper officer shall".

⁵ Substituted vide Notf No 79/2020-CT dt. 15.10.2020 for "shall communicate".

the provisions of the Act ⁶[whether on his own ascertainment or, as communicated by the proper officer under sub rule (1A),] he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.

⁷[(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A.]

(3) Where the person chargeable with tax makes payment of tax and interest under sub-section (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within ⁸~~fourteen days of detention or seizure of the goods and conveyance~~ seven days of the notice issued under sub-section (3) of section 129 but before the issuance of order under the said sub-section (3)], he shall intimate the proper officer of such payment in FORM GST DRC-03 and the ⁹[proper officer shall issue an intimation] in FORM GST DRC-05 concluding the proceedings in respect of the said notice.

(4) The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 or the reply to any notice issued under any section whose summary has been uploaded electronically in FORM GST DRC-01 under sub-rule (1) shall be furnished in FORM GST DRC-06.

(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of ¹⁰[tax, interest and penalty, as the case may be, payable by the person concerned].

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in FORM GST DRC-08.]

Related Provisions of the Statute

⁶ Inserted vide Notf No. 49/2019 - CT dated 09.10.2019.

⁷ Inserted vide Notf No. 49/2019 - CT dated 09.10.2019.

⁸ Substituted vide Notf No. 40/2021-CT dated 29.12.2021 w.e.f. 01.01.2022.

⁹ Substituted vide Notf No. 52/2023 – CT dt.26.10.2023 before it was read as, "proper officer shall issue an order".

¹⁰ Substituted vide Notf No. 40/2021 – CT dt. 29.12.2021 w.e.f. 01.01.2022, before it was read as "tax, interest and penalty payable by the person chargeable with tax".

Section or Rule	Description
Section 75	General provisions relating to determination of tax
Section 50	Interest on delayed payment of tax

73.1. Introduction

1. Section 73 deals with determination of tax and its demand under certain circumstances such as:
 - Tax not paid; or
 - Tax short paid; or
 - Input tax credit wrongly availed; or
 - Input tax credit wrongly utilized; or
 - Tax erroneously refunded.

This section specifically covers determination of such taxes under circumstances of cases **not involving fraud, wilful misstatement or suppression of facts;**

2. Section 73 also applies for demand of interest payable which is not paid or partly paid or interest erroneously refunded. Here, tax authorities would issue notice under section 73 and (i) demand tax applicable on the transaction along with interest and applicable penalty (ii) record the fact of payment discharged only to the extent of tax due (iii) appropriate the tax already deposited and (iv) require payment of outstanding interest and applicable penalty. Issuing a notice is an essential requirement to demand any payment (tax or interest or penalty) while adhering to principles of natural justice.

73.2. Analysis

Section 73 makes it abundantly clear that in GST there is no such thing called "SPOT recovery" as was practiced under earlier tax regime. There is no question of any determination of liability bypassing section 73. And there is no question of taxpayer accepting such determination without a valid notice and the attendant safeguards provided in section 75 (discussed later).

The provisions of section 73 can be invoked where it appears to the Proper Officer that a situation involving payment of tax (stated in para 1(b) infra) has arisen in cases other than fraud, wilful misstatement or suppression of facts.

1. The provision provides for –
 - (a) Service of notice by the Proper Officer;
 - (b) Notice shall be served on the person who is chargeable with tax, who has –
 - Not paid or short paid the tax;
 - Wrongly availed or utilized input tax credit;
 - Received the erroneous refund;
 - (c) Such amounts as mentioned above shall be required to be determined along with

the applicable interest as per section 50 and penalty leviable under the provisions of this Act or the rules made thereunder.

- (d) The notice has to be issued at least three months prior to the time limit of three years for issuance of order.
 - (e) The proper office shall along with notice provide a summary in **Form GST DRC-01** specifying therein the details of the amount payable.
2. **Where no notice is required to be issued for 'periodical demand'**: Subsequent to issue of a notice under section 73(1) to a person, where the Proper Officer finds similar issues for any period, the Proper Officer may, instead of issuing a detailed notice for such period, serve a statement containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such subsequent period not covered in the earlier notice so issued under section 73(1). Service of such statement shall be deemed to be service of notice as per section 73(1) on the condition that the grounds relied upon are the same as those mentioned in the earlier notice issued for previous period. The proper office shall, along with the statement, provide a summary in **Form GST DRC-02**, specifying therein the details of the amount payable. Care should be taken NOT to regard such 'statement of demand' as being inferior or different from a show cause notice ("**SCN**") issued under section 73(1) [similarly under section 74(1)].
3. **Voluntary payment of tax and interest before issue of notice/statement**: Voluntary payment of tax and interest as per section 50 before issue of notice/statement can be done either:
- As per own ascertainment of such tax and interest or;
 - As per the ascertainment of tax and interest by the Proper Officer;
- in accordance with the provisions of the Act and the same shall be intimated to the Proper Officer in **FORM GST DRC-03** and the Proper Officer shall issue an acknowledgement, accepting the payment made, in **FORM GST DRC-04**. Thereafter, the Proper Officer shall not serve any notice / statement to the extent of such payment. In such situations, there can be no further proceedings with regard to tax and penalty so paid. Payment under **FORM GST DRC-03** would be a response to departmental communication in **FORM GST DRC-01A** so as to comply with the opportunity afforded to taxpayer under section 73(5) (similarly under 74(5)).
4. When the amount paid as per the ascertainment of the assessee falls short, the Proper Officer shall issue a notice for the amount of shortfall.
5. In situations where the assessee makes the payment of tax along with interest within 30 days of issuance of Notice / Statement and intimates the Proper Officer of such payment in **FORM GST DRC-03**, the Proper Officer shall issue an intimation in **FORM**

GST DRC-05 concluding the proceedings in respect of the said notice and subsequently no penalty shall be payable. Therefore, until 30 days from date of issue of SCN, no adjudication order can be passed and haste in posting of hearings can be adjourned on this ground.

Pre-notice resolution of dispute: Based on pre-notice consultations (not expressly called so), Proper Officer is permitted to issue a demand in **FORM GST DRC-01A** which the taxable person may accept and avail the relief available under section 73(5) or 74(5). Care must be taken not to consider this as an indirect form of 'spot recovery'. Taxable person must take care NOT to suddenly become anxious and admit tax liability and must be well advised to avail this remedy. With the amendment to rule 142 (*vide 49/2019-CT dated 9 Oct 2019*), it is mandatory for taxpayer to (i) be issued 'intimation' to avail nil or reduced penalty under section 73(5) and 74(5), respectively and (ii) where the same is rejected or accepted, partially or fully, then 'summary of show cause notice' in **FORM GST DRC-01** may be issued. It may be noted that in *Amadeus India Pvt. Ltd.v. Pr.Comm 2019 (25) GSTL 486 (Del.)*, where for failure to comply with a similar pre-notice consultation procedure (issued under *Master Circular. 1053/2/2017-CX, dated 10.03.2017*) the impugned SCN itself was set aside and parties relegated to pre-notice stage of the proceedings, proceed with such consultations and then, if still remaining unresolved, to proceed with SCN. With the mandate now in the rules, it is now incumbent on the Proper Officer to carefully tread this path of 'due process' of law that is laid down.

6. In situations where the person files a reply or representation, the Proper Officer after considering the representation, shall issue an order in **FORM GST DRC-06**, consisting of the amount of tax, interest and penalty (i.e., tax + interest + penalty). The amount of penalty shall be higher of 10% of tax or ₹ 10,000/-. A summary of such order shall be uploaded electronically in **FORM GST DRC-07**, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax. Such summary of order in **FORM GST DRC-07** shall be treated as a notice for recovery.
7. Where a rectification of the order has been passed or where an order uploaded in the system has been withdrawn, a summary of the rectification or withdrawal order is to be uploaded electronically by the Proper Officer in **FORM GST DRC-08**.
8. It must be noted that the Proper Officer is required to pass an order within a period of 3 years from the:
 - due date for filing of Annual return for the year to which the short payment or non-payment or input tax credit wrongly availed or utilised relates; or
 - date of erroneous refund.

The following table summarises the time limit for issuance of Notice and Order:

Particulars	Time limit for issuing SCN	Time limit for issuing order (Sec 73(10))
Cases not involving fraud, wilful misstatement or suppression of facts	At least 3 months prior to the time limit specified under section 73(10) for issuance of an order.	3 years from the due date for furnishing annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or 3 years from the date of erroneous refund.

9. **Extension of time limit for issuing adjudication order under section 73 for specific financial years** vide *Notification No. 09/2023-CT dt. 31.03.2023* read with *Notification No. 56/2023 –CT dt. 28.12.2023*.

The time limit under section 73(10) for issuing the order under section 73(9) was extended in the following manner through *Notification No. 09/2023 –CT dt. 31.03.2023*:

Financial Year	Due date of filing Annual return	Time period for issuing order u/s 73(10)	Extended time period for issuing order u/s 73(10)
2017-18	05.02.2020 / 07.02.2020	Up to 05.02.2023 / 07.02.2023	Up to 31.12.2023
2018-19	31.12.2020	Up to 31.12.2023	Up to 31.03.2024
2019-20	31.03.2021	Up to 31.3.2024	Up to 30.06.2024

The above notification has been amended to further extend the time limit vide *Notification No. 56/2023 –CT dated 28.12.2023* as follows:

Financial Year	Time period for issuing order u/s 73(10) – (As per <i>Notification No. 09/2023 - CT dated 31.03.2023</i>)	Extended time period for issuing order u/s 73(10)
2018-19	Up to 31.03.2024	Up to 30.04.2024
2019-20	Up to 30.06.2024	Up to 31.08.2024

10. When all other opportunities granted, such as acceptance of liability before issue of

SCN by pre-notice consultations under rule 142(1A) and acceptance of liability within 30 days after issue of SCN, Proper Officer will be liable to pass a 'speaking order'. Care must be taken to examine all aspects of natural justice and adherence to due process of law are satisfied in passing such adjudication order, such as (not exhaustive):

- Opportunity granted to be heard which is adequate and reasonable which includes granting adjournments, for genuine reasons, where requested or necessitated;
- Grounds raised in SCN are recorded and dealt with during the proceedings. SCN must be the culmination of investigation or inquiry by tax authorities. Incomplete investigation or inquiry leading to assumptions in SCN about tax default is fatal to the proceedings. Investigation or inquiry cannot be continued after SCN is issued. Taxpayer is well within statutory rights to question the incompleteness of the investigation and leave the adjudicating authority to find within the SCN sufficient evidence to fasten tax demand;
- Relevant facts and applicable provisions of law including judicial authorities (case laws) are considered. Relevant facts are facts which impact the allegations. Onus to prove the allegations lie on the tax authorities making such allegation. Under VAT laws it was common for allegations to be made and taxpayer carried the burden to disprove those allegation;
- Points and submission of both sides are recorded and discussed. Taxpayer is NOT liable to furnish facts to displace the allegations. Taxpayer merely needs to (i) accept or deny allegation (ii) assail (or attack and question) the evidence adduced to satisfy burden that lies on the tax authorities to prove allegations. Evidence may be produced by the taxpayer, in reply to SCN, by way of rebuttal even if there is a presumption in the law about *mens rea*. Presumption is not assumption (refer discussion under section 144) and all presumption are to be understood as 'rebuttable presumption' only;
- Clear findings are reached based on the above without adopting new grounds that were not originally raised in the SCN (see discussion under section 75(7) below). Howsoever compelling 'new grounds' may be, adjudicating authority is barred from travelling beyond the four corners of the SCN even if the SCN contains errors of omission or commission which may be fatal to the proceedings;
- Final decision is reached based on the said findings by an 'order' which is to be complied with or appealed against.

Proper officer: As per *Circular No. 3/3/2017-GST dated 05.07.2017*, the Superintendent of Central Tax is assigned to discharge powers under sub-sections (1), (2), (3), (5), (6), (7), (9) and (10) of section 73 of the CGST Act. In other words, all officers up to the rank of Additional/Joint Commissioner of Central Tax are assigned as the Proper Officer for issuance of show cause notices and orders under this section.

Further, they are also assigned powers under the IGST Act as well, as per section 3 read with section 20 of the IGST Act.

11. Penalty is always determined to be 10 per cent of tax stipulated in adjudication order due to the relief from further litigation, that such relaxation is permitted under 73(11). Further, where any self-assessed tax remains to be paid or where any amount collected 'as tax' is lying unpaid, penalty of 10% of tax or Rs.10.000/- is also prescribed under section 73(11). Please refer to various other aspects such as notice under section 76 without any time limit and mandatory penalty under that section in the detailed discussion under section 76.
12. Monetary limits have been prescribed *vide Circular No. 31/05/2018-GST dated 09.02.2018* for officers of different designations to function as the Proper Officers in relation to issue of show cause notices and orders under Sections 73 and 74:

Designation of Officer	Monetary limit of the amount of CGST (including cess) for issuance of show cause notices and orders u/s 73 and 74 of CGST	Monetary limit of the amount of IGST (including cess) for issuance of show cause notices and orders u/s 73 and 74 of CGST Act made applicable to IGST	Monetary limit of the amount of CGST and IGST (including cess) for issuance of show cause notices and orders u/s 73 and 74 of CGST Act made applicable to IGST
Superintendent	Up to Rs.10 lakhs	Up to Rs.20 lakhs	Up to Rs.20 lakhs
Deputy or Assistant Commissioner	Above Rs.10 lakhs up to Rs.1 crore	Above Rs.20 lakhs up to Rs.2 crore	Above Rs. 20 lakhs up to Rs.2 crore
Additional or Joint Commissioner	Above Rs.1 Crore	Above Rs.2 Crore	Above Rs.2 Crore

CBIC issued 2/2022-GST (Instruction) dt. 22.03.2022 focusing on SOP for scrutiny of returns for FYs 2017-18 and 2018-19.

Above Circular 31/05/2022 - GST dt. 09.02.2018 on Proper officer under sections 73 and 74 of the CSGT Act, 2017 and under the IGST Act, 2017 has been amended *vide Circular No. 169/01/2022-GST dt. 12.03.2022* — Power to Additional Commissioners/Joint Commissioner of Central Tax of specified Central Tax Commissionerate with All India Jurisdiction for adjudication of SCNs issued by DGGI.

Serving of the summary of notice in FORM GST DRC-01 and uploading of summary of order in FORM GST DRC-07 electronically on the portal by the Proper Officer [Instruction No. 04/2023-GST dt. 23.11.2023]

As per the said Instruction, non-issuance of the summary of such notices/ orders electronically on the portal is in clear violation of the explicit provisions of CGST Rules. Further, to keep track of the proceedings and consequential action in respect of recovery, appeal etc, subsequent to issuance of notices/ orders, the proper officers have been directed:

- to serve summary of the notice required to be issued under sections 52, 73, 74, 122, 123, 124, 125, 127, 129 and 130 of the CGST Act, 2017 in Form DRC-01 as required under rule 142(1), electronically on the common portal, and
- to issue summary of the orders required to be issued in sections 52, 62, 63, 64, 73, 74, 75, 76, 122, 123, 124, 125, 127, 129 and 130 of the CGST Act, 2017 in Form DRC-07 as prescribed under rule 142(5), electronically on the common portal.

Summary of Penalty implications

If tax, interest and penalty (as indicated in the table below) are paid, then all the proceedings in that respect shall stand concluded:

Pay tax plus interest	Amount of penalty
Before issuance of SCN notice	No penalty
Within 30 days after the issuance of SCN	No penalty
In any other case	10% of the tax or ₹ 10,000 whichever is higher.

73.3. MCQ

1. The officer can issue the order under section 73 with a maximum demand up to?
- (a) Amount of tax + interest + penalty 10% of tax
 - (b) Amount of tax + interest + penalty equal to 10% of tax or ₹ 10,000/- whichever is higher
 - (c) ₹ 10,000/-
 - (d) Tax + interest + 25% penalty

Ans. (b) Amount of tax + interest + penalty equal to 10% of tax or Rs.10,000/- whichever is higher

Statutory Provisions**74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.**

- (1) *Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*
- (2) *The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.*
- (3) *Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.*
- (4) *The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.*
- (5) *The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*
- (6) *The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.*
- (7) *Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.*
- (8) *Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five*

per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

- (9) *The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.*
- (10) *The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.*
- (11) *Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.*

Explanation 1.— For the purposes of section 73 and this section, —

- (i) *the expression “all proceedings in respect of the said notice” shall not include proceedings under section 132;*
- (ii) *where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122 and 125 [~~129 and 130~~]¹¹ are deemed to be concluded.*

Explanation 2.—For the purposes of this Act, the expression “suppression” shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the Proper Officer.

Related Provisions of the Statute

Section or Rule	Description
Section 73	Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts
Section 75	General provisions relating to determination of tax
Section 50	Interest on delayed payment of tax
Section 122	Penalty for certain offences

¹¹ *Substituted vide The Finance Act, 2021 through Notf No. 39/2021-CT dt. 21.12.2021. Applicable w.e.f. 01.01.2022.*

Section 125	General penalty
Section 129	Detention, seizure and release of goods and conveyances in transit
Section 130	Confiscation of goods or conveyances and levy of penalty
Section 132	Punishment for certain offences
Rule 142	Notice and order for demand of amounts payable under the Act

74.1. Introduction

Where the reasons for not being identified earlier are attributable to certain 'special circumstances', notice must still be issued under section 74 in order to demand tax. In other words, even in such special circumstances, "SPOT recovery" is not sanctioned in law. The section covers certain situations for demand of taxes in cases of fraud, or any kind of wilful misstatement or suppression of facts with an intent to evade payment of tax.

1. Whenever the tax is

- not paid or
- short paid or
- credit wrongly availed or
- credit wrongly utilized or
- erroneously refunded

in 'special circumstances' with an "intent to evade tax" by way of

- Fraud;
- Wilful misstatement;
- Suppression of facts;

the Proper Officer shall issue a notice for such amount along with interest as per section 50 and penalty equivalent to the amount of tax specified in notice. The Proper Officer shall along with the Notice provide a summary in **Form GST DRC-01** specifying therein the details of the amount payable.

2. This section covers the time limit within which the Proper Officer shall issue the Notice and Order for the determination/ recovery of tax defaulted by the person. Section 74 also applies for demand of interest payable which is not paid or partly paid or interest erroneously refunded. Interest is an automatic incidence that does not involve any explanation or arguments except to the extent of accuracy in computation. Please note, Karnataka High Court has decided in the case of *Uol & Ors v. LC Infra Projects Pvt Ltd 2020 (81) GSTR 281 (Kar)* that SCN is required before making demand of interest under section 50 in view of principles of natural justice. Unless demand for interest is 'disputed' and remaining unpaid, interest on self-assessed or other admitted tax liability would be an 'undisputed arrear'. Please refer to discussions under section 75(12) about

such undisputed arrears coming within the operation of automatic recovery of dues under section 79.

3. Fraud is normally understood as deceit with an intent to obtain an unjust advantage, while suppression has been defined by way of explanation 2 to section 74. Willful misstatement usually covers a case of deceit but generally with the connivance of another. The situations cited *supra* normally come to light only on an inquiry. A fraud generally comes to light on its detection. Thus, this section broadly covers detection and response while no provisions are traceable to prevention mechanism.
4. Care must be taken that *vide* explanation 2 to section 74, the word 'suppression' has been given a very special meaning. As per this meaning, normal understanding of suppression has been left behind such that a variety of actions or inactions can be regarded as suppression to invoke extended period of limitation.

74.2. Analysis

1. **No notice is required to be issued for 'periodical demand'**: Similar to the provisions of section 73 explained earlier, this section also provides that a statement containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised be issued, shall be issued for such periods other than those covered in the Notice under section 74(1) on the person chargeable with tax, along with a summary in **FORM GST DRC-02**. This is issued in place of a detailed notice for the period other than the ones covered in the Notice issued as per section 74(1). Further, service of such statement shall be deemed to be service of Notice under section 73(1), subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under section 74(1) are the same as those mentioned in the earlier notice.
2. The Proper Officer shall not serve any Notice on the assessee in case of voluntary payment of tax and interest along with penalty @ 15% of tax either
 - As per the own ascertainment of the tax or;
 - As per the ascertainment of the Proper Officer;

In both the above situations the person charged with tax shall intimate the same to the Proper Officer in FORM GST DRC-03 and Proper Officer will provide acknowledgment in FORM GST DRC-04 and no Notice shall be served in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

In case, there exists some shortfall between the amount paid by assessee on his own ascertainment and the actual amount liable to be paid, the Proper Office shall issue a Notice for the tax that remains unpaid.

3. Where the person makes the payment of tax and interest along with penalty equal to

25 % of tax within 30 days of issuance of Notice / Statement and intimates the Proper Officer of such payment in FORM GST DRC-03, the Proper Officer shall issue an order in FORM GST DRC-05 concluding the proceedings in respect of the said notice.

4. If the person makes any representation or files a reply, the Proper Officer shall issue an order after considering the representation / reply in FORM GST DRC-06, and the amount determined shall comprise of tax along with interest and penalty as stated above. A summary of such order shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax. Such summary of order in FORM GST DRC-07 shall be treated as a notice for recovery.
5. Where the assessee makes the payment of tax and interest along with penalty @ 50 % of tax within 30 days of communication of the order, then in such cases it shall be deemed that all the proceedings have been concluded.
6. The Proper Officer shall pass an order within a period of 5 years from the
 - due date for filing of annual return for the year to which the short payment or non-payment or input tax credit wrongly availed or utilised relates
 - date of erroneous refund

The time limit for issuance of Notice and Order is summarized in the following table:

Particulars	Time limit for issuing SCN	Time limit for issuing order. [Sec 74(10)]
Cases involving fraud, wilful misstatement or suppression of facts to evade tax	At least 6 months prior to the time limit specified under Section 74(10) for issuance of order.	5 years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or 5 years from the date of erroneous refund.

7. The term “suppression” is specifically explained to mean:
 - non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under the Act or the rules made thereunder, or
 - failure to furnish any information on being asked for, in writing, by the Proper Officer
8. Proper Officer: As per *Circular No. 31/05/2018-GST dated 09.02.2018*, the Superintendent of Central Tax is assigned to discharge powers under sub-sections (1), (2), (3), (5), (6), (7), (9) and (10) of section 74 of the CGST Act. In other words, all

officers up to the rank of Additional/Joint Commissioner of Central Tax are assigned as the Proper Officer for issuance of show cause notices and orders under this section. Further, they are also assigned under the IGST Act as well, as per section 3 read with section 20 of the IGST Act. Please refer earlier discussion under section 73 regarding some aspects relating to the manner in which proceedings should be conducted to pass adjudication orders.

Monetary limits have been also being *prescribed vide Circular No. 31/05/2018-GST dated 09.02.2018* for officers of different designations to function as the Proper Officers in relation to issue of show cause notices and orders under section 74. Refer Para 10 of our analysis of section 73.

Circular No. 169/01/2022-GST, dated 12.03.2022 (amending Circular No. 31/05/2018-GST dated 09.02.2018)

Vide Notification No. 2/2022-CT dated 11.03.2022, para 3A has been inserted in the Notification No. 2/2017-CT dated 19.06.2017, to empower Additional Commissioners of Central Tax/Joint Commissioners of Central Tax of some of the specified Central Tax Commissionerates, with All India Jurisdiction for the purpose of adjudication of the show cause notices issued by the officers of the Directorate General of Goods and Services Tax Intelligence.

9. After adjudication order is passed, taxpayer may pay 50% of the penalty demanded in such adjudication order within 30 days of communication of the order and enjoy rebate of the remainder of the penalty. Tax and interest as demanded must be fully paid as a condition of this relaxation under section 74(11).

Summary of Penalty implications:

If tax, interest and penalty as indicated in the table below, are paid, it is provided that further proceedings should not be continued to that extent.

Payment of Tax, Interest and Penalty	Amount of Penalty
Before issuance of show cause notice	15% of the tax amount
Within 30 days after the issuance of SCN	25% of the tax amount
Within 30 days from the communication of order	50% of the tax amount
In any other case	100% of the amount equal to tax

10. **Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or willful misstatement or suppression of facts to evade tax. [Instruction No. 05/2023-GST dt. 13.12.2023]**

Subsequent to the judgment of the Hon'ble Supreme Court's dated 19.05.2022 in the case of *CC, CE and ST, Bangalore (Adj.) etc Vs. Northern Operating Systems Private Limited (NOS)*, proceedings were initiated for the alleged evasion of GST on the issue

of secondment under section 74(1) of the CGST Act, 2017. It was held in the said case that the secondment of employees by the overseas group company to NOS was a taxable service of 'manpower supply' and Service Tax was applicable on the same. It is noted that secondment as a practice is not restricted to Service Tax and the issue of taxability on secondment shall arise in GST also. However, there may be multiple types of arrangements in relation to secondment of employees of overseas group company in the Indian entity. In each arrangement, the tax implications may be different, depending upon the specific nature of the contract and other terms and conditions attached to it. Therefore, the decision of the Hon'ble Supreme Court in the NOS judgment should not be applied mechanically in all the cases.

The instruction has been issued to inform that section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or willful misstatement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or willful misstatement or suppression of fact to evade tax on the part of the taxpayer, provisions of section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.

74.3. Issues and Concerns under sections 73 and 74

- i. Where a statement is issued by the Proper Officer against which the assessee remits applicable taxes along with interest and penalty at 25%. Subsequently, it is held that the statement cannot be deemed to be a notice as it does not have the same grounds as the previous notice. Can the assessee apply for refund of the additional 10% penalty that was paid on grounds that payment prior to issue of notice attracts only 15% penalty?
- ii. Rule 142(1A) has been introduced for issuing **FORM GST DRC-01A** to undertake process of 'pre-notice consultations'. It is important to engage in such consultations by marking all communication as 'without prejudice' as there may be some misleading promises alluded to without expressly granting assurance that SCN will not be issued. Experts caution that such consultations should not be entertained, if taxpayer is not freely admitting liability and there is no ambiguity around the nature of tax demand. Rejection of this opportunity does not imply that, any adversarial approach is being followed for the taxpayer and full extent of relief based on merits of the case will be available in adjudication and appellate proceedings. This provision is mainly to take away discretion in the hands of Proper Officer regarding the penalty to be imposed.
- iii. On comparison of section 73(11) with section 122(1)(iii) and (iv) one finds that while penalty under section 73(9) is applicable if self-assessed tax or any amount collected as tax is not paid within 30 days from the due date for payment of such tax, section 122 penalty will be applicable if such tax or amount is not paid within 3 months from the due date for payment.

As a number of cases have come to notice of the Board where the registered persons

are found to be involved in issuing tax invoice, without actual supply of goods or services or both (hereinafter referred to as "fake invoices"), in order to enable the recipients of such invoices to avail and utilize input tax credit (hereinafter referred to as "ITC") fraudulently, a clarification on various issues relating to applicability of demand and penalty provisions under the CGST Act, 2017 in respect of transactions involving fake invoices has been issued by CBIC vide *Circular No. 171/03/2022-GST dt. 06.07.2022*.

Statutory Provisions

75. General provisions relating to determination of tax

- (1) *Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74, as the case may be.*
- (2) *Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the Proper Officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.*
- (3) *Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.*
- (4) *An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person.*
- (5) *The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:*
Provided that no such adjournment shall be granted for more than three times to a person during the proceedings.
- (6) *The proper officer, in his order, shall set out the relevant facts and the basis of his decision.*
- (7) *The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice.*
- (8) *Where the Appellate Authority or Appellate Tribunal or court modifies the amount of tax determined by the proper officer, the amount of interest and penalty shall stand modified accordingly, taking into account the amount of tax so modified.*
- (9) *The interest on the tax short paid or not paid shall be payable whether or not*

specified in the order determining the tax liability.

- (10) *The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74.*
- (11) *An issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated by way of issue of a show cause notice under the said sections.*
- (12) *Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.*
- ¹²*[Explanation.-For the purposes of this sub-section, the expression "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39.]*
- (13) *Where any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act.*

¹³**[Rule 142B. Intimation of certain amounts liable to be recovered under section 79 of the Act.-**

- (1) *Where, in accordance with section 75 read with rule 88C, or otherwise, any amount of tax or interest has become recoverable under section 79 and the same has remained unpaid, the proper officer shall intimate, electronically on the common portal, the details of the said amount in FORM GST DRC-01D, directing the person in default to pay the said amount, along with applicable interest, or, as the case may be the amount of interest, within seven days of the date of the said intimation and the said amount shall be posted in Part-II of Electronic Liability Register in FORM GST PMT-01.*
- (2) *The intimation referred to in sub-rule (1) shall be treated as the notice for recovery.*
- (3) *Where any amount of tax or interest specified in the intimation referred to in sub-rule*

¹² Inserted vide The Finance Act, 2021 through Notf No. 39/2021-C.T. dt. 21.12.2021 applicable w.e.f. 01.01.2022.

¹³ Inserted vide Notf No. 38/2023- CT dt.04.08.2023.

(1) remains unpaid on the expiry of the period specified in the said intimation, the proper officer shall proceed to recover the amount that remains unpaid in accordance with the provisions of rule 143 or rule 144 or rule 145 or rule 146 or rule 147 or rule 155 or rule 156 or rule 157 or rule 160.]

Related Provisions of the Statute

Section or Rule	Description
Section 73	Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts
Section 74	Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts
Section 79	Recovery of tax
Section 21	Manner of recovery of credit distributed in excess
Section 61	Scrutiny of returns
Section 62	Assessment of non-filers of returns
Section 83	Provisional attachment to protect revenue in certain cases
Rule 88C	Manner of dealing with difference in liability reported in statement of outward supplies and that reported in return
Rule 88D	Manner of dealing with difference in input tax credit available in auto-generated statement containing the details of input tax credit and that availed in return

75.1. Analysis

These provisions are general provisions for taxpayer's safeguard in determination of tax and are applicable irrespective of whether the notice invokes the extended period or not.

1. If an order of court or Appellate Tribunal stays the service of notice or issuance of order then, the period of such stay will get excluded from the period of issuance of order i.e., 3 years or 5 years as the case may be.
2. When a notice has been issued considering the case to be for fraud or for wilful-representation or for suppression of facts, and whereas the charges of fraud, wilful misstatement and suppression of facts were not sustainable or not established by an order of Appellate Authority or Appellate Tribunal, then in such case the officer shall determine the tax as if the notice is issued for the normal period of 3 years.
3. An order required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a Court, shall be issued within two years from the date of communication of the said direction. Compared with the bar on 'power of remand' in

section 107(11), it is forthcoming that Appellate Authority will not enter into verification of documents or sanction of refund, after reaching a finding on merits and passing Orders.

4. Opportunity of personal hearing has to be granted when requested for in writing by the person chargeable with tax or where any adverse decision is proposed to be taken against the person.
5. Personal hearing can be adjourned for reasons to be recorded in writing, when sufficient cause is shown by the person chargeable with tax. However, such adjournment can be granted for a maximum of 3 times. It should be noted that a departmental SCN which specifies three consecutive dates for personal hearing (failing which an *ex-parte* order is passed) will not be held to be valid as this is against the principles of natural justice.
6. The “relevant facts” and “basis” of the decision shall be set out in the order, which means a Speaking Order needs to be passed. It is important to note that the “grounds” on which allegations were made cannot be deviated from and the “Order” must support the demand on the same grounds and not introduce new grounds or cure deficiencies in grounds present in SCN. Failure of adjudication on this aspect alone may be sufficient to get favourable order in appellate proceedings. Drafting of SCN has now attained more importance. This provision when read together with section 160(2), provides an important clue as to the ‘preliminary objections’ that need to be raised while replying to SCN.
7. The amount of tax along with interest and penalty should not exceed the amount mentioned in the notice and the grounds shall not go beyond what is mentioned in the notice.
8. When the decision of Tribunal/ Court/ Appellate Authority modifies the amount of tax, correspondingly interest and penalty shall also be modified to that extent by the Proper Officer.
9. Interest shall be payable in all cases whether specifically mentioned or not. This provision indicates that where ‘penalty’ is OMITTED from the SCN, even if applicable, the adjudicating authority cannot confirm demand for penalty by furnishing the obvious deficiency in SCN. This is evident in the fact that Legislature has thoughtfully only saved omission of ‘interest’ from Order and not ‘interest and penalty’.
10. If the order is not issued within the time limits as prescribed in sub-section (10) of section 73 or (10) of section 74, i.e., 5 years in case of fraud, wilful-misstatement or suppression and 3 years in any other case, the adjudication proceedings shall be deemed to be concluded. Reference may be taken from the decision in case of *Ramlal and Ors v. Rewa Coalfields Ltd AIR 1962 SC 361*, wherein Hon’ble Supreme Court has recognized that lapse of time to pass such orders (lapse of limitation) creates a vested

right to the taxpayer that should not be easily disturbed. And with a specific embargo, it is well accepted that where SCN is issued 'after' 33 months (or 54 months) or adjudication orders are passed 'after' 36 months (or 60 months), the entire proceedings would fail. For the remainder of the period, fresh SCN is required and curing this deficiency or adjudicating for 'adjusted shorter period' is NOT permissible. This is well established administrative law principle. Refer discussion under section 6 of the CGST Act regarding 'administrative discipline' and related circulars to be referred on this administrative law principle.

11. An issue on which Appellate Authority or Appellate Tribunal or High Court has given its decision which is prejudicial to the interest of the revenue and an appeal to the Appellate Tribunal or High Court or Supreme Court against such decision is pending, then the period spent between the two dates of decision shall be excluded in computing the period of 3 years or 5 years respectively, for issue of order. It is important to note that the 'exclusion period' due to pendency of an issue is NOT limited to case of the same taxpayer but of ANY OTHER taxpayer. This is a clear measure to protect interest of revenue provided 'proceedings under section 73 or 74 are initiated'. This is also referred to as 'call book' cases. Reference may be had to the circulars issued under earlier laws and GST regarding 'administrative discipline' where administration of 'call book' cases is discussed. This discussion may be found under section 6 of the CGST Act.
12. Any amount of self-assessed tax or interest payable, whether wholly or in part in accordance with a return furnished under section 39 shall be recovered under the provisions of section 79. It is important to understand what would constitute 'undisputed arrears'. While self-assessed tax is an undisputed arrear, interest being an automatic levy, unpaid interest on self-assessed tax would also be an undisputed arrear.
13. It is also provided that when the penalty is imposed under sections 73 and 74, no penalties shall be imposed under any other provisions of this Act for the same act or omission.
14. In order to clarify regarding the time limit within which the proper officer is required to re-determine the amount of tax payable considering notice to be issued under sub-section (1) of section 73, specially in cases where time limit for issuance of order as per sub-section (10) of section 73 has already been over and also, to clarify the doubts regarding the methodology for computation of such amount payable by the noticee, deeming the notice to be issued under sub-section (1) of section 73, *Circular No. 185/17/2022-GST dt. 27.12.2022* has been issued by CBIC with regard to applicability of provisions of section 75(2) of CGST Act, 2017 and its effect on limitation.
15. Rule 88C is in respect of admitted liability in GSTR-1 that remains undischarged in GSTR-3B for that tax period. It is prescribed that taxpayer will be informed in FORM GST DRC-1B – Part A about the 'admitted liability' which may either be explained

suitably in FORM GST DRC-1B – Part B or rule 88C(3) authorizes Proper Officer to proceed with recovery under section 79. Rule 142B prescribes yet another intimation of liability that is to be recovered for want of dissatisfactory response or non-response to earlier intimation in Form GST DRC-1D.

16. It is interesting to note that options for response by taxpayer in Form GST DRC-1B – Part B contains following alternates:
- a) Excess liability paid in earlier tax periods in FORM GSTR-3B
 - b) Some transactions of earlier tax period which could not be declared in the FORM GSTR-1/IFF of the said tax period but in respect of which tax has already been paid in FORM GSTR-3B of the said tax period and which have now been declared in FORM GSTR-1/IFF of the tax period under consideration
 - c) FORM GSTR-1/IFF filed with incorrect details and will be amended in next tax period (including typographical errors, wrong tax rates, etc.)
 - d) Mistake in reporting of advances received and adjusted against invoices
 - e) Any other reasons

The above indicates that (i) not every data mismatch automatically admits undischarged arrears and (ii) possibility that GSTR-3B is correct and GSTR-1 is incorrect is admitted by Government too. *Instruction 1/2022-23 GST dated 07.01.2022* clearly specifies in para 4 that there may be bona fide reasons for mismatch between GSTR-1 and GSTR-3B. This rule 88C comes into effect from 26.12.2022 but direct recovery action under rule 142B comes into effect from 04.08.2023.

17. Notice under rule 88D on the other hand, is another system generated notice due to mismatch between data in GSTR-2B with GSTR-3B. But the key point of distinction with rule 88C is that unlike unresolve mismatch intimation in rule 88D(3) only empowers Proper Officer to issue a notice of demand and does not empower taking recovery action under section 79.
18. Rule 88D requires where credit claimed in GSTR-3B is greater than credit appearing in GSTR-2B, even when rule 37A requires mandatory reversal of unmatched credits, taxpayer is intimated in Form GST DRC-1C – Part A about such mismatch. Taxpayer is required to respond in Form GST DRC-1C – Part B whether such mismatch results in any admitted liability or some explanation against the presumption of liability can be offered. In view of the mandate to restrict claim of input tax credit from Aug 2022 to balances appearing in GSTR2B, any excess claim of credit that is either dissatisfactory explained or remains un-responded, presumption of wrong-doing is raised against taxpayer.
19. It is interesting to note that options for response by taxpayer in Form GST DRC-1C – Part B contains following alternatives:
- a) Input tax credit not availed in earlier tax period(s) due to non-receipt of inward

supplies of goods or services in the said tax period (including in case of receipt of goods in instalments);

- b) Input tax credit not availed in earlier tax period(s) inadvertently or due to mistake or omission;
- c) ITC availed in respect of import of goods, which is not reflected in FORM GSTR-2B;
- d) ITC availed in respect of inward supplies from SEZ, which are not reflected in FORM GSTR-2B;
- e) Excess reversal of ITC in previous tax periods which is being reclaimed in the current tax period;
- f) Recredit of ITC on payment made to supplier, in respect of ITC reversed as per rule 37 in earlier tax period;
- g) Recredit of ITC on filing of return by the supplier, in respect of ITC reversed as per rule 37A in earlier tax period;
- h) Form GSTR-3B filed with incorrect details and will be amended in next tax period (including typographical errors, wrong tax rates, etc.);
- i) Any other reasons.

The above indicates that (i) not every data mismatch automatically admits undischarged arrears and (ii) possibility that GSTR-3B is correct and GSTR-2B is incorrect is admitted by Government too. This rule comes into effect from 04.08.2023. Care must be taken that choice of response implicitly contains admission of wrongdoing. And without clearly denying the underlying allegation, taxpayer will be prejudiced if the response selected admits default.

Issues & Concerns

- a) Without rule 142B (notified only on 04.08.2023), is action under rule 88C (notified on 26.12.2022) deferred?
- b) Without rule 88C/142B, is action under explanation to section 75(12) (notified from 01.01.2022) remain suspended?

Notice by Appellate Authority - Provisos to Section 107(11)

While it is uncommon for Appellate Authority to issue a 'show cause notice', the express language in the two provisos to section 107(11) make it clear that Appellate Authority is permitted to issue a 'supplementary' show cause notice. And the order of Appellate Authority in respect of such supplementary notice is subject to statutory limitation and the consequent safeguard in section 75(10). Further, reference to rule 109C reiterates that show cause notice can be issued under section 107(11).

Analysis

First proviso – contains authority to ‘enhance’ any fee, fine or penalty that was imposed in adjudication. Now it is important to note that section 107(11) itself permits Appellate Authority only to “pass such orders confirming, modifying or annulling” and there is no express authority for Appellate Authority for “enhancing” which exists in section 108(1). However, the unequivocal language in this proviso cannot be rendered otiose.

- Instance when such enhancement may be harmonized would be where Proper Officer has confirmed penalty less than that the statutory minimum prescribed, say, in section 73(9) or in 75(8). And when, for other reasons, taxpayer carries the order of Proper Officer in appeal, Appellate Authority is empowered to “enhance” the penalty.
- However, such harmonization is hardly possible in case of fee – which is levied under section 47 – as no notice under section 73 or 74 could possibly be issued to demand such fee. There would not be any occasion when an appeal involving such fee would come for consideration by Appellate Authority.

And fine must only refer to redemption fine under section 130(2) which, when carried in appeal, having already been examined and imposed by Proper Officer based on facts of the case, taxpayer cannot be worse-off at the end of appeal than at the start. And appeal is not an exercise to re-appreciate material on record when once such material have been appreciated by a competent officer and a conclusion reached based on the facts and the law. Appeal is not yet another opportunity to re-do adjudication by an officer of higher rank. Not even when the quantum of redemption fine is suspiciously liberal and yet somehow the matter is carried in appeal by taxpayer, no such enhancement would be possible. For these instances, revisionary proceedings under section 108(1) are available to Revenue. But when the appeal is carried by Revenue seeking enhancement of redemption fine imposed, this proviso is not pressed into service.

Second proviso – is capable of correcting computational errors and not substitute with a fresh notice. Where tax is demanded but applicable cess is omitted in adjudication. For e.g., where tax is demanded under one classification, it cannot be replaced with a different classification, for the vice that this would be a fresh notice. Appellate Authority is excluded from definition of Adjudicating Authority in section 2(4).

Interestingly, the expression in this proviso is not “enhance” but apparently unhindered when it refers to “any tax or credit”. Care must taken not to read this proviso as authorizing Appellate Authority to issue an altogether new notice. Safeguard is found in the fact that such liability must be based on “opinion” formed by Appellate Authority. No such opinion can be formed by calling for new records and material but formed from the material already available on record being the ‘relied upon documents’ in notice and additional material introduced during adjudication. If no such “opinion” can be formed without calling for new records and material, then Appellate Authority must limit the scope of fact-finding during appeal to the grounds

agitated against order of adjudication.

Issues and Concerns

1. Whether Appellate Authority can call for books of accounts for enquiring into new demands that may have been omitted in pre-notice stages such as scrutiny of returns, audit or investigation?
2. Whether books submitted by taxpayer can authorize expansion of scope of appellate proceedings into new demands that are not forming part of original proceedings?

75.2. FAQs

Q1. Who has the power to issue a notice/ order?

Ans. "Proper officer" as defined under section 2(91) of the Act and assigned vide *Circular No. 3/3/2017-GST dated 05.07.2017* read with *Circular No.31/05/2018-GST dated 09.02.2018* as amended vide *Circular No. 169/01/2022-GST dated 12.03.2022* to exercise powers under sections 73 and 74 can issue notices and orders under the said sections.

Q2. When can proceedings be initiated under sections 73/74?

Ans. The proceedings can be initiated when there is

- Short payment of tax
- Non-payment of tax
- Wrong input credit availed
- Wrong input credit utilized
- Erroneous refund

Q3. Is notice for a period of 5 years valid even if charge of suppression, fraud and wilful misstatement are not sustained?

Ans. No, when the allegations of fraud, suppression or wilful misstatement are not established, the notice issued under section 74 would get covered under section 73 and 3 years' time limit would be applicable for date of issue of order.

Q4. What is the condition for giving a repeat notice under section 73(3) for a different period?

Ans. The condition is that the grounds relied upon should be same as in the notice issued previously. In such cases, it is not essential to issue a detailed notice. It would suffice, if a statement giving the statement of alleged amounts is issued.

Q5. Whether there is any time limit to issue notice is applicable?

Ans. The time limit to issue notice is at least 3 months/ 6 months prior to the last day to pass the order i.e., 3 years or 5 years from the due date for furnishing annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed

or utilised relates to or within 3 years or 5 years from the date of erroneous refund.

Q6. Is interest applicable in all cases, even if not specifically mentioned?

Ans. Yes, interest is applicable whenever the tax is payable whether or not it is specifically mentioned.

Q7. Can the assessee pay tax after the issue of notice and before an order? What is the benefit from such voluntary payments under different cases?

Ans. Yes. The assessee is given the benefit to pay the tax after issue of notice and before issuance of order as follows:

In cases other than fraud, misstatement and suppression	
When the assessee pays the amount payable after the issue of notice but within 30 days from the issue of SCN	Tax + interest to be paid in full and complete waiver of penalty
In cases of fraud, misstatement and suppression	
When the assessee pays the amount payable after the issue of notice but within 30 days from the issue of SCN	Tax and+ interest to be paid in full+ along with penalty @ 25% of tax

75.3 MCQs

Q1. What is the time limit for issue of order in case of fraud, wilful-misstatement or suppression?

- (a) 30 months
- (b) 18 months
- (c) 5 years
- (d) 3 years

Ans. (c) 5 years

Q2. What is the time limit for issue of order in case of other than fraud, wilful-misstatement or suppression?

- (a) 30 months
- (b) 18 months
- (c) 5 years
- (d) 3 years

Ans. (d) 3 years

Q3. The maximum number of times the hearing can be adjourned?

- (a) 1
- (b) 3
- (c) 5
- (d) None

Ans. (b) 3

Statutory provisions

76. Tax collected but not paid to Government

- (1) *Notwithstanding anything to the contrary contained in any order or direction of any Appellate Authority or Appellate Tribunal or court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force, every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not.*
- (2) *Where any amount is required to be paid to the Government under sub-section (1), and which has not been so paid, the proper officer may serve on the person liable to pay such amount a notice requiring him to show cause as to why the said amount as specified in the notice, should not be paid by him to the Government and why a penalty equivalent to the amount specified in the notice should not be imposed on him under the provisions of this Act.*
- (3) *The proper officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person and thereupon such person shall pay the amount so determined.*
- (4) *The person referred to in sub-section (1) shall in addition to paying the amount referred to in sub-section (1) or sub-section (3) also be liable to pay interest thereon at the rate specified under section 50 from the date such amount was collected by him to the date such amount is paid by him to the Government.*
- (5) *An opportunity of hearing shall be granted where a request is received in writing from the person to whom the notice was issued to show cause.*
- (6) *The Proper Officer shall issue an order within one year from the date of issue of the notice.*
- (7) *Where the issuance of order is stayed by an order of the court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of one year.*
- (8) *The Proper Officer, in his order, shall set out the relevant facts and the basis of his decision.*
- (9) *The amount paid to the Government under sub-section (1) or sub-section (3) shall be adjusted against the tax payable, if any, by the person in relation to the supplies*

referred to in sub-section (1).

- (10) *Where any surplus is left after the adjustment under sub-section (9), the amount of such surplus shall either be credited to the Fund or refunded to the person who has borne the incidence of such amount.*
- (11) *The person who has borne the incidence of the amount, may apply for the refund of the same in accordance with the provisions of section 54.*

Statutory Provisions of the Statute:

Section or Rule	Description
Section 50	Interest on delayed payment of tax
Section 54	Refund of tax
Section 33	Amount of tax to be indicated in tax invoice and other documents
Rule 142	Notice and order for demand of amounts payable under the Act

76.1 Introduction

This provision deals with payment of any amount collected as tax but not remitted to the Central/State Government or Union Territory. This section requires him to make the payment forthwith regardless of whether the related supplies are taxable or not.

76.2 Analysis

- (i) This section makes it obligatory on every person who has collected from any other person any amount representing “tax under this Act”, to pay the said amount to the credit of the Central or State Government regardless of whether the supplies in respect of which the amount was collected are taxable or not.
- (ii) Please note that there is NO TIME LIMIT, also called ‘period of limitation’ for issue of notice under this section unlike under section 73 or 74. Take the example, sale of MRP goods where the MRP includes output tax carrying the ‘maximum price’ for sale in retail. Experts hold the view that MRP actually contains output tax and when goods are sold ‘at MRP’, it would be hit by this section. Experts who hold this view caution unregistered persons, composition taxpayers and taxpayers making exempt supplies to steer clear of selling MRP goods. It appears they need to sell ‘below MRP’ excluding output tax but after including input credit lost (refer below for effect of collecting ‘credit lost’). Refer discussions under section 32 for a conjoint reading and understanding on this topic.
- (iii) Before effecting recovery, the Proper Officer has to serve a notice along with a summary in **FORM GST DRC-01**, on to any person who has collected any amount representing as tax requiring to show cause as to why –
- the said amount should not be paid by him to the Government;

- penalty equivalent to such amount specified in the notice should not be imposed on him.
- (iv) The person is permitted to make representation in **FORM GST DRC-06**, against the notice served on him. The person ought to be given an opportunity of being heard where a request is made by such person in writing.
- (v) After considering such representation made by the person, the Proper Officer shall determine the amount due from the person and pass an order within one year from the date of issue of notice. Where the service of notice is stayed by order of the Court or Appellate Tribunal, the period covered by the stay shall stand excluded for the purpose of computing the time limit.
Further, a summary of such order shall be uploaded electronically in **FORM GST DRC-07**, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.
- (vi) The Proper Officer must pass a Speaking Order.
- (vii) Upon such determination, the person has to pay such amount determined.
- (viii) Interest at the rate specified under section 50 shall be paid on the amount collected as representing tax (either paid voluntarily or on determination by the Proper Officer). Interest shall be calculated from the date of collection of amount till the date of deposit of amount.
- (ix) The amount paid by such person to the credit of the Central Government or a State Government shall be adjusted against the tax payable by the person.
- (x) If any surplus is left after adjustment against the tax liability, it will be
 - Credited to consumer welfare fund; or
 - Refunded to the person who has borne the incidence of such amount.
- (xi) The person claiming such refund shall follow the conditions and procedure contained in section 54 of the CGST Act.
- (xii) There appears to be no time limit to commence proceedings under this section. Experts hold the view that principle of *res judicata* demands that when there is no time limit prescribed in the law a reasonable time limit must be applied and nothing is more reasonable that the maximum time limit of 5 years in section 74.

It is important to note that in the context of Central Excise, where input credit was to be reversed on account of Customer being entitled to exemption from payment of duties, the Larger Bench of the Hon'ble Tribunal held in *Unison Metals Ltd. v. CCE, Ahd-I [(2006) 204 ELT 323 (LB-Tri.)]*, that recovery of 'Cenvat Loss' would not attract the mischief of section 11D

as it was not 'duty of excise' collected liable to be paid to the Government. GST too denies credit under section 17(2) of CGST Act where supplies made are exempt. Please note that rate *Notification 11/2017-CT(R) dt. 27.06.2017* prescribing reduced rate of tax with condition of non-availment of input tax credit as well as exemption *Notification No 12/2017-CT(R) dt. 27.06.2017* prescribing exemption up to certain value limit or in certain circumstances, both are enjoined with a 'condition' of reversal of credit as read under explanation 4(iv)(b) along with section 17(2) of the CGST Act.

It is noted in demands relating to fake invoices, output tax is left undisputed but allegation is made that inward supplies are fictitious and demand for reversal of such credit made, unless the inward supplies are admitted to be for own consumption and not inventory for manufacture and sale or resale. It is important for Revenue to (i) demand output tax under section 76 in respect of fictitious outward supplies (ii) appropriate output tax already discharged and (iii) demand reversal of input tax credit for being fictitious. It would be a striking contradiction that inward supplies alone are alleged to be fictitious while implicitly admitting that outward supplies are genuine.

76.3 FAQs

Q1. What is the interest rate applicable on delayed payment of amount collected representing it as tax?

Ans. According to section 50, the rate of interest cannot exceed 18%. The rate of interest has been specified @ 18% per annum by *Notification No. 13/2017 – CT dt. 28.06.2017*.

Q2. How is the amount of surplus left after adjustment with tax payable dealt with?

Ans. Where any surplus is left after the adjustment against the tax payable, the amount of such surplus shall either be credited to the Consumer Welfare Fund or, as the case may be, refunded to the person who has borne the incidence of such amount.

Q3. What is the procedure to be followed by the person on receipt of determination of demand of tax collected but not deposited with the Central or a State Government from the Proper Officer?

Ans. The person will be given an opportunity of being heard and after that if any demand arises, then tax, interest and penalty has to be paid accordingly.

76.4 MCQs

Q1. Any amount of tax collected shall be deposited to the credit of the Central or a State Government,

- (a) Only when the supplies are taxable
- (b) Regardless of whether the supplies in respect of which such amount was collected are taxable or not.

- (c) Only when the supplies are not taxable
- (d) None of the above.

Ans. (b) Regardless of whether the supplies in respect of which such amount was collected are taxable or not.

- Q2. Within how many years should the proper office issue an order from the date of notice?
- (a) 1 year
 - (b) 2 years
 - (c) 3 years
 - (d) 4 years

Ans. (a) 1 year

Statutory Provisions

77. Tax wrongfully collected and paid to Central Government or State Government

- (1) *A registered person who has paid the Central tax and State tax or, as the case may be, the Central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed.*
- (2) *A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of central tax and State tax or, as the case may be, the Central tax and the Union territory tax payable.*

Related Provisions of the Statute

Section or Rule	Description
Section 54	Refund of tax

77.1 Introduction

This provision deals with a situation when CGST/SGST or CGST/UTGST is paid on any inter-State supply. Further also it covers interest implication in a situation where IGST is paid on transaction of intra-State supply.

77.2 Analysis

- (i) This provision deals with a situation where a taxable person wrongly pays CGST/SGST or CGST/UTGST on the transaction treating it as intra-State supply, but which is

subsequently held to be inter-State supply. Upon payment of IGST on such transaction, the CGST/SGST or CGST/UTGST will be refunded. The refund of such CGST/SGST or CGST/UTGST would be granted subject to such conditions as may be prescribed in this regard.

Further, interest is not required to be paid on the IGST payable in terms of section 19 (2) of the IGST Act

- (ii) If a taxable person wrongly pays IGST by treating a supply as inter-State supply, which is subsequently held to be intra-State supply, interest is not required to be paid on the CGST/SGST or CGST/UTGST payable. The refund of such IGST would be granted subject to such conditions as may be prescribed in this regard in terms of section 19(1) of the IGST Act.

Please note that jurisdiction to demand for CGST (and SGST) is contained in section 77(1) whereas jurisdiction to demand IGST is contained in section 19(1) of IGST Act. And relief from payment of interest on CGST-SGST is allowed under section 77(2) whereas relief from payment of interest on IGST is allowed under section 19(2) of IGST Act.

Reference could be made to the following decision of the Kerala High Court decision with regard to section 77:

Saji S, Proprietor, Adithya and Ambadi Traders [(2018) 19 G.S.T.L. 385 (Ker.)]

Issue:

Petitioner, a registered dealer, had purchased goods from Chennai. While transporting the goods to Kerala, the same were detained while in transit by the Assistant State Tax Officer. Based on the demand made, the consignor paid tax and penalty, but the remittance was made under the head 'SGST' - Since the remittance should have been made under the head IGST, the authorities refused to release the goods and hence this writ petition.

Held:

Section 77 of the CGST Act, 2017 provides for the refund of the tax paid mistakenly under one head instead of another; however, rule 4 of the GST Refund Rules speaks of adjustment - Where the amount of refund is completely adjusted against any outstanding demand under the Act, an order giving details of the adjustment is to be issued in Part A of Form GST RFD-07 - Under these circumstances, the High Court does not find any difficulty for the respondent officials to allow the petitioner's request and get the amount transferred from the head 'SGST' to 'IGST' . It is inequitable for the authorities to let the petitioner suffer on the count that such transfer may take some time. Second respondent directed to release the goods forthwith along with the vehicle and then, ensure that the tax and penalty which already stood remitted under the 'SGST' is transferred to the head 'IGST'. Petition was accordingly disposed by the High

Court.

Clarification in respect of refund of tax specified in section 77(1) of the CGST Act and section 19(1) of the IGST Act vide Circular No. 162/18/2021-GST dt. 25.09.2021

(i) *Interpretation of the term “subsequently held”*

The term “subsequently held” given in section 77 of CGST Act and section 19 of IGST Act covers both the cases where the inter-State or intra-State supply made by a taxpayer, is either subsequently found by taxpayer himself as intra-State or inter-State respectively or where the inter-State or intra-State supply made by a taxpayer is subsequently found/ held as intra-State or inter-State respectively by the tax officer in any proceeding.

(ii) *The relevant date for claiming refund under section 77 of the CGST Act, 2017/ section 19 of the IGST Act, 2017*

Through the insertion of sub-rule (1A) in rule 89 vide aforementioned *Notification No. 35/2021-CT dt. 24.09.2021*, it has been clarified that the refund under section 77 of CGST Act/ section 19 of IGST Act, 2017 can be claimed before the expiry of two years from the date of payment of tax under the correct head. However, in cases, where the taxpayer has made the payment in the correct head before the date of issuance of *Notification No.35/2021-CT dt. 24.09.2021*, the refund application under section 77 of the CGST Act/ section 19 of the IGST Act can be filed before the expiry of two years from the date of issuance of the said notification. i.e., from 24.09.2021.

Application of sub-rule (1A) of rule 89 read with section 77 of the CGST Act / section 19 of the IGST Act has been explained through various illustrations in the Circular.

77.3 FAQs

Q1. What is the remedy available when tax is paid wrongly as CGST/SGST and subsequently the supply is considered as inter-State supply attracting IGST?

Ans. Refund can be claimed by the taxable person who has paid CGST/SGST or CGST/UTGST on payment of IGST subject to such conditions as may be prescribed.

Q2. Is interest payable on CGST/SGST or CGST/UTGST, when IGST was wrongly paid on the transaction of intra-State supply?

Ans. When IGST was wrongly paid on intra-State supply, it is not required to pay any interest on the amount so paid when CGST/SGST or CGST/UTGST becomes payable.

77.4 MCQs

Q1. Which section deals with tax wrongly collected and deposited with Central or State Government?

- (a) Section 57
- (b) Section 58
- (c) Section 77
- (d) Section 79

Ans. (c) Section 77

Q2. If CGST/SGST is wrongly remitted instead of IGST, the tax payer can_____

- (a) seek refund
- (b) adjust against future liability
- (c) take re-credit
- (d) file a civil suit for recovery

Ans. (a) seek refund

Statutory provisions

78. Initiation of recovery proceedings

Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated:

Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him.

Related Provisions of the Statute

Section or Rule	Description
Section 79	Recovery of tax
Section 84	Continuation and validation of certain recovery proceedings

78.1. Introduction

This provision empowers the Proper Officer to collect any amount which is payable by a taxable person in pursuance of an order passed under the Act.

78.2 Analysis

- (a) This section enables initiation of proceedings for recovery of the amount from a taxable person.

- (b) The amount shall be paid by taxable person within a period of 3 months of the service of order, failing which the Proper Officer shall initiate the recovery proceedings. Note that time to file appeal under section 107 is 3 months and in harmony with that time limit, recovery action is kept in abeyance until that time is passed. Although additional time to file appeal (1 month before Appellate Authority and 3 months before Appellate Tribunal) is permitted. Recovery action need not be kept in abeyance until additional time is passed. Additional time is available not as a right but a remedy if sufficient cause is shown. Care must be taken to avoid delay in filing appeal, so that recovery action is not initiated.
- (c) If it is in the interest of Revenue, the Proper Officer after recording the reasons in writing, may initiate the recovery proceedings even before the completion of the said period of 3 months. However, this section empowers the Proper Officer in the interest of revenue (after recording the reasons) to initiate recovery proceedings even before the expiry of 3 months period.

78.3 FAQs

Q1. When is the amount payable by a taxable person in pursuance of order passed under this Act?

Ans. In the normal course, any amount payable by a taxable person in pursuance of an order passed under the Act shall be paid by such person within 3 months from the date of service of such order.

Q2. When can the Proper Officer require a taxable person to make payment of the amount specified in the order, within such shorter period as may be specified by him?

Ans. When the Proper Officer considers it necessary in the interest of Revenue, he may, after recording reasons in writing, ask the said taxable person to make the payment within such shorter period as may be specified by him.

78.4 MCQs

Q1. In which of the following cases, recovery proceedings be initiated?

- (a) To recover any amount payable by a taxable person in pursuance of an order passed under the Act
- (b) To recover any input tax credit availed by taxable person
- (c) None of the above
- (d) All of the above

Ans. (a) To recover any amount payable by a taxable person in pursuance of an order passed under the Act.

Q2. The time limit for payment of any amount payable by a taxable person in pursuance of

an order passed under the Act-

- (a) 6 months
- (b) 3 months
- (c) 1 year
- (d) 2 years

Ans. (b) 3 months.

Q3. The Proper Officer can require a taxable person to make payment within such shorter period as may be specified-

- (a) It is necessary in the interest of revenue
- (b) When amount payable exceeds ₹ 10 Lakhs
- (c) Both of the above
- (d) None of the above

Ans. (a) It is necessary in the interest of revenue

Statutory Provisions

79. Recovery of Tax

(1) *Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely: —*

- (a) *the proper officer may deduct or may require any other specified officer to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other specified officer;*
- (b) *the proper officer may recover or may require any other specified officer to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the proper officer or such other specified officer;*
- (c) (i) *the proper officer may, by a notice in writing, require any other person from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the Government either forthwith upon the money becoming due or being held, or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;*
(ii) *every person to whom the notice is issued under sub-clause (i) shall be*

bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

- (iii) in case the person to whom a notice under sub-clause (i) has been issued, fails to make the payment in pursuance thereof to the Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Act or the rules made thereunder shall follow;*
 - (iv) the officer issuing a notice under sub-clause (i) may, at any time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice;*
 - (v) any person making any payment in compliance with a notice issued under sub-clause (i) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the Government shall be deemed to constitute a good and sufficient discharge of the liability of such person to the person in default to the extent of the amount specified in the receipt;*
 - (vi) any person discharging any liability to the person in default after service on him of the notice issued under sub-clause (i) shall be personally liable to the Government to the extent of the liability discharged or to the extent of the liability of the person in default for tax, interest and penalty, whichever is less;*
 - (vii) where a person on whom a notice is served under sub-clause (i) proves to the satisfaction of the officer issuing the notice that the money demanded or any part thereof was not due to the person in default or that he did not hold any money for or on account of the person in default, at the time the notice was served on him, nor is the money demanded or any part thereof, likely to become due to the said person or be held for or on account of such person, nothing contained in this section shall be deemed to require the person on whom the notice has been served to pay to the Government any such money or part thereof;*
- (d) the proper officer may, in accordance with the rules to be made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the*

proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person;

- (e) *the proper officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business or to any officer authorised by the Government and the said Collector or the said officer, on receipt of such certificate, shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue;*
- (f) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the proper officer may file an application to the appropriate Magistrate and such Magistrate shall proceed to recover from such person the amount specified thereunder as if it were a fine imposed by him.*
- (2) *Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.*
- (3) *Where any amount of tax, interest or penalty is payable by a person to the Government under any of the provisions of this Act or the rules made thereunder and which remains unpaid, the proper officer of State tax or Union territory tax, during the course of recovery of said tax arrears, may recover the amount from the said person as if it were an arrear of State tax or Union territory tax and credit the amount so recovered to the account of the Government.*
- (4) *Where the amount recovered under sub-section (3) is less than the amount due to the Central Government and State Government, the amount to be credited to the account of the respective Governments shall be in proportion to the amount due to each such Government.*

¹⁴*[Explanation.—For the purposes of this section, the word person shall include "distinct persons" as referred to in sub-section (4) or, as the case may be, sub-section (5) of section 25.]*

Extract of the CGST Rules, 2017

¹⁵**[142A. Procedure for recovery of dues under existing laws.**

- (1) *A summary of order issued under any of the existing laws creating demand of tax,*

¹⁴ *Inserted vide The Central Goods and Services Tax (Amendment) Act, 2018 read with Notf No. 02/2019 - CT dt. 29.01.2019 w.e.f. 01.02.2019.*

¹⁵ *Inserted vide Notf No. 60/2018 - CT dt. 30.10.2018.*

interest, penalty, fee or any other dues which becomes recoverable consequent to proceedings launched under the existing law before, on or after the appointed day shall, unless recovered under that law, be recovered under the Act and may be uploaded in FORM GST DRC-07A electronically on the common portal for recovery under the Act and the demand of the order shall be posted in Part II of Electronic Liability Register in FORM GST PMT-01.

- (2) Where the demand of an order uploaded under sub-rule (1) is rectified or modified or quashed in any proceedings, including in appeal, review or revision, or the recovery is made under the existing laws, a summary thereof shall be uploaded on the common portal in FORM GST DRC-08A and Part II of Electronic Liability Register in FORM GST PMT-01 shall be updated accordingly.]

143. Recovery by deduction from any money owed.

Where any amount payable by a person (hereafter referred to in this rule as the “defaulter”) to the Government under any of the provisions of the Act or the rules made thereunder is not paid, the proper officer may require, in FORM GST DRC-09, a specified officer to deduct the amount from any money owing to such defaulter in accordance with the provisions of clause (a) of sub-section (1) of section 79.

Explanation.- For the purposes of this rule, “specified officer” shall mean any officer of the Central Government or a State Government or the Government of a Union territory or a local authority, or of a Board or Corporation or a company owned or controlled, wholly or partly, by the Central Government or a State Government or the Government of a Union territory or a local authority.

144. Recovery by sale of goods under the control of proper officer.

- (1) Where any amount due from a defaulter is to be recovered by selling goods belonging to such person in accordance with the provisions of clause (b) of sub-section (1) of section 79, the proper officer shall prepare an inventory and estimate the market value of such goods and proceed to sell only so much of the goods as may be required for recovering the amount payable along with the administrative expenditure incurred on the recovery process.
- (2) The said goods shall be sold through a process of auction, including e-auction, for which a notice shall be issued in FORM GST DRC-10 clearly indicating the goods to be sold and the purpose of sale.
- (3) The last day for submission of bid or the date of auction shall not be earlier than fifteen days from the date of issue of the notice referred to in sub-rule (2):

Provided that where the goods are of perishable or hazardous nature or where the expenses of keeping them in custody are likely to exceed their value, the proper officer may sell them forthwith.

- (4) The proper officer may specify the amount of pre-bid deposit to be furnished in the manner specified by such officer, to make the bidders eligible to participate in the auction, which may be returned to the unsuccessful bidders, forfeited in case the

successful bidder fails to make the payment of the full amount, as the case may be.

- (5) The proper officer shall issue a notice to the successful bidder in FORM GST DRC-11 requiring him to make the payment within a period of fifteen days from the date of auction. On payment of the full bid amount, the proper officer shall transfer the possession of the said goods to the successful bidder and issue a certificate in FORM GST DRC-12.
- (6) Where the defaulter pays the amount under recovery, including any expenses incurred on the process of recovery, before the issue of the notice under sub-rule (2), the proper officer shall cancel the process of auction and release the goods.
- (7) The proper officer shall cancel the process and proceed for re-auction where no bid is received or the auction is considered to be non-competitive due to lack of adequate participation or due to low bids.

¹⁶[144A. Recovery of penalty by sale of goods or conveyance detained or seized in transit

- (1) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub-section (1) of section 129 within fifteen days from the date of receipt of the copy of the order passed under sub-section (3) of the said section 129, the proper officer shall proceed for sale or disposal of the goods or conveyance so detained or seized by preparing an inventory and estimating the market value of such goods or conveyance.

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer.

- (2) The said goods or conveyance shall be sold through a process of auction, including e-auction, for which a notice shall be issued in FORM GST DRC-10 clearly indicating the goods or conveyance to be sold and the purpose of sale.

Provided that where the person transporting said goods or the owner of such goods pays the amount of penalty under sub-section (1) of section 129, including any expenses incurred in safe custody and handling of such goods or conveyance, after the time period mentioned in sub-rule (1) but before the issuance of notice under this sub-rule, the proper officer shall cancel the process of auction and release such goods or conveyance.

- (3) The last day for submission of bid or the date of auction shall not be earlier than fifteen days from the date of issue of the notice referred to in sub-rule (2).

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer.

¹⁶ Inserted vide Notf. No. 40/2021-CT dt. 29.12.2021. Applicable w.e.f. 01.01.2022.

(4) *The proper officer may specify the amount of pre-bid deposit to be furnished in the manner specified by such officer, to make the bidders eligible to participate in the auction, which may be returned to the unsuccessful bidders, forfeited in case the successful bidder fails to make the payment of the full amount, as the case may be.*

(5) *The proper officer shall issue a notice to the successful bidder in FORM GST DRC-11 requiring him to make the payment within a period of fifteen days from the date of auction.*

The proper officer shall issue a notice to the successful bidder in FORM GST DRC-11 requiring him to make the payment within a period of fifteen days from the date of auction.

(6) *On payment of the full bid amount, the proper officer shall transfer the possession and ownership of the said goods or conveyance to the successful bidder and issue a certificate in FORM GST DRC-12.*

(7) *The proper officer shall cancel the process and proceed for re-auction where no bid is received or the auction is considered to be non-competitive due to lack of adequate participation or due to low bids.*

(8) *Where an appeal has been filed by the person under the provisions of sub-section (1) read with sub-section (6) of section 107, the proceedings for recovery of penalty by sale of goods or conveyance detained or seized in transit under this rule shall be deemed to be stayed.*

Provided that this sub-rule shall not be applicable in respect of goods of perishable or hazardous nature.]

145. Recovery from a third person.

(1) *The proper officer may serve upon a person referred to in clause (c) of sub-section (1) of section 79 (hereafter referred to in this rule as "the third person"), a notice in FORM GST DRC-13 directing him to deposit the amount specified in the notice.*

(2) *Where the third person makes the payment of the amount specified in the notice issued under sub-rule (1), the proper officer shall issue a certificate in FORM GST DRC-14 to the third person clearly indicating the details of the liability so discharged.*

146. Recovery through execution of a decree, etc.

Where any amount is payable to the defaulter in the execution of a decree of a civil court for the payment of money or for sale in the enforcement of a mortgage or charge, the proper officer shall send a request in FORM GST DRC- 15 to the said court and the court shall, subject to the provisions of the Code of Civil Procedure, 1908 (5 of 1908), execute the attached decree, and credit the net proceeds for settlement of the amount recoverable.

147. Recovery by sale of movable or immovable property.

(1) *The proper officer shall prepare a list of movable and immovable property belonging to*

the defaulter, estimate their value as per the prevalent market price and issue an order of attachment or distraint and a notice for sale in FORM GST DRC- 16 prohibiting any transaction with regard to such movable and immovable property as may be required for the recovery of the amount due:

Provided that the attachment of any property in a debt not secured by a negotiable instrument, a share in a corporation, or other movable property not in the possession of the defaulter except for property deposited in, or in the custody of any Court, shall be attached in the manner provided in rule 151.

- (2) The proper officer shall send a copy of the order of attachment or distraint to the concerned Revenue Authority or Transport Authority or any such Authority to place encumbrance on the said movable or immovable property, which shall be removed only on the written instructions from the proper officer to that effect.*
- (3) Where the property subject to the attachment or distraint under sub-rule (1) is-*
 - a) an immovable property, the order of attachment or distraint shall be affixed on the said property and shall remain affixed till the confirmation of sale;*
 - b) a movable property, the proper officer shall seize the said property in accordance with the provisions of chapter XIV of the Act and the custody of the said property shall either be taken by the proper officer himself or an officer authorised by him.*
- (4) The property attached or distrained shall be sold through auction, including e-auction, for which a notice shall be issued in FORM GST DRC- 17 clearly indicating the property to be sold and the purpose of sale.*
- (5) Notwithstanding anything contained in the provision of this Chapter, where the property to be sold is a negotiable instrument or a share in a corporation, the proper officer may, instead of selling it by public auction, sell such instrument or a share through a broker and the said broker shall deposit to the Government so much of the proceeds of such sale, reduced by his commission, as may be required for the discharge of the amount under recovery and pay the amount remaining, if any, to the owner of such instrument or a share.*
- (6) The proper officer may specify the amount of pre-bid deposit to be furnished in the manner specified by such officer, to make the bidders eligible to participate in the auction, which may be returned to the unsuccessful bidders or, forfeited in case the successful bidder fails to make the payment of the full amount, as the case may be.*
- (7) The last day for the submission of the bid or the date of the auction shall not be earlier than fifteen days from the date of issue of the notice referred to in sub-rule (4):*

Provided that where the goods are of perishable or hazardous nature or where the expenses of keeping them in custody are likely to exceed their value, the proper officer may sell them forthwith.
- (8) Where any claim is preferred or any objection is raised with regard to the attachment or*

distrain of any property on the ground that such property is not liable to such attachment or distraint, the proper officer shall investigate the claim or objection and may postpone the sale for such time as he may deem fit.

- (9) *The person making the claim or objection must adduce evidence to show that on the date of the order issued under sub-rule (1) he had some interest in, or was in possession of, the property in question under attachment or distraint.*
- (10) *Where, upon investigation, the proper officer is satisfied that, for the reason stated in the claim or objection, such property was not, on the said date, in the possession of the defaulter or of any other person on his behalf or that, being in the possession of the defaulter on the said date, it was in his possession, not on his own account or as his own property, but on account of or in trust for any other person, or partly on his own account and partly on account of some other person, the proper officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or distraint.*
- (11) *Where the proper officer is satisfied that the property was, on the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the proper officer shall reject the claim and proceed with the process of sale through auction.*
- (12) *The proper officer shall issue a notice to the successful bidder in FORM GST DRC-11 requiring him to make the payment within a period of fifteen days from the date of such notice and after the said payment is made, he shall issue a certificate in FORM GST DRC12 specifying the details of the property, date of transfer, the details of the bidder and the amount paid and upon issuance of such certificate, the rights, title and interest in the property shall be deemed to be transferred to such bidder:*
- Provided that where the highest bid is made by more than one person and one of them is a co-owner of the property, he shall be deemed to be the successful bidder.*
- (13) *Any amount, including stamp duty, tax or fee payable in respect of the transfer of the property specified in sub-rule (12), shall be paid to the Government by the person to whom the title in such property is transferred.*
- (14) *Where the defaulter pays the amount under recovery, including any expenses incurred on the process of recovery, before the issue of the notice under sub-rule (4), the proper officer shall cancel the process of auction and release the goods.*
- (15) *The proper officer shall cancel the process and proceed for re-auction where no bid is received, or the auction is considered to be non-competitive due to lack of adequate participation or due to low bids.*

148. Prohibition against bidding or purchase by officer.

No officer or other person having any duty to perform in connection with any sale under the

provisions of this Chapter shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

149. Prohibition against sale on holidays.

No sale under the rules under the provision of this chapter shall take place on a Sunday or other general holidays recognized by the Government or on any day which has been notified by the Government to be a holiday for the area in which the sale is to take place.

150. Assistance by police.

The proper officer may seek such assistance from the officer in-charge of the jurisdictional police station as may be necessary in the discharge of his duties and the said officer-in-charge shall depute sufficient number of police officers for providing such assistance.

151. Attachment of debts and shares, etc.

- 1) A debt not secured by a negotiable instrument, a share in a corporation, or other movable property not in the possession of the defaulter except for property deposited in, or in the custody of any court shall be attached by a written order in FORM GST DRC-16 prohibiting. -
 - a) in the case of a debt, the creditor from recovering the debt and the debtor from making payment thereof until the receipt of a further order from the proper officer;
 - b) in the case of a share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;
 - c) in the case of any other movable property, the person in possession of the same from giving it to the defaulter.
- 2) A copy of such order shall be affixed on some conspicuous part of the office of the proper officer, and another copy shall be sent, in the case of debt, to the debtor, and in the case of shares, to the registered address of the corporation and in the case of other movable property, to the person in possession of the same.
- 3) A debtor, prohibited under clause (a) of sub-rule (1), may pay the amount of his debt to the proper officer, and such payment shall be deemed as paid to the defaulter.

152. Attachment of property in custody of courts or Public Officer.

Where the property to be attached is in the custody of any court or Public Officer, the proper officer shall send the order of attachment to such court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held till the recovery of the amount payable.

153. Attachment of interest in partnership

- 1) Where the property to be attached consists of an interest of the defaulter, being a partner, in the partnership property, the proper officer may make an order charging the share of such partner in the partnership property and profits with payment of the amount

due under the certificate, and may, by the same or subsequent order, appoint a receiver of the share of such partner in the profits, whether already declared or accruing, and of any other money which may become due to him in respect of the partnership, and direct accounts and enquiries and make an order for the sale of such interest or such other order as the circumstances of the case may require.

- 2) The other partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

154. Disposal of proceeds of sale of goods and movable or immovable property

- (1) ¹⁷[The amounts so realised from the sale of goods or conveyance, movable or immovable property, for the recovery of dues from a defaulter or for recovery of penalty payable under sub-section (3) of section 129 shall,

- a) first, be appropriated against the administrative cost of the recovery process;
- b) next, be appropriated against the amount to be recovered or to the payment of the penalty payable under sub-section (3) of section 129, as the case may be;
- c) next, be appropriated against any other amount due from the defaulter under the Act or the Integrated Goods and Services Tax Act, 2017 or the Union Territory Goods and Services Tax Act, 2017 or any of the State Goods and Services Tax Act, 2017 and the rules made thereunder; and
- d) the balance, if any, shall be credited to the electronic cash ledger of the owner of the goods or conveyance as the case may be, in case the person is registered under the Act, and where the said person is not required to be registered under the Act, the said amount shall be credited to the bank account of the person concerned;

(2) where it is not possible to pay the balance of sale proceeds, as per clause (d) of sub-rule (1), to the person concerned within a period of six months from the date of sale of such goods or conveyance or such further period as the proper officer may allow, such balance of sale proceeds shall be deposited with the Fund.]

155. Recovery through land revenue authority

Where an amount is to be recovered in accordance with the provisions of clause (e) of sub-section (1) of section 79, the proper officer shall send a certificate to the Collector or Deputy Commissioner of the district or any other officer authorised in this behalf in FORM GST DRC-18 to recover from the person concerned, the amount specified in the certificate as if it were an arrear of land revenue.

156. Recovery through court.

Where an amount is to be recovered as if it were a fine imposed under the Code of Criminal Procedure, 1973, the proper officer shall make an application before the appropriate Magistrate in accordance with the provisions of clause (f) of sub-section (1) of section 79 in

¹⁷ Substituted vide Notf. No. 40/2021-CT dt. 29.12.2021. Applicable w.e.f. 01.01.2022.

FORM GST DRC- 19 to recover from the person concerned, the amount specified thereunder as if it were a fine imposed by him.

157. Recovery from surety

Where any person has become surety for the amount due by the defaulter, he may be proceeded against under this Chapter as if he were the defaulter.

160. Recovery from company in liquidation

Where the company is under liquidation as specified in section 88, the Commissioner shall notify the liquidator for the recovery of any amount representing tax, interest, penalty or any other amount due under the Act in FORM GST DRC -24.

79.1 Introduction

Section 79 empowers departmental officers to collect/recover any amount that is payable under GST Act. Section 79 provide manner in which recovery proceedings can be carried out.

79.2 Analysis

- (i) When **any amount** that is payable by any person (*hereinafter referred to as defaulter*) to Government is not paid, the officer can adopt one or more of the methods set out in section 79 for recovery of amounts payable. The methods are :
- (a) **Deduction out of any money owing to defaulter:**
- There should be some money which is being owed by the Government to defaulter;
 - The amount payable can be deducted out of the said amount due to defaulter;
 - The deduction can be done by the Proper Officer himself or he may ask any other specified officer to do so.
 - The Proper Officer shall specify the amount so deducted in **FORM GST DRC-09** as prescribed in rule 143 of the CGST Rules.
- (b) **By detaining and selling the goods belonging to defaulter:**
- There should be goods which are under the control of the Proper Officer or other specified officer;
 - Such goods should belong to the person who is liable to pay any amount.
 - The goods may be detained and sold by the Proper Officer or such other specified officer on request by the Proper Officer;
 - Out of the realisation, the amount payable by defaulter shall be recovered.
 - As per rule 144 of the CGST Rules, the goods shall be sold through a process of auction including e-auction, for which a notice shall be issued in

FORM GST DRC-10 clearly indicating the goods to be sold and the purpose of sale. The last day for submission of bid or the date of auction shall not be earlier than 15 days from the date of issue of the above notice. However, if the goods are perishable or hazardous in nature or the expenses of storing them is likely to exceed the value of such goods, then Proper Officer may sell them forthwith.

- The Proper Officer shall issue a notice to the successful bidder in FORM GST DRC-11 requiring him to make the payment within a period of 15 days from the date of auction. On payment of the full bid amount, the possession of the said goods shall be transferred to the successful bidder and Proper Officer shall issue a certificate in FORM GST DRC-12.
- Where the defaulter pays the amount under recovery, including any expenses incurred on process of recovery, before the issue of notice issued in **FORM GST DRC-10** (Notice of Auction), then the Proper Officer shall cancel the process of auction and release the goods.

(c) Recovery from any other person who owes money to defaulter.

- This applies when any other person -
 - owes money to defaulter;
 - is likely to become due to pay money to the defaulter;
 - holds money for or on account of the defaulter;
 - may subsequently hold money for or on account of the defaulter.
- In such cases the Proper Officer may issue notice in writing in **FORM GST DRC-13** to such other person to pay to the credit of the Government –
 - forthwith
 - upon the money becoming due or
 - being held, or
 - at or within the time specified in the notice not being before the money becomes due or is held.
- The amount directed to be paid in the notice shall be –
 - where the amount due/held by such other person is more than amount due by the defaulter – to the extent of amount due by the defaulter;
 - where the amount due/held by such other person is equal to or less than amount due by defaulter – whole of money due/held.
- Such other person to whom such notice is issued is bound to comply with the same.

- In cases, where such notice is issued to a post office, banking company or an insurer, they are required to comply with the same without insisting on production of any passbook, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like, though that might be the normal practice.
- If such person to whom such notice is issued, fails to comply, he shall be treated as defaulter to the extent of the amount mentioned in the notice and all other consequences under the law shall follow.
- Where the third person makes the payment of the amount specified in the notice in **FORM GST DRC-13**, then the Proper Officer shall issue a certificate in **FORM GST DRC-14** to the third person clearly indicating the details of the liability so discharged.
- The notice so issued may be amended or revoked or time may be extended for making any payment;
- The payment made by such other person in accordance with the notice issued, shall be deemed to have made the payment on behalf of such defaulter and the amount credited to the government shall be deemed to constitute the discharge of liability of such defaulter to the extent of the payment made. Consequently, no civil suit or other proceedings could be filed or initiated by the defaulter on the notice, who has complied with this provision.
- Instead of crediting the amount to the Government, if such person makes the payment to defaulter, then such other person shall be personally liable to the Government to the extent of the amount due by the defaulter or amount discharged to the defaulter, whichever is lower.
- However, such person shall not be personally liable, if he proves to the officer issuing the notice that
 - the money demanded or any part thereof was not due to the person in default or
 - at the time of service of the notice he did not hold any money for or on account of the person in default,
 - the money was not demanded from him; or
 - any part of the money demanded is not likely to become due to such other person or
 - any part of the money will not likely be held for or on account of such person.

(d) Collection by detention of any movable or immovable property.

- The Proper Officer in accordance with the rule 147 of the CGST Rules framed for this purpose, may *inter-alia*
 - prepare a list of movable and immovable property belonging to the defaulter,
 - estimate their value as per the prevalent market price and
 - issue an order of attachment or distraint and a notice for sale in FORM GST DRC-16 prohibiting any transaction with regard to such movable and immovable property as may be required for the recovery of the amount due.
 - The property attached or distrained shall be sold through auction, including e-auction, for which a notice shall be issued in FORM GST DRC- 17 clearly indicating the property to be sold and the purpose of sale. And Proper Officer shall issue notice in FORM GST DRC- 11 to successful bidder for payment within 15 days of such notice. Thereafter on payment, the Proper Officer shall issue Certificate in FORM GST DRC- 12.
- Such detention of any movable or immovable property belonging to defaulter will be done till the amount payable is paid.
- If any part of the amount payable or cost of distress or keeping the property is not paid within 30 days from such distress, the Proper Officer may sell the property and with the proceeds he may adjust towards:
 - amount payable;
 - costs including the cost of sale remaining unpaid;
- After such adjustment, the remaining surplus shall be returned to the defaulter.

(e) Recovery through District Collector:

- Proper officer may prepare a certificate signed by him specifying the amount due from the defaulter.
- Such certificate will be sent to the Collector of the District or Deputy Commissioner or any other officer authorised in this behalf (DC) in FORM GST DRC-18 in which the defaulter.
 - owns any property; or
 - resides; or
 - carries on his business.
- The DC on receipt of such certificate shall proceed to recover from such defaulter the amount specified in the certificate as if such amount is arrears of land revenue.

(f) Recovery through Magistrate\Court:

- This provision has overriding effect over Code of Criminal Procedure;
 - In this case, the Proper Officer may file an application in FORM GST DRC- 19 to the appropriate Magistrate as per section 79(1)(f);
 - The Magistrate to whom application is made shall proceed to recover from the defaulter, the amount specified in the application as if it is fine imposed by such Magistrate.
- (ii) Under the Act, rules or regulations there would be requirement to execute bond or other instruments. If such bond/instrument provides that the amount becoming due shall be recovered in terms of section 79(1), then the recovery shall be effected as discussed above, irrespective of whether other mode of recovery exists or not.
- (iii) Further, it is also provided that, if either SGST Officer/ UTGST Officer while recovering SGST/UTGST arrears may also recover any amount due from the defaulter, the amount due by him under CGST Act as if it is SGST/UTGST and later pass it on to the Central Government.
- (iv) Similar provision also exists in SGST/UTGST Act for recovery of any amount due under SGST Act/UTGST Act to be recovered by CGST officers while recovering arrears of CGST as though the amount due was CGST and later pass it on to the concerned State Government/Union Territory.
- (v) It is also provided that in case where the SGST officer/UTGST officer also collects CGST in the course of collection of SGST/UTGST or *vice versa*, where the amount recovered is not fully covering both the liabilities, the amount collected has to be apportioned between Centre and State/Union Territory in the same proportion of the amounts due.
- (vi) *Recovery through execution of a decree, etc.-* Where any amount is payable to the defaulter in the execution of a decree of a civil court for the payment of money or for sale in the enforcement of a mortgage or charge, the Proper Officer shall send a request in **FORM GST DRC- 15** to the said court and the court shall, subject to the provisions of the Code of Civil Procedure, 1908, execute the attached decree, and credit the net proceeds for settlement of the amount recoverable.
- (vii) *Recovery from surety-* Where any person has become surety for the amount due by the defaulter, he may be proceeded as if he is the defaulter.
- (viii) *Recovery from Company under liquidation-* Where the company is under liquidation, the Commissioner shall notify the liquidator for the recovery of any amount representing tax, interest, penalty or any other amount due under the Act in **FORM GST DRC-24**.
- (ix) A new rule 144A (*Recovery of penalty by sale of goods or conveyance detained or seized in transit*) has been inserted with effect from 01.01.2022. The rule lays down that that where the person transporting any goods or the owner of such goods fails to pay

the amount of penalty section 129(1) within fifteen days from the date of receipt of the copy of the order passed under section 129(3), the proper officer shall proceed for sale or disposal of the goods or conveyance so detained or seized by preparing an inventory and estimating the market value of such goods or conveyance.

If the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer. The said goods or conveyance shall be sold through a process of auction, including e-auction.

- (x) Rule 154 (Disposal of proceeds of sale of goods or conveyance and movable or immovable property) has been substituted with effect from the 01.01.2022 to provide that such proceeds shall now be appropriated against the amount to be recovered or to the payment of the penalty payable section 129(3), as the case may be, after being appropriated against administrative cost of the recovery process. Further, balance amount, if any, instead of paying directly to the defaulter, shall now be credited to the electronic cash ledger of the owner of the goods or conveyance in case the person is registered or else shall be credited to his bank account. However, where the balance of sale proceeds cannot be so paid within a period of six months from the date of sale of such goods or conveyance or such further period as the proper officer may allow, such balance of sale proceeds shall be deposited with the Fund.

Clarification on the legal position of voluntary payment of taxes during the course of inspection, search or investigation-Instruction No. 01/2022-23 [GST-Investigation] dt. 25.05.2022

Under CGST Act, 2017, the taxpayers have an option to make voluntary payment of tax through Form DRC-03. Such voluntary payment of tax before issuance of show cause notice is permitted under section 73(5) and section 74(5) of the CGST Act, 2017. This helps the taxpayers in discharging their admitted liability, self-ascertained or as ascertained by the tax officer, without having to bear the burden of interest under section 50 of CGST Act, 2017 for delayed payment of tax and may also save him from higher penalty imposable on him subsequent to issuance of show cause notice under section 73 or section 74, as the case may be.

Recovery of taxes not paid or short paid, can be made under the provisions of section 79 of CGST Act, 2017 only after following due legal process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order. Therefore, there may not arise any situation where "recovery" of the tax dues has to be made by the tax officer from the taxpayer during the course of search, inspection or investigation, on account of any issue detected during such proceedings. However, the law does not bar the taxpayer from voluntarily making payment of any tax liability ascertained by him or the tax officer in respect of such issues, either before or during the course of such proceedings or subsequently. The tax officer should however, inform the taxpayers regarding the provisions of voluntary tax payments through DRC-03.

The Principal Chief Commissioners/ Chief Commissioners, CGST Zones and Principal Director General, DGGI are advised that in case, any complaint is received from a taxpayer regarding use of force or coercion by any of their officers for getting the amount deposited during search or inspection or investigation, the same may be enquired at the earliest and in case of any wrongdoing on the part of any tax officer, strict disciplinary action as per law may be taken against the defaulting officers.

79.3 FAQs

Q1. What are the methods of recovery as prescribed in section 79 read with the CGST Rules?

- Ans. — Deduction out of any money owing to defaulter.
— By detaining and selling the goods belonging to defaulter.
— Recovery from any other person who owes money to defaulter.
— Collection by detention of any movable or immovable property.
— Recovery through District Collector.
— Recovery through Magistrate
— Recovery through execution of a decree, etc.
— Recovery from surety
— Recovery from company in liquidation
— Various attachment can be done like- Attachment of interest in partnership; Attachment of property in custody of courts or Public Officer, Attachment of debts and shares, etc.

Q2. Can the authorities use more than one of the methods for the recovery proceedings?

Ans. Yes, they can use one or more methods at the option and choice of the Proper Officer.

Q3. Officer, in the course of tax recovery, recovered ₹ 2 Crore whereas, the amount due were ₹ 2 Crores of CGST and ₹ 3 Crore of SGST/UTGST, to which account, the amount recovered would be allocated?

Ans. 2 Crores recovered will be allocated between Centre and State/Union Territory in the proportion of 2:3.

79.4 MCQs

Q1. Recovery of amount payable by a defaulter can be made from _____

- (a) customer
- (b) bank
- (c) post office

(d) all the above.

Ans. (d) all the above.

Q2. Recovery of amount payable by a defaulter can be made _____

- (a) after determination of liability under section 73 or 74
- (b) even before issue of notice under section 73 or 74
- (c) any time
- (d) at the discretion of the Proper Officer.

Ans. (a) after determination of liability under section 73 or 74

Q3. The Proper Officer may cause the sale of distressed property after-

- (a) 30 days
- (b) 60 days
- (c) 90 days
- (d) 120 days

Ans. (a) 30 days

Statutory Provisions

80. Payment of tax and other amount in instalments

On an application filed by a taxable person, the Commissioner may, for reasons to be recorded in writing, extend the time for payment or allow payment of any amount due under this Act, other than the amount due as per the liability self-assessed in any return, by such person in monthly instalments not exceeding twenty-four, subject to payment of interest under section 50 and subject to such conditions and limitations as may be prescribed:

Provided that where there is default in payment of any one instalment on its due date, the whole outstanding balance payable on such date shall become due and payable forthwith and shall, without any further notice being served on the person, be liable for recovery.

Extract of the CGST Rules, 2017

158. Payment of tax and other amounts in instalments

- 1) *On an application filed electronically by a taxable person, in FORM GST DRC- 20, seeking extension of time for the payment of taxes or any amount due under the Act or for allowing payment of such taxes or amount in instalments in accordance with the provisions of section 80, the Commissioner shall call for a report from the jurisdictional officer about the financial ability of the taxable person to pay the said amount.*

- 2) Upon consideration of the request of the taxable person and the report of the jurisdictional officer, the Commissioner may issue an order in FORM GST DRC- 21 allowing the taxable person further time to make payment and/or to pay the amount in such monthly instalments, not exceeding twenty-four, as he may deem fit.
- 3) The facility referred to in sub-rule (2) shall not be allowed where-
- a) the taxable person has already defaulted on the payment of any amount under the Act or the Integrated Goods and Services Tax Act, 2017 or the Union Territory Goods and Services Tax Act, 2017 or any of the State Goods and Services Tax Act, 2017, for which the recovery process is on;
 - b) the taxable person has not been allowed to make payment in instalments in the preceding financial year under the Act or the Integrated Goods and Services Tax Act, 2017 or the Union Territory Goods and Services Tax Act, 2017 or any of the State Goods and Services Tax Act, 2017;
 - c) the amount for which instalment facility is sought is less than twenty-five thousand rupees.

Related Provisions of the Statute

Section or Rule	Description
Section 50	Interest on delayed payment of tax

80.1 Introduction

This section permits a taxable person to make payment of an amount due on instalment basis, other than the amount due as per self-assessed return. The term 'instalments' in general parlance would mean equated periodical payments (money due) spread over an agreed period of time. This provision happens to be a beneficial piece of law to the taxpayers to pay the demand in instalments along with interest.

80.2 Analysis

- (i) This section empowers the Commissioner to grant permission only to the taxable person to make payment of any amount due on instalment basis, on an application filed electronically in **FORM GST DRC-20** (Refer rule 158).
The Commissioner after considering the request by the taxable person (in **FORM GST DRC-20**) and report of the jurisdictional office, may issue an order in **FORM GST DRC-21**, allowing the taxable person to either extend the time or allow payment of any amount due under the Act on instalment basis.
- (ii) This section applies to amounts due other than the self-assessed liability shown in any return.
- (iii) The instalment period shall not exceed 24 months.

- (iv) The taxable person shall also be liable to pay prescribed interest on the amount due from the first day such tax was due to be payable till the date tax is paid.
- (v) If default occurs in payment of any one instalment the taxable person would be required to pay the whole outstanding balance payable on such date of default itself without further notice.

80.3 FAQs

Q1. Whether application is to be made to pay the amount due in instalments?

Ans. Yes, an application should be made by a taxable person to the Commissioner stating the reasons for his/her request to make payment through instalments. (in **FORM GST DRC-20**)

Q2. Can an unregistered person be covered under the said provisions?

Ans. A taxable person is covered by the provision. Section 2(107) defines taxable person as "a person who is registered or liable to be registered under Section 22 or Section 24". Hence, unregistered person cannot opt the benefit of this provision.

Q3. From which date does the interest liability arise?

Ans. The interest is liable to be paid from the date on which the said amount of tax became due to be paid till the actual payment of tax i.e., last instalment.

Q4. 'A' requested the Commissioner to provide the benefit to pay ₹ 5,00,000/- under instalments. The Commissioner directs 'A' to make the payment in five monthly instalments. How to pay the interest?

Ans. It is assumed that the actual date on which the tax was required to be paid as 06.01.2019. Benefit of instalment was granted by Commissioner on 12.01.2020 to be paid w.e.f. 02.01.2020 onwards over 5 instalments.

Payment date	Interest to be paid as per section 50 – No of days	Amount on which interest to be paid
1 st Instalment – 02.01.2020	06.01.2019 to 01.01.2020 = 361 days	₹ 1,00,000/-
2 nd Instalment – 02.02.2020	06.01.2019 to 01.02.2020 = 392 days	₹ 1,00,000/-
3 rd Instalment – 02.03.2020	06.01.2019 to 01.03.2020 = 421 days	₹ 1,00,000/-
4 th Instalment - 02.04.2020	06.01.2019 to 01.04.2020 = 452 days	₹ 1,00,000/-
5 th Instalment – 02.5.2020	06.01.2019 to 01.05.2020 =	₹ 1,00,000/-

	432 days	
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Q5. What will happen if the taxable person fails to pay any one instalment on its due date?

Ans. In such a case, the entire outstanding balance payable as on the said due date shall forthwith become due and payable without any further notice and be liable for recovery.

80.4 MCQs

Q1. The following amounts due cannot be paid through instalments,

- (a) Self-assessed tax shown in return
- (b) Arrears of tax
- (c) Short paid tax for which notice has been issued
- (d) Concealed liability

Ans. (a) Self-assessed tax shown in return

Q2. Maximum number of instalments permissible under section 80

- (a) 36
- (b) 12
- (c) 48
- (d) 24

Ans. (d) 24

Q3. Which officer/s has the power to grant permission for payment of tax through instalment?

- (a) Commissioner
- (b) Assistant Commissioner
- (c) Chief Commissioner
- (d) both (a) and (b)

Ans. (a) Commissioner

Statutory Provisions

81. Transfer of property to be void in certain cases

Where a person, after any amount has become due from him, creates a charge on or parts with the property belonging to him or in his possession by way of sale, mortgage, exchange, or any other mode of transfer whatsoever of any of his properties in favour of any other person with the intention of defrauding the Government revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the said person:

Provided that, such charge or transfer shall not be void if it is made for adequate consideration, in good faith and without notice of the pendency of such proceedings under this Act or without notice of such tax or other sum payable by the said person, or with the previous permission of the proper officer.

81.1 Introduction

This provision protects the Government revenue by avoiding transfer of property by a taxable person to another person. This would prevent any attempt to defraud the revenue by alienating the properties.

81.2 Analysis

- (i) The said provision would be applicable only when any tax has become due.
- (ii) The following acts done by a person, in favour of any another person, after the tax becomes due, would be void

Situations / cases – Void	Situations / cases –Valid
<ul style="list-style-type: none"> • Creates a charge on; or • Parts with the property • Belonging to him; or • In his possession <p>By way of sale, mortgage, exchange, or any other mode of transfer whatsoever of any of his properties.</p>	<p>Made for adequate consideration and</p> <ul style="list-style-type: none"> • without notice of the pendency of proceeding • Without notice of such tax or other sum payable by the said person, • With previous permission of the Proper Officer.

- (iii) The transfer will be void, when it is or was with an intention of defrauding the Government revenue. Please note that there is no 'time limit' for the look-back period to question transactions. As such, proving intent to defraud appears quite onerous and hardly feasible to prove satisfactorily to reach actual reversal and recovery of tax by reversal of transfers.
- (iv) Intention to defraud Revenue is not an impression Proper Officer can reach lightly. To reach such a conclusion, there must be (i) imminent liability that is undischarged (ii) except for this asset that is proposed to be transferred, there is no other source of funds to discharge this liability (iii) after transfer (or charge) of this asset, proceeds do not reside with taxable person to discharge tax and other obligations (iv) no other ostensible reasons forthcoming for undertaking proposed transfer of assets. In fact, any application for 'permission' of Proper Officer must revolve around these factors to be allowed.
- (v) There is no compulsion that every transfer (or charge) must be made only after 'permission' of Proper Officer is secured. Had that been the objective, the requirement

for permission would not reside in the *proviso* but would have been in the main section and read as “no transfer or charge of assets will be valid unless previous permission of Proper Officer is granted” (or any equivalent). And when a transfer is made (which is possible) without such prior permission, a suspicion could arise if the above factors are palpable. But no presumption in favour of Revenue – as to the intention of taxpayer in making this transfer (or charge) was to defraud Revenue – could be made. It is misplaced enthusiasm of buyers to make this permission a ‘condition precedent’. But then, no one can be blamed for being too cautious, even if it is not justified.

- (vi) To ‘void’ a transaction is ‘without remedy’ in law because it does not arise out of a ‘decision or order’ to be appealable under section 107. It is a declaration that the “charge or transfer will be void” in this provision. But the need for ‘application of mind’ to reach such a conclusion and the factors indicated above to support this conclusion requires Revenue to interrupt a concluded transfer by filing a complaint in Court to pass a ‘declaration decree’ or by attachment of property by the Collector of the district. Voiding a concluded transfer is not based on Proper Officer’s opinion as to the underlying motive. Proper Officer authorized to issue prior permission, to protect buyer who enters into the transfer without knowledge of these factors. But a transfer that is concluded with such an intention cannot still prejudice any buyer who acted without knowledge of extant liability and for good consideration. In the absence of any liability or existence of sources to discharge such liability or proper flow of consideration to taxable person (to meet any such liability) or liability pending in appeal admitted, will also not prejudice the buyer. This declaration decree will arise only when recovery action is initiated in Court under section 79(1)(f). Remedy available to Proper Officer under section 79(1)(d) will not be available in case of properties already transferred even when such transfer was without securing the permission prescribed.

Illustrations:

1. Mr. Defrauder was served with a notice of demand for ₹ 20 Lakhs on 10.06.2020. He filed a reply for the said notice on 20.06.2020, stating that he was unable to deposit tax dues as he was financially stressed. On 15.06.2020, Mr. Defrauder transferred all the property worth ₹ 35 Lakhs under his name to the name of his wife for a consideration of ₹ 10,000/-. Is this act of Mr. Defrauder valid?

Ans. As per section 81, the said transfer would be void and the property worth ₹ 35 Lakhs would be considered still to be in the hands of Mr. Defrauder.
2. In the above illustration, if transfer of property was for a consideration of ₹ 42 Lakhs to Mr. X who is unaware of the pending proceedings of Mr. Defrauder. The transfer took place on 15.06.2020. Is the act of Mr. Defrauder valid?

Ans. In this case, the transaction would be a valid act, since the transfer was made for adequate consideration and also without notice of the pendency of proceeding.
3. On Mr. Perfect, notice was issued on 10.06.2020. However, the same was received by Mr. Perfect on 20.06.2020. Meanwhile the property of Mr. Perfect was sold to Mr.

Perfectionist for ₹ 35 Crore. Is the sale void or valid?

Ans. The sale is valid since on the date of sale there was no pending proceeding on Mr. Perfect.

81.3 Comparative review

This provision is new to Indirect Tax law. It is a concept borrowed from the Income-Tax law to safeguard the revenue. According to the Income Tax (IT) Act, certain transfers can be considered void without a tax-clearance certificate (Section 281B). "This can be transfer of immovable property, that is, sale or mortgage of housing property, any gift, or exchange,"

81.4 FAQ

Q1. When the transaction in property is void as per section 81?

Ans. During the pendency of proceeding under GST Act, if the taxable person transfers the property of his to another person with an intent of defrauding the Government revenue, then such transfer would be considered as void.

81.5 MCQs

Q1. What all modes of transfers are covered under section 81?

- (a) Sale
- (b) Exchange
- (c) Mortgage
- (d) All of the above

Ans. (d) All of the above

Q2. When the transfer of property would be considered as void?

- (a) Transaction is done to defraud the Govt. revenue
- (b) Transaction is done without intention to defraud the Govt. revenue
- (c) Any of the above

Ans. (a) Transaction is done to defraud the Govt. revenue

Statutory Provisions

82. Tax to be first charge on property

Notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, any amount payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.

82.1 Introduction

Other than as provided under Insolvency and Bankruptcy Code, 2016, this provision shall have an overriding effect over the other provisions contained in any law for the time being in force. This provision provides that if any dues are payable by a taxable person or any other person to the Government, then it would have first charge on the property of such taxable or other person.

82.2 Analysis

- (i) The provisions of this section would apply to a taxable person or any other person who is liable to pay tax, interest or penalty to Government.
- (ii) Any liability to be paid to the Government would be given priority in the matter of effecting recovery by placing a first charge on the property of the taxable person or any other person.
- (iii) This provision also covers any other person since there are other provisions in the Act, which provide for creating a liability or recovery from a person other than the taxable person like a legal representative, member of partitioned HUF etc.
- (iv) It would make it interesting if, read of section 53 of IBC where a 'waterfall' provision lists Government dues way below several others. So, reference may be had to IBC which will prevail over GST law. However, it is interesting that Apex Court in *STO v. Rainbow Papers Ltd. CA 1661/2020 (SC)* has overturned this position to allow statutory dues to be in priority. It is respectfully submitted that reference to section 85 and 87 of CGST Act has not been made in this decision where the determination of liability is permitted even after the transfer. Further clarity in the GST context is required to establish the applicability of this decision in respect of liability (i) determined, undisputed and lying undischarged prior to date of transfer (ii) determined but disputed as on date of transfer and (iii) determined after date of transfer.

82.3 FAQs

Q1. When can the charge on property of taxable person be created?

Ans. The charge can be created only when taxable person or any other person is liable to pay tax or interest or penalty to Government.

Q2. Are unregistered persons covered under the said provision?

Ans. The section refers to both taxable person and any other person, on whose property first charge could be created. Hence, all persons as defined under section 2(84) of the CGST Act would be covered, whether he is a taxable person or not.

82.4 MCQs

Q1. What liabilities can be recovered under this section?

- (a) Interest
- (b) Tax
- (c) Penalty

(d) All of the above

Ans. (d) All of the above

Q2. Mr. Richie Poor has the following properties. Which of the below would be treated as attracting first charge?

(a) Richie Nilaya, a mansion in the name of Mr. Richie

(b) Mrs. Richie's fixed deposit

(c) Richie's neighbour, Mrs. Y's Jewellery

(d) None of the above

Ans. (a) Richie Nilaya, a mansion in the name of Mr. Richie

Statutory Provisions

83. Provisional attachment to protect revenue in certain cases

(1) ~~¹⁸[Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.]~~

¹⁸[Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed.]

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Extract of the CGST Rules, 2017

159. Provisional attachment of property

1) Where the Commissioner decides to attach any property, including bank account in accordance with the provisions of section 83, he shall pass an order in FORM GST DRC-22 to that effect mentioning therein, the details of property which is attached.

2) The Commissioner shall send a copy of the order of attachment ¹⁹[in GST DRC-22] to the concerned Revenue Authority or Transport Authority or any such Authority to place encumbrance on the said movable or immovable property, which shall be

¹⁸ Substituted vide The Finance Act, 2021 through Notf No. 39/2021-CT. dt. 21.12.2021. Applicable w.e.f. 01.01.2022.

¹⁹ Inserted vide Notf No 40/2021-CT dt. 29.12.2021 w.e.f. 01.01.2022.

removed only on the written instructions from the Commissioner to that effect ²⁰[or on expiry of a period of one year from the date of issuance of order under sub-rule (1), whichever is earlier], ²¹[and a copy of such order shall also be sent to the person whose property is being attached under section 83]

- 3) Where the property attached is of perishable or hazardous nature, ²²~~and if the taxable person~~ and if the person whose property has been attached] pays an amount equivalent to the market price of such property or the amount that is or may become payable ²³~~by the taxable person~~ by such person], whichever is lower, then such property shall be released forthwith, by an order in FORM GST DRC-23, on proof of payment.
- 4) Where ²⁴~~the taxable person~~ such person] fails to pay the amount referred to in sub-rule (3) in respect of the said property of perishable or hazardous nature, the Commissioner may dispose of such property and the amount realized thereby shall be adjusted against the tax, interest, penalty, fee or any other amount payable by ²⁸~~the taxable~~ such person].
- 5) Any person whose property is attached may ²⁵~~file an objection in Form GST DRC 22A, within seven days of the attachment under sub-rule (1), file an objection]~~ to the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in FORM GST DRC-23.
- 6) The Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in FORM GST DRC- 23.

83.1 Introduction

This section confers power to provisionally attach the property of the taxable person or any person specified in sub-section (1A) of section 122 in certain situations to protect the interest of the Government.

83.2 Analysis

As per the amended sub-section (1) of section 83 (vide the *Finance Act, 2021*), applicable from 01.01.2022:

- (i) This section applies 'after initiation of' any proceedings under:
 - (a) Chapter XII, covering sections 59 to 64 – Assessment.

²⁰ Inserted vide Notf No. 52/2023 – CT dt. 26.10.2023.

²¹ Inserted vide Notf No. 40/2021 – CT dt. 29.12.2021 w.e.f. 01.01.2022.

²² Substituted vide Notf No 40/2021-CT dt. 29.12.2021 w.e.f. 01.01.2022.

²³ Substituted vide Notf No 40/2021-CT dt. 29.12.2021 w.e.f. 01.01.2022.

²⁴ Substituted vide Notf No 40/2021-CT dt. 29.12.2021 w.e.f. 01.01.2022.

²⁵ Substituted vide Notf No 40/2021-CT dt. 29.12.2021 w.e.f. 01.01.2022.

- (b) Chapter XIV, covering sections 67 to 72 – Inspection, Search, Seizure and Arrest.
 - (c) Chapter XV, covering sections 73 to 84 – Demands and Recovery.
- (ii) The provisional attachment of property of taxable person shall be executed by the Commissioner. Provisional attachment 'during pendency' and 'after initiation of', any proceedings do not alter the power to attach property prior to any proceedings but only after clear steps have been taken to invoke the powers under the respective sections (or Chapters) of the law as referred. 'Initiation' is when steps are taken to 'set the law in motion' as defined by the ingredients in the respective provisions of law. Once proceedings are 'initiated', the said proceedings are 'pending', and these powers become invocable.
 - (iii) Note that provisional attachment under section 83 can be 'during investigation' whereas recovery under section 79 only after 'final demand' arises out of any order. Provisional attachment is not the same as confiscation. Confiscation results in property being taken over and vesting with the Government. Provisional attachment will leave the property where it is but only the freedom of taxpayer to access and use it is prohibited by this Order of attachment.
 - (iv) The only condition is that the Commissioner should be of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary to provisionally attach the property. The Commissioner may also seize bank accounts of such persons, if it is in the interest of revenue.
 - (v) Attachment of property belonging to taxable person alone is permitted to be attached. But the amended provision permits attachment of property belong to (i) taxable person and (ii) person who is the mind behind the offences as identified in section 122(1A) of the CGST Act, are permitted to be covered by this amended provision.
 - (vi) Such provisional attachment would be valid for one year from the date of the order made by the Commissioner in FORM GST DRC-22 & copy of order shall also be sent to the person whose property is being attached under section 83. Provisional attachment of property (being any movable or immovable property) is not the same as confiscation of property (in offending articles) under section 130.
 - (vii) Where the property attached is of perishable or hazardous nature, and if the person whose property is attached pays an amount equivalent to the market price of such property or the amount that is or may become payable by such person, whichever is lower, then such property shall be released forthwith, by an order in **FORM GST DRC-23**, on proof of payment. Further, where such person fails to pay the aforesaid amount, the Commissioner may dispose of such property and the amount realized thereby shall be adjusted against the tax, interest, penalty, fee or any other amount payable by the such person.
 - (viii) Any person whose property is attached may, file an objection in Form GST DRC-22A to

the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in **FORM GST DRC-23**. Taxpayers must attempt to alleviate the risks perceived by Commissioner to invoke these exceptional powers. Taxpayer's application to present (i) undertaking to discharge liability when a lawful demand is made (ii) ability of taxpayer to meet future obligations (iii) liability is not free from doubt about underlying interpretation of facts or of law (iv) all other returns and compliances up to date by taxpayer (v) no other delinquency detected and (vi) no risk of light and any perception to be redressed by offering surety or suitable security. When these factors are presented, it would be herculean task to reject application as the decision to reject is subject to 'judicial review' of the reasons for dissatisfaction with explanation offered by taxpayer. Plead for lenience (without addressing these factors) would be an unhelpful approach in such application.

The Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in **FORM GST DRC- 23**. After all, provisional attachment only places a lien on the said property and it will continue to remain in lawful possession of taxable person and available for use and enjoyment. Only bar would be alienation for one (1) year or until attachment is vacated, whichever is earlier.

- (ix) Forms GST DRC-10 and GST DRC-22 have been substituted with new Forms with effect from 01.01.2022.
 - (x) Form GST DRC-11 (Notice to successful bidder)- rule 144A has been included in addition to existing rules 144(5) and 147(12). Further, the word conveyance has also been included in addition to goods with effect from 01.01.2022 implying that now the possession of the goods as well as conveyance shall be transferred to the successful bidder after making full payment of the bid amount. Similar changes have also been made in FORM GST DRC-12 (Sale Certificate).
 - (xi) In Form GST DRC-11 (Restoration of provisionally attached property / bank account under section 83), the words 'Regional Transport Authority/Other Relevant Authority' have been added in addition to existing 'Immovable property registering authority', with effect from 01.01.2022.
 - (xii) A new table has been inserted under clause (a) of entry no. 15 in FORM APL-01 with effect from 01.01.2022.
- 83.3** A new Form GST DRC-22A (Application for filing objection against provisional attachment of property) has been introduced with effect from 01.01.2022 under rule 159(5).

83.4 FAQs

- Q1. Provisional attachment shall be applicable to which proceedings?

Ans. Provisional attachment shall be applicable for the following pending proceedings of a taxable person:

1. Assessment of non-filers of returns.
2. Assessment of unregistered persons.
3. Summary assessment in certain special cases.
4. Inspection, search and seizure.
5. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts.
6. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful-misstatement or suppression of facts.

Q2. What is the condition for provisionally attaching the property of a taxable person?

Ans. The Commissioner should be of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary to do so.

Q3. Why attachment should be done, before conclusion of proceedings?

Ans. Attachment to be done before conclusion of proceedings, if Commissioner is of the opinion that there is risk of recovery and to protect interest of revenue.

83.5 MCQs

Q1. Till what period does the order passed for provisional attachment is valid?

- (a) Infinite period
- (b) One year
- (c) Ten years
- (d) till the end of such proceedings

Ans. (b) One year

Q2. Who is the competent authority for passing an order for provisional attachment?

- (a) The Deputy Commissioner
- (b) The GST Council
- (c) The Commissioner
- (d) The Assistant Commissioner

Ans. (c) The Commissioner

Q3. Attachment can be done under section 83:

- (a) Before completion of proceedings.

- (b) After completion of proceedings.
- (c) After 3 attempts to recover dues.
- (d) Only if there is risk of delinquency in payment of dues.

Ans. (a) Before completion of proceedings.

Statutory Provision

84. Continuation and validation of certain recovery proceedings

Where any notice of demand in respect of any tax, penalty, interest or any other amount payable under this Act, (hereafter in this section referred to as "Government dues"), is served upon any taxable person or any other person and any appeal or revision application is filed or any other proceedings is initiated in respect of such Government dues, then -

- (a) *where such Government dues are enhanced in such appeal, revision or other proceedings, the Commissioner shall serve upon the taxable person or any other person another notice of demand in respect of the amount by which such Government dues are enhanced and any recovery proceedings in relation to such Government dues as are covered by the notice of demand served upon him before the disposal of such appeal, revision or other proceedings may, without the service of any fresh notice of demand, be continued from the stage at which such proceedings stood immediately before such disposal;*
- (b) *where such Government dues are reduced in such appeal, revision or in other proceedings—*
 - (i) *it shall not be necessary for the Commissioner to serve upon the taxable person a fresh notice of demand;*
 - (ii) *the Commissioner shall give intimation of such reduction to him and to the appropriate authority with whom recovery proceedings is pending;*
 - (iii) *any recovery proceedings initiated on the basis of the demand served upon him prior to the disposal of such appeal, revision or other proceedings may be continued in relation to the amount so reduced from the stage at which such proceedings stood immediately before such disposal.*

Extract of the CGST Rules, 2017

161. Continuation of certain recovery proceedings.

The ²⁶~~order~~ intimation or notice] for the reduction or enhancement of any demand under section 84 shall be issued in FORM GST DRC- 25.

²⁶ Substituted vide Notf No. 26/2022-CT dt. 26.12.2022.

Related Provisions of the Statute:

Section or Rule	Description
Section 79	Recovery of tax

84.1 Introduction

This section deals with continuation of proceedings, where a notice is already served for recovery of Government dues upon a taxable person or any other person and upon any appeal, revision application or other proceeding there is reduction or enhancement of such Government dues.

84.2 Analysis

- (i) The section refers to –
- any notice of demand in respect of Government dues (tax, interest or any other amount payable) served on taxable person or any other person; and
 - any appeal or revision application is filed or other proceedings are initiated in respect of such Government dues.

Further–

- (a) such Government dues may be enhanced; or
- (b) reduced in such appeal, revision or in other proceedings

The intimation or notice for such reduction or enhancement of any demand under section 84 shall be issued in **FORM GST DRC- 25**.

- (ii) In such cases, the Commissioner shall –
- Serve another notice on the taxable person or any other person, in respect of the enhanced amount.
 - If notice of demand is already served on taxable person or any other person before such appeal, revision or any other proceedings, then recovery of enhanced amount would be continued from the stage at which the initial proceedings stood. There is no need to issue a fresh notice of demand to the extent already covered by earlier notice.
 - In case the Government dues are reduced in such appeal, revision or in other proceedings – the Commissioner
 - Is not required to serve fresh notice of demand upon the taxable person;
 - Shall intimate such reduction to taxable person and also to appropriate Authority with whom recovery proceedings are pending;

Any recovery proceedings initiated prior to the disposal of such appeal, revision application or other proceeding may be continued in relation to the amount so reduced

from the stage at which such proceedings stood immediately before such disposal.

Where departmental appeal is filed and allowed resulting in enhancement of demand, fresh notice will not be required. Where revisionary proceedings are initiated and demand is made, fresh notice will be required. But where additional demand is being made, arising from appeal or revisionary proceedings, taxpayer cannot be prejudiced by NOT being 'put at notice'.

Section 84 aligns with *second proviso* to section 107(11). This only goes to demonstrate the unalienable nature of 'due process' for making any demand, even if it is attendant to an issue already demanded to some extent.

Where the demand is reduced in appeal or revisionary proceedings, fresh notice will NOT be required. For example, if notice issued under section 74 is determined to lack the special circumstances needed to support demand under section 74, demand will be recomputed under section 73 consequent to relief admissible under section 75(2) read with 84(1)(b).

Clarification regarding the treatment of statutory dues under GST law in respect of the taxpayers for whom the proceedings have been finalised under Insolvency and Bankruptcy Code, 2016 - Circular No. 187/19/2022-GST dt. 27.12.2022

As per Circular No.134/04/2020-GST dated 23.03.2020, no coercive action can be taken against the corporate debtor with respect to the dues of the period prior to the commencement of Corporate Insolvency Resolution Process (CIRP). Such dues will be treated as 'operational debt' and the claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC.

In order to clarify the modalities for implementation of the order of the adjudicating authority under Insolvency and Bankruptcy Code, 2016 as well under the existing laws and the treatment of such statutory dues under CGST Act and existing laws, after finalization of the proceedings under IBC, the following has been elucidated:

- (i) As per section 84 of the CGST Act, if the government dues against any person under CGST Act are reduced as a result of any appeal, revision or other proceedings in respect of such government dues, then an intimation for such reduction of government dues has to be given by the Commissioner to such person and to the appropriate authority with whom the recovery proceedings are pending. Further, recovery proceedings can be continued in relation to such reduced amount of government dues.
- (ii) The word 'other proceedings' is not defined in the CGST Act. It is to be mentioned that the adjudicating authorities and appellate authorities under IBC are quasi-judicial authorities constituted to deal with civil disputes pertaining to insolvency and bankruptcy. For instance, under IBC, NCLT serves as an adjudicating authority for insolvency proceedings which are initiated on application from any stakeholder of the entity like the firm, creditors, debtors, employees etc. and passes an order approving the resolution plan. As the proceedings conducted under IBC also adjudicate the

government dues pending under the CGST Act or under existing laws against the corporate debtor, the same appear to be covered under the term 'other proceedings' in section 84 of CGST Act.

- (iii) Rule 161 of CGST Rules, 2017 prescribes FORM GST DRC-25 for issuing intimation for such reduction of demand specified under section 84 of CGST Act. Accordingly, in cases where a confirmed demand for recovery has been issued by the tax authorities for which a summary has been issued in FORM GST DRC-07/DRC 07A against the corporate debtor, and where the proceedings have been finalised against the corporate debtor under IBC reducing the amount of statutory dues payable by the corporate debtor to the government under CGST Act or under existing laws, the jurisdictional Commissioner shall issue an intimation in FORM GST DRC-25 reducing such demand, to the taxable person or any other person as well as the appropriate authority with whom recovery proceedings are pending.

84.3 FAQs

Q1. How should the recovery proceedings of enhanced demand under an appeal, revision of application or other proceedings to be continued?

Ans. In case of enhanced demand consequent to appeal, revision of application or other proceedings, then

- the Commissioner is required to issue fresh notice of demand only for enhanced demand.
- If already recovery proceedings of Govt. dues are covered by the notice of demand served on taxable person before disposal of appeal, revision of application or other proceedings, then the enhanced demand would be merged with the first recovery proceedings.

Q2. Under what circumstances issue of fresh notice is not necessary?

Ans. When a notice is already served for recovery on taxable person or any other person, before disposal of appeal, revision application or other proceedings, then issue of fresh notice is not required to the extent of amount covered in the notice in case of increase in demand and when there is reduction also there is no need to issue fresh notice.

Q3. What will the fate of the recovery proceedings initiated, prior to disposal of such appeal, revision or other proceedings, where Government dues are enhanced/ reduced?

Ans. **Where such Government dues are enhanced :**

Any recovery proceedings initiated prior to disposal of such appeal, revision or other proceedings may be continued in respect of the Government dues covered by the notice of demand served to him earlier from the stage at which it stood immediately prior to such disposal.

Where such Government dues are reduced:

Any recovery proceedings initiated prior to disposal of such appeal, revision or other proceedings may be continued in relation to the reduced amount from the stage at which it stood immediately prior to such disposal.

84.4 MCQs

- Q1. When shall Commissioner issue a fresh notice to recover the Government dues?
- (a) Demand amount is enhanced
 - (b) Demand amount is reduced
 - (c) Both (a) and (b)
- Ans. (a) Demand amount is enhanced
- Q2. When Commissioner is not required to serve fresh notice to recover the Government dues:
- (a) Demand amount is reduced
 - (b) Already proceedings of recovery of Government dues are covered by the notice of demand served before disposal of appeal, revision of application or other proceedings
 - (c) Demand amount is enhanced
 - (d) Both (a) and (b)
 - (e) Both (b) and (c)
- Ans. (d) Both (a) and (b)
- Q3. Who can issue notice for enhanced demand by appeal, revision of application or other proceedings:
- (a) Commissioner (or any delegate)
 - (b) Assistant Commissioner
 - (c) Joint Commissioner
 - (d) Any of above
- Ans. (a) Commissioner (or any delegate)