

## Chapter 12

# Assessment

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### Statutory Provisions

#### **59. Self-assessment**

*Every registered taxable person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under Section 39.*

### Related provisions of the Statute

Section or Rule	Description
Section 2(94)	Definition of Registered Person
Section 2(97)	Definition of Return
Section 39	Furnishing of returns
Chapter VIII of the CGST Rules, 2017	Returns

#### **59.1 Introduction**

In terms of Section 2(11) of the Act, “assessment” means *determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgement assessment*. It is important to note that there is no provision permitting a Proper Officer to re-assess the tax liability of taxable person. The provisions of the law permit a registered person to rectify any incorrect particulars furnished in the returns. In terms of Section 39(9), if a registered person discovers any omission or incorrect particulars furnished in a return, he is required to rectify such omission or incorrect particulars in the return to be furnished for the tax period during which such omission or incorrect particulars as are noticed (on payment of due interest), unless the same is as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, or such rectification is time barred (i.e., after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual

return, whichever is earlier). As such, reference to such re-assessment in the definition may have to be suitably read down.

It is normally understood that an Assessment is conducted by a proper officer. In terms of Section 2(91) of the CGST Act, 2017, a “proper officer” in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board;

The CGST Act contemplates the following types of Assessments:

- Self-assessment (Section 59)
- Provisional Assessment (Section 60)
- Scrutiny of returns filed by registered taxable persons (Section 61 )
- Assessment of non-filers of returns (Section 62)
- Assessment of unregistered persons (Section 63)
- Summary Assessment in certain special cases (Section 64)
  - (i) Self-assessment in terms of Section 59 refers to the assessment made by registered person himself / itself while all other assessments are undertaken by tax authorities.
  - (ii) Provisional Assessment under Section 60 is an assessment undertaken at the instance of the registered person. Provisional Assessment is followed by a final Assessment.
  - (iii) Scrutiny Assessment under section 61 is a form of re-assessment (since the self-assessment is made by the registered person himself / itself). A scrutiny of returns conducted by the proper officer who checks for the correctness of the returns filed and intimates the registered person of any discrepancies noticed.
  - (iv) Assessment of non-filers u/s 62 and Assessment of un-registered person u/s 63 are in the nature of best judgement assessments.
  - (v) Summary Assessment under Section 64 is a form of protective assessment based on information gathered from the tax authorities in a particular case.

### 59.2 Analysis

Self-assessment means an assessment by the registered person himself and not an assessment conducted or carried out by the Proper Officer. The GST regime continues to promote the scheme of self-assessment. Hence, every registered person would be required to assess his tax dues in accordance with the provisions of GST Act and report the basis of calculation of tax dues to the tax administrators, by filing periodic tax returns.

The provisions of the law permit a registered person to rectify any incorrect particulars furnished in the returns. In terms of Section 39(9), if a registered person discovers any omission or incorrect particulars furnished in a return, he is required to rectify such omission

or incorrect particulars in the return to be furnished for the tax period during which such omission or incorrect particulars are noticed (on payment of due interest), unless the same is as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, or such rectification is time barred (i.e., after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier). Further, Para 4 of Circular No. 26/2017 dated 29.12.17, clarifies that in case of summary returns like GSTR-3B, where there are no separate tables for reflecting tax effects of amendments for past periods are available, the figures pertaining to the current month can be adjusted for past month amendments, so long as the amount is not negative. These provisions exhort the concept of self-assessment.

It is important to note that 'self-assessment' does not confer authority of an assessing officer (called Proper Officer) on the taxpayer. Taxpayer must exercise this liberty to assess tax liability voluntarily with the perils of interest and penalty for any miscalculations or misinterpretations without usurping the role of Proper Officer.

For eg. If tax is charged in excess to a customer and the same has been reported in GSTR 1 and paid in GSTR 3B, whether taxpayer on realizing the error, is required to file a refund claim under section 54 or free to adjust the excess with any other dues. And if the tax is correctly charged to customer but error is in GSTR 1 and GSTR 3B, whether taxpayer is still liable to file refund under section 54 or does section 59 permit taxpayer to *suo moto* adjust the excess by reducing any other tax payable.

Experts are of the view that taxpayer must submit to the jurisdiction of Proper Officer to examine and sanction refund in case the tax charged to customer is in excess by filing a refund application and not merely when the errors is in reporting in GSTR 1 and 3B and not in tax invoice issued to customer. It is on this premise that experts opine that ANX-1 containing instructions that 'tax dues admitted in ANX-1 will be liability under the Act' may not be entirely in accordance with law.

The point therefore is about the 'limits' to this liberty of self-assessment cannot be lost sight of while complying with GST. Self-assessment does not mean 'unsupervised self-administration'.

### 59.3 Comparative Review

The principles of self-assessment were contained in Central Excise Law, Service Tax Law as well as VAT Laws.

Rule 6 of Central Excise Rules, provides that the assessee shall himself assess the duty payable on excisable goods (except in the case of cigarettes). As regards service tax, the concept of self-assessment is envisaged in Section 70 of the Act which provides that every person liable to pay service tax shall himself assess the tax due on services provided by him. State VAT laws also provide for filing of returns and payment of VAT on self-assessment basis [For instance, Section 20 of MVAT Act, 2002 or Section 38 of the Karnataka VAT Act, 2003]

**59.4 Related provisions of the Statute**

Section	Rule	Form
Self-Assessment by Regular Assessee and Casual Taxable Person u/s 39(1)	61	Form GSTR 3 & 3B
Self-Assessment by Composition Dealer u/s 39(2)	62	Form GSTR 4
Self-Assessment by Non-Resident Taxable Person u/s 39(5)	63	Form GSTR 5
Self-Assessment of OIDARS provided by person located outside India to non-taxable person in India u/s 39(1)	64	Form GSTR 5A
Self-Assessment by ISD u/s 39(4)	65	Form GSTR 6
Self-Assessment of Tax Deducted At Source u/s 39(3)	66	Form GSTR 7
Self-Assessment of Tax Collected At Source u/s 52(4)	67	Form GSTR 8
Self-Assessment for purpose of Refund by persons having UIN u/s 39(1)	82	Form GSTR 11

**59.5 Issues and Concerns**

In respect of discharge of any additional tax liability that may arise on account of any re-working or re-computation etc., (for example - Reversal of input tax credit on account of obtaining completion certificate required under any law for the time being in force by a builder in the construction sector), the proportionate input tax credit ought to be reversed (in this example, in case of unsold flats). The quantum of reversal of taxes relating to the pre-GST regime cannot be reflected in the GST returns, since the credits have been availed under the erstwhile laws (which may or may not have been carried forward as transitional credit). In so far as GST returns are concerned (presently GSTR-3B), the return does not permit / allow a registered person to enter the proportionate reversal of Credit.

Reference may be had to section 75(12) where 'undisputed arrears' permits recovery action by tax authorities without affording an opportunity to be heard.

**59.6 FAQs**

Q1. Who is the person responsible to make self-assessment of taxes payable under the Act?

Ans. Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under Section 39.

**Statutory Provisions****60. Provisional Assessment**

- (1) *Subject to the provision of sub-section (2), where the taxable person is unable to determine the value of goods or services or both or determine the rate of tax applicable thereto, he may request the proper officer in writing giving reasons for payment of tax on a provisional basis and the proper officer shall pass an order within a period not later than ninety days from the date of receipt of such request, allowing payment of tax on provisional basis at such rate or on such value as may be specified by him.*
- (2) *The payment of tax on provisional basis may be allowed, if the taxable person executes a bond in such form as may be prescribed, and with such surety or security as the proper officer may deem fit, binding the taxable person for payment of the difference between the amount of tax as may be finally assessed and the amount of tax provisionally assessed.*
- (3) *The proper officer shall, within a period not exceeding six months from the date of the communication of the order issued under sub-Section (1), pass the final assessment order after taking into account such information as may be required for finalizing the assessment:  
  
Provided that the period specified in this sub-section may, on sufficient cause being shown and for reasons to be recorded in writing, be extended by the Joint/Additional Commissioner for a further period not exceeding six months and by the Commissioner for such further period not exceeding four years.*
- (4) *The registered person shall be liable to pay interest on any tax payable on the supply of goods or services or both under provisional assessment but not paid on the due date specified under subsection (7) of section 39 or the rules made thereunder, at the rate specified under sub-Section (1) of Section 50, from the first day after the due date of payment of tax in respect of the said supply of goods or services or both till the date of actual payment, whether such amount is paid before or after the issuance of order for final assessment.*
- (5) *Where the registered person is entitled to a refund consequent to the order of final assessment under sub-Section (3), subject to the provisions of sub-Section (8) of Section 54, interest shall be paid on such refund as provided in Section 56.*

**Extract of the CGST Rules, 2017****98. Provisional Assessment**

- 1) *Every registered person requesting for payment of tax on a provisional basis in accordance with the provisions of sub-section (1) of section 60 shall furnish an*

application along with the documents in support of his request, electronically in FORM GST ASMT-01 on the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

- 2) The proper officer may, on receipt of the application under sub-rule (1), issue a notice in FORM GST ASMT-02 requiring the registered person to furnish additional information or documents in support of his request and the applicant shall file a reply to the notice in FORM GST ASMT – 03, and may appear in person before the said officer if he so desires.
- 3) The proper officer shall issue an order in FORM GST ASMT-04 allowing the payment of tax on a provisional basis indicating the value or the rate or both on the basis of which the assessment is to be allowed on a provisional basis and the amount for which the bond is to be executed and security to be furnished not exceeding twenty-five per cent. of the amount covered under the bond.
- 4) The registered person shall execute a bond in accordance with the provisions of subsection (2) of section 60 in FORM GST ASMT-05 along with a security in the form of a bank guarantee for an amount as determined under sub-rule (3):

*Provided that a bond furnished to the proper officer under the State Goods and Services Tax Act or Integrated Goods and Services Tax Act shall be deemed to be a bond furnished under the provisions of the Act and the rules made thereunder.*

*Explanation. - For the purposes of this rule, the expression “amount” shall include the amount of integrated tax, central tax, State tax or Union territory tax and cess payable in respect of the transaction.*

- 5) The proper officer shall issue a notice in FORM GST ASMT-06, calling for information and records required for finalization of assessment under sub-section (3) of section 60 and shall issue a final assessment order, specifying the amount payable by the registered person or the amount refundable, if any, in FORM GST ASMT-07.
- 6) The applicant may file an application in FORM GST ASMT- 08 for the release of the security furnished under sub-rule (4) after issue of the order under sub-rule (5).
- 7) The proper officer shall release the security furnished under sub-rule (4), after ensuring that the applicant has paid the amount specified in sub-rule (5) and issue an order in FORM GST ASMT–09 within a period of seven working days from the date of the receipt of the application under sub-rule (6).

#### Related provisions of the Statute

Section or Rule	Description
Section 2(11)	Definition of assessment
Section 39	Furnishing of returns

Section 50	Interest on delayed payment of tax
Section 54	Refund of Tax
Section 56	Interest on delayed refunds

### 60.1 Introduction

Provisional assessment can be resorted to in the following situations:

- (i) At the outside, “unable to determine” does not mean “difficult”. Inability due to unavailability of facts relevant for determination of tax liability. For eg. if rate of tax was dependent on ‘percentage of copper content’, then unless this fact (percentage of copper content) is determined by a laboratory, neither taxpayer nor tax administration can arrive at the applicable rate of tax. This is just one example and there are others. Provisional assessment cannot be treated to be a substitute for Advance Ruling.
- (ii) It would be abdication of self-assessment responsibility by taxpayers to ‘claim’ inability to determine tax liability and remarkably place that responsibility before the Proper Officer. Except for facts, inability to determine tax liability on account of interpretation of law does not come within the operation of section 60.
- (iii) When a taxable person is unable to determine the value of goods and/or services - viz, there is a difficulty in ascertaining:
  - Facts affecting transaction value to be adopted for determination of tax payable; e.g. open market value to be determined, where consideration is not wholly in money or where supplier enters into cost plus contract with the buyer.
  - Facts affecting inclusion or exclusion of any amounts in the value of supply; e.g. as per pre existing agreement certain percentage of discount to be allowed to buyer depending upon the buying targets achieved by them.
  - Facts affecting existence of any circumstance causing failure of transaction value declared e.g. where the supplier is concerned whether the price of the supply can be regarded as the sole consideration for the supply, if the supply has been effected based on a certain promise made by the recipient, for which the monetary value is indeterminable.
- (iv) Rate of tax applicable on the supply cannot be determined by the taxable person, viz there is difficulty in ascertaining:
  - Facts affecting classification of the goods and / or services;
  - Facts affecting eligibility to any exemption notification u/s 11 or compliance with conditions associated with such exemption.
  - Facts affecting applicability of any abatement/deduction in rate of tax to the assessee u/s 9 or compliance of conditions associated with such abatement.

## 60.2 Analysis

The facility of provisional assessment is available only in the cases of valuation and determination of rate of tax. The provisions of this section cannot be extended for any other purpose or subject matter. For example, there may be uncertainty about the kind of tax (IGST or CGST-SGST) applicable, time of supply, supplies to be treated as “supply of goods” or “supply of services”, [determination of mixed or composite supply is a rate dispute], admissibility of ITC, quantum of reversal of ITC, whether a particular action is supply or not. In the aforesaid kind or classes of cases, recourse is not available to provisional assessment.

### Procedure

- (i) In terms of Rule 98(1), the process of provisional assessment commences on furnishing of an application by the registered person along with the necessary supporting documents in FORM GST ASMT-01, electronically through the common portal. The provisional assessment cannot be resorted to by the proper officer on *suo-motu* basis.
- (ii) The proper officer will thereafter issue a notice in FORM GST ASMT-02. As per ASMT-2, reply is required to be given within 15 days to the registered person and if required seek additional information or documents. At this stage the proceedings are deemed to have commenced and the applicant is required to file his objections / make submissions in FORM GST ASMT – 03. The registered person can also appear in person and be heard provided he makes a specific request for a personal hearing.
- (iii) On due consideration of the reply so filed, and after providing a reasonable opportunity of being heard, the proper officer must issue an order in FORM GST ASMT-04, by allowing payment of tax on provisional basis, indicating the value or rate or both on the basis of which assessment is allowed on a provisional basis. The proper officer, in the normal course, cannot pass an order rejecting the application of provisional assessment. Since section 60(1) employs the term ‘shall’ pass order ‘allowing’ payment of tax provisionally. The word “shall” in this circumstance cannot be construed as “may”.
- (iv) The order so passed should also indicate the amount for which bond has to be executed in **Form GST ASMT – 05** by the applicant. The security has to be furnished in the form of bank guarantee not exceeding 25% of the bond ‘amount’ which shall include IGST, CGST, SGST or UTGST and cess (if any) payable in respect of the transaction. A bond furnished to the proper officer under State Goods and Services Tax Act or Integrated Goods and Services Tax Act shall be deemed to be a bond furnished under the provisions of Central Goods and Services Tax Act and the rules made thereunder.

As per Form GST ASMT-5, if the bond and security is not provided within the period specified in notice, the provisional assessment shall lapse.

### Finalization of provisional assessment

Once the above process is complete the proper officer by issue of a notice in **FORM**



**GST ASMT-06**, will call for information and records required for finalization of assessment. On conclusion of the due process of hearing, a final assessment order shall be passed by the proper officer in **FORM GST ASMT-07**, specifying the amount payable or refundable to the registered person within a period of 6 months from the date of communication of provisional assessment order. However, on sufficient cause being shown and for reasons to be recorded in writing, this period can be extended by Joint / Additional Commissioner or by the Commissioner for such further period as mentioned below:

Additional / Joint Commissioner	Maximum of 6 months
Commissioner	Maximum of 4 years

It may be noted that, in the statement of outward supply to be furnished by a registered person under section 37(1) i.e. in Form GSTR-1, the invoices in respect of which tax is paid under provisional assessment is required to be mentioned.

Further, CBIC vide Circular No. 122/41/2019-GST dated 5<sup>th</sup> November, 2019 clarified the implementation of the electronic generation of Document Identification Number (DIN) for all communications sent by its offices to taxpayers. Therefore, no communication of provisional assessment order is made without a computer-generated Document Identification Number, on or after 8<sup>th</sup> November, 2019.

### Interest liability

If the amount of tax determined to be payable under final assessment order, is more than the tax which is already paid along with the return filed in terms of section 39, the registered person shall be liable to pay interest on the shortfall, at the rates specified in Section 50(1) of the Act [i.e. @18%], from the first day after due date of payment of tax in respect of the said goods and/or services or both, till the date of actual payment, irrespective of whether such shortfall is paid before or after the issuance of order for final assessment<sup>1</sup>. Likewise, when the registered person is entitled to refund consequent upon the order for final assessment, interest shall be paid on such refund at the rates specified in proviso to Section 56 @ 9% because refund is arising out of order of adjudicating authority. The interest on refund shall run from 61st date from the date of receipt of application for refund till the date of refund.

As such, the registered person must avail this opportunity of provisional assessment after much thought and careful consideration. Any claim for refund of taxes paid in excess under this section would be processed in accordance with Section 54 (refund provision) and is subject to the concept of "unjust enrichment u/s 54(8)(e). Hence if where the registered person has not borne the incidence of tax and has passed on the burden to some other person, then instead of granting refund to the applicant, it shall be credited to consumer welfare fund. Except for authorizing refund, this section does not by itself sanction refund. The application

<sup>1</sup> To overcome the decision of Ceat Limited V. CCE, 2015 (317) ELT 192 (Bom), maintained by the Supreme Court in Commissioner V. Ceat Ltd., 2016 (342) ELT A181 (SC)

for refund is required to be made within 2 years from the relevant date defined in clause (f) of Explanation 2 to Section 54 i.e. within 2 years from the date of adjustment of tax after the final assessment.

#### **Release of Security consequent to Finalization**

On conclusion of the final assessment order, the applicant can file an application under Rule 98(6) in **FORM GST ASMT- 08** for release of security furnished. On receipt of such application, the proper officer ought to release the security furnished, after ensuring that the payment of the amount specified in the final assessment order and issue an order in **FORM GST ASMT-09**. This order has to be issued within a period of 7 working days from the date of receipt of the application for release of security.

#### **Rejection of Application**

If taxpayer's application seeking provisional assessment FAILS to establish the 'facts affecting' the determination of tax liability, then Proper Officer is welcome to reject the application. In all other cases, since the taxpayer is imperilled by interest liability, Proper Officer would not reject the application.

#### **60.3 Comparison with equivalent provisions under other laws:**

Section 60 of the CGST Act is broadly drafted on the lines of the erstwhile provisions of Central Excise and Service Tax law. A provisional assessment is permitted under Central Excise Act and also under the Finance Act 1994, and is governed by the procedure contained in Rule 7 of the Central Excise Rules or as the case may be, Rule 6(4)/(4A)/(4B)/(5) of Service Tax Rules. Under both these Acts, provisional assessment is carried out only at the instance of the assessee.

Under the State VAT Acts, the concept of provisional assessment "at the instance of assessee", is not prevalent. Some State Acts have used this term to cover the cases of best-judgment assessment done by the tax authorities, in the absence of returns or records. For example, refer Section 32 of Gujarat Value Added Tax Act or Section 40 of the Orissa Value Added Tax Act.

#### **60.4 Issues and Concerns**

The provisional assessment provides a discretionary power to Joint Commissioner or Additional commissioner and Commissioner to extend the proceedings or pass the order or decree upto 6 months or 4 years. If for any reasons, the time limit stands extended till the 4<sup>th</sup> year, the registered person shall have to pay interest from the due date of original return filed under Section 39(7) of the CGST Act, in spite of the taxable person paying tax as per provisional order passed by proper officer.

#### **60.5 FAQs**

Q1. When is a taxable person permitted to pay tax on a provisional basis?

Ans. Tax payments can be made on a provisional basis only when a proper officer passes an order for permitting the same. For this purpose, the registered person has to make a written request to the proper officer, giving reasons for payment of tax on a provisional basis. The reasons for this purpose may be a case where the registered person is unable to determine the value of goods and/ or services or determine the applicable tax rate, etc. Further, the registered person may also be required to execute a bond in the prescribed form, and with such surety or security as the proper officer may deem fit.

Q2. What is the latest time by which final assessment is required to be made?

Ans. It is the responsibility of the proper officer to pass the final assessment order after taking into account such information as may be required for finalizing the assessment, within six months from the date of the communication of the order for provisional assessment. However, on sufficient cause being shown and for reasons to be recorded in writing, the timelines may be extended by the Joint/Additional Commissioner for a further period not exceeding six months and by the Commissioner for such further period not exceeding 4 years as he may deem fit.

#### 60.6 MCQs

Q1. Where the tax liability as per the final assessment is higher than tax paid, at the time of filing of return u/s 39 the registered person shall \_\_\_\_\_.

- (a) not be liable to interest, provided he proves that his actions were bonafide
- (b) be liable to pay interest from due date till the date of actual payment
- (c) be liable to pay interest from date of the final assessment till the date of actual payment
- (d) be liable to pay interest from due date till the date of the final assessment

Ans. (b) be liable to pay interest from due date till the date of actual payment

Q2. Provisional assessment under the GST law is permitted to be:

- (a) At the instance of the taxable person
- (b) At the instance of the tax authorities on a best judgment basis in absence of adequate details or response from registered person
- (c) Either of (a) and (b)
- (d) Available only to certain notified persons

Ans. (a) At the instance of the taxable person

Q3. On the grounds of sufficient reasons being provided by proper officer the time period for passing final assessment order can be extended by Joint/ Additional Commissioner for further period of not exceeding

- (a) 2 months
- (b) 4 months

- (c) 6 months
- (d) No time limit.

Ans. (c) 6 months

Q4. On the grounds of sufficient reasons being provided by proper officer the time period for passing final assessment order can be extended by Commissioner for further period of

- (a) 2 months
- (b) 4 years
- (c) 6 months
- (d) No time limit.

Ans. (b) 4 years

### Statutory Provisions

#### 61. Scrutiny of Returns

- (1) *The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.*
- (2) *In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.*
- (3) *In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the taxable person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under Section 65 or Section 66 or Section 67, or proceed to determine the tax and other dues under Section 73 or Section 74.*

### Extract of the CGST Rules, 2017

#### 99. Scrutiny of returns

- (1) *Where any return furnished by a registered person is selected for scrutiny, the proper officer shall scrutinize the same in accordance with the provisions of section 61 with reference to the information available with him, and in case of any discrepancy, he shall issue a notice to the said person in FORM GST ASMT-10, informing him of such discrepancy and seeking his explanation thereto within such time, not exceeding thirty days from the date of service of the notice or such further period as may be permitted by him and also, where possible, quantifying the amount of tax, interest and any other amount payable in relation to such discrepancy.*

- (2) *The registered person may accept the discrepancy mentioned in the notice issued under sub-rule (1), and pay the tax, interest and any other amount arising from such discrepancy and inform the same or furnish an explanation for the discrepancy in FORM GST ASMT- 11 to the proper officer.*
- (3) *Where the explanation furnished by the registered person or the information submitted under sub-rule (2) is found to be acceptable, the proper officer shall inform him accordingly in FORM GST ASMT-12.*

#### Related provisions of the Statute

Section or Rule	Description
Section 2(97)	Definition of Return
Chapter IX of the CGST Act	Returns
Section 65	Audit by tax authorities.
Section 66	Special audit.
Section 67	Power of inspection, search and seizure.
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 wilfull-misstatement or suppression of facts.

#### 61.1 Introduction

Section 61 deals with the powers vested in the proper officer to scrutinize the returns filed by registered persons with a view to verify the correctness of the return. In legal parlance, it is considered to be a pre-adjudication process. The process of adjudication is provided in Sections 73 to 75 of the Act.

#### 61.2 Analysis

At the outset, it is important to recognize that email or text messages cannot be sent to taxpayer if a query arises in the mind of the Proper Officer with respect to the returns filed. It has been noted that such informal communication has been sent and even responded by taxpayers. Scrutiny of returns requires the following ingredients:

- Returns – identify which is a 'return' in respect of which scrutiny is being carried out. Return is defined in section 2(97) which does not refer to any specific section but states

'any' return 'prescribed or otherwise required to be furnished'. This requires careful consideration as there is room to gloss over this important document. Any of the "GSTR" series of documents (and replacements like ANX-1/2 and RET-1/2/3) will be a 'return' to which scrutiny provisions will apply. Experts are of the view that once GSTR 9 or 9A has been filed, no further scrutiny of the underlying returns (say, GSTR 1/3B) can be taken up for scrutiny as the information may, as it was filed or altered and now reported in GSTR 9/9A. Scrutinizing documents that are no longer current (GSTR 1/3B) or already rectified in another return filed later in time (GSTR 9/9A) may be an exercise in futility;

- Proper Officer – only the Proper Officer under whose jurisdiction taxpayer is registered and filing returns is authorized to scrutinize returns. Any cross-empowered officer may collect or access the returns but is not vested with authority under section 61 to scrutinize. Such Officer may even scrutinize but take action under other provisions and not under section 61. Reference may be had to the detailed discussion regarding listing of jurisdiction and powers conferred under section 3 to 6 of CGST Act along with relevant notifications and related circulars;
- Discrepancy – is an inconsistency or inaccuracy which is a very important requirement to invoke section 61 that the Proper Officer must 'discover' from within the returns itself. Section 61 does not permit investigation into new things not emerging from the returns as there other provisions with checks and balances to undertaken investigation. It is very clear provision 'conferring jurisdiction' by this expression 'discrepancy'. Discrepancy is not a doubt or confusion about what might have been the transactions carried out by taxpayer. Discrepancy is a 'lack of compatibility' arising from within the returns and not from any external source of additional information. Any inquiry without this jurisdiction makes the entire proceedings void. Where a notice is issued under section 61, care must be taken to identify whether the issue involved can pass must be of being a 'discrepancy'. While self-assessment has been stated NOT to be 'unsupervised self-administration' system, at the same time, self-assessment does not empower wide-ranging assessment in the name of scrutiny. The scope is large but not unlimited scope that Proper Officer is permitted to carry out in the name of scrutiny under section 61. Responding to notice under section 61 does not amount to admission of wrong-doing.
- Resolution – taxpayer may take three routes (a) admission and rectification or explanation (b) non-admission and (c) Admission but inaction by Taxpayer. Based on this, further steps to be taken by Proper Officer are prescribed. Proper Officer cannot routinely call for books and records of taxpayer. Proper Officer is welcome to then invoke sections 65 or 66 to audit the books of taxpayer but those sections have other prerequisites (which are discussed later). Carrying out inspection is not permissible without prior permission from JC, there's a special ingredient of 'reason to believe' to

involve given in section 67 (discussed later). Most important aspect is that Proper Officer CANNOT carry out any assessment under section 61. Care must be taken to object to any attempt at carrying out assessment where tax liability is being determined on an apprehension based on the discrepancy. Discrepancy must conclude and be resolved in one of the three ways listed in the section. There can be no 'order of demand' arising out of section 61 itself. Yes, scrutiny can give rise to a show cause notice under section 73 or 74 which will be adjudicated on its own merits but the proceedings under section 61 will conclude.

Now, to reiterate the process permitted under section 61, when a return furnished by a registered person is selected for scrutiny, the proper officer scrutinizes the same with reference to the information available with him, and in case of any discrepancy, he shall issue a notice to the said person in FORM GST ASMT-10, under Rule 99(1), informing him of such discrepancy and seeking his explanation thereto. The proper officer shall quantify the amount of tax, interest and any other amount payable in relation to such discrepancy, wherever possible.

An explanation shall be furnished by the registered person, in reply to the aforesaid notice, within a maximum period of 30 days from the date of service of the notice or such further period as may be permitted by the proper officer.

The registered person may accept the discrepancy mentioned in the notice issued under Rule 99(1), and pay the tax, interest and any other amount arising from such discrepancy and inform the same OR furnish an explanation for the discrepancy in FORM GST ASMT- 11 to the proper officer.

Where the explanation furnished by the registered person or the information submitted under Rule 99(2) is found to be acceptable, the proper officer shall inform the registered person in FORM GST ASMT-12.

In case, explanation is not furnished OR explanation furnished is not satisfactory, OR after accepting discrepancies, the registered person fails to take corrective measures, in his return for the month in which the discrepancy is accepted by him, the proper officer, may, take recourse to any of the following provisions:

- Initiate departmental audit as per section 65 of the Act; or
- Initiate Special Audit as per section 66 of the Act;
- Initiate inspection, search and seizure as per section 67 of the Act;
- Issue show cause notice u/s 73 & 74 of the CGST Act.

The first stage in return scrutiny denotes a *prima facie* scrutiny, in order to ascertain whether the information furnished by the assessee in returns is *prima facie* valid and not internally

inconsistent or inadequate. The second stage appears to be a detailed assessment calling for records and determination of tax liability under sections 73 to 75.

While doing so, the proper officer is entitled to exercise the powers vested in him under section 67 of the Act, which deals with power of inspection, search and seizure.

From the language employed in section 67, it appears that these powers are required to be exercised not in routine manner, but only under circumstances when there is reasonable belief regarding suppression or intention to evade tax.

It's important to note that section 61(3) empathetically provides that in case the explanation given by the tax payer in response to discrepancies informed by the proper officer, if found acceptable, the registered person shall be informed accordingly in **FORM GST ASMT-12** and no further action shall be taken in this regard.

Taking pointers from Annual Returns, following is an illustrative list of what may or may not constitute a 'discrepancy' to be taken up for scrutiny under section 61:

Likely to be a 'discrepancy' for Scrutiny	Unlikely to be a 'discrepancy' for scrutiny
Tariff notification prescribing credit restriction or credit ban, but credit found to be taken in returns	Whether turnover reported as 'exports' has been billed in foreign currency or not
'Net Tax' payable being 'negative' through out the year indicative of missing value addition or possibly investments in capital goods when inverted rate structure known not to exist	EWB known to be generated for inward supply of motor vehicles, but no credit found to be disallowed or reversed as ineligible
Taxpayer eligible to deemed value under rule 32 found to be paying tax at 18%	Balance sheet containing 'amounts received from clients' but tax not found to be paid against 'receipt voucher'
GSTR 2A showing inward supplies at 3% rate of tax but no outward supplies appearing at 3% rate of tax	Balance sheet showing 'other service income' but no turnover reported under chapter 99
Tax paid via DRC 03 for 2017-18 utilizing credit	Tax paid via DRC 03 for 2019-20 relating RCM under 9(4) for the year 2018-19
Taxpayer operating SEZ unit found to have paid IGST and claimed input tax credit without availing tax-free inward supplies	Company operating SEZ unit found to claim all inward supplies 9(3) or 9(4) for 2017-18 to qualify as 'zero-rated'
Taxpayer involved in non-seasonal trading business filed 'nil' returns for 6 months of the year	Taxpayer involved in trading of goods found to have paid 'nil' tax under 9(3) at 5% towards GTA services likely to have been availed



Turnover in GSTR 1 and GSTR 3B mismatch or credit in GSTR 2A and GSTR 3B mismatch	Taxpayer reported to have received notices from creditors under IBC, 2016 but no credit reversals reported under rule 37
Sale of scrap reported by taxpayer (authorized service centre or electronics dealer) without any inward supplies under 9(4) for 2017-18	EWB raised for outward movement of goods by taxpayer with outward supplies only under chapter 99
Regular amendments in outward supplies but no payment found towards 'interest'	'Nil' EWB generated throughout the year

Caution is advised that above instances are meant to be a general guide to help readers differentiate when questions arise 'from the returns' itself and be eligible to be treated as a discrepancy and scrutinized under section 61 and when questions, though valid, cannot be taken up for scrutiny under section 61. Also, these instances do not represent to be based on any circulars or court decisions but prepared based on understanding of underlying issues for various contributors.

### 61.3 Comparative Review

The provisions as to scrutiny of returns were also present in Service Tax / Central Excise and State VAT laws. For example, Rule 12(3) of Central Excise Rules provided that, the 'Proper Officer' may on the basis of information contained in the return filed by the assessee under rule 12(1), and after such further enquiry as he may consider necessary, scrutinize the correctness of the duty assessed by the assessee on the goods removed, in the manner to be prescribed by the Board. CBIC has issued guidelines for detailed scrutiny of Central Excise Returns vide Circular No. 1004/11/2015-CX dated 21-7-2015 and also issued guidelines for detailed scrutiny of service tax returns vide Circular No. 18/4/2015-ST dated 30-06-2015

### 61.4 Issues and Concerns

During the filing of returns, the registered person should ensure that the value of exempted supplies as well as non-taxable supplies, if any, made by him is properly disclosed or else the same may be considered as suppression of information and a notice under section 73 or 74 would stand issued or the proper officer can take recourse for conducting an audit or special audit, as the case may be.

### 61.5 FAQs

Q1. Describe the recourse that may be taken by the officer in case proper explanation is not furnished for the discrepancy in the return.

Ans. In case, satisfactory explanation is not obtained or after accepting discrepancies, registered person fails to take corrective measures, in his return for the month in which the discrepancy is accepted by him, the Proper Officer may take recourse to any of the following provisions:

- (a) Conduct audit at the place of business of registered person in a manner provided in Section 65 of the Act, or;
- (b) Direct such registered person by notice in writing to provide his records including audited books of account examined and audited by a Chartered Accountant or Cost Accountant under Section 66 of the Act or ;
- (c) Undertake procedures of inspection, search and seizure under Section 67 of the Act; and
- (d) Issue notice under Sections 73 to 75 of the Act.

Q2. What does Section 61 deal with?

Ans. Section 61 deals with scrutiny of returns filed by registered persons to verify the correctness of such returns.

Q3. What is the proper officer required to do, if the information obtained from assessee u/s 61 is found satisfactory?

Ans. In case the explanation is found acceptable, the registered person shall be informed accordingly in Form GST ASMT-12 and no further action shall be taken in this regard.

#### 61.6 MCQs

Q1. Where the tax authorities notice a discrepancy in the details during the scrutiny of returns, the registered person:

- (a) would be liable for interest if he is unable to prove that the discrepancy did not arise on his account and it was a fault of another person
- (b) is required to provide satisfactory/ acceptable explanation for the same within 30 days or any extended timelines as may be permitted
- (c) must prepare documents to cover up the discrepancy.
- (d) Both (a) and (b)

Ans. (b) is required to provide satisfactory/ acceptable explanation for the same within 30 days or any extended timelines as may be permitted

Q2. If the information obtained from taxable person is not found satisfactory by the proper officer, he can pass assessment order u/s 61 raising demand of disputed tax demand.

- (a) True
- (b) False

Ans. (b) False

Q3. What is the time limit after which action under section 61 cannot be taken?

- (a) 30 days from filing of return or such further period as may be decided by proper officer.

- (b) No time Limit
- (c) Time limit mentioned in Section 73 or 74 of the Act.
- (d) None of the above

Ans. (c) Time limit mentioned in Section 73 or 74 of the Act.

Q.4 What is the time limit, within which the registered person should take corrective measures after accepting the discrepancies communicated to him by proper officer?

- (a) reasonable time
- (b) 30 days from the date of communication of discrepancy.
- (c) 30 days from date of acceptance of the discrepancy
- (d) date of filing of return for the month in which the discrepancy is accepted

Ans. (d) date of filing of return for the month in which the discrepancy is accepted.

#### Statutory Provisions

##### **62. Assessment of non-filers of returns**

- (1) *Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered taxable person fails to furnish the return under Section 39 or Section 45, even after the service of a notice under Section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgement taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under Section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.*
- (2) *Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-Section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for the payment of late fee under section 47 shall continue.*

**Extract of the CGST Rules, 2017****<sup>2</sup>[100. Assessment in certain cases**

- (1) *The order of assessment made under sub-section (1) of section 62 shall be issued in FORM GST ASMT-13 and a summary thereof shall be uploaded electronically in FORM GST DRC-07.*
- (2) *The proper officer shall issue a notice to a taxable person in accordance with the provisions of section 63 in FORM GST ASMT-14 containing the grounds on which the assessment is proposed to be made on best judgment basis and shall also serve a summary thereof electronically in FORM GST DRC-01, and after allowing a time of fifteen days to such person to furnish his reply, if any, pass an order in FORM GST ASMT-15 and summary thereof shall be uploaded electronically in FORM GST DRC07.*
- (3) *The order of assessment under sub-section (1) of section 64 shall be issued in FORM GST ASMT-16 and a summary of the order shall be uploaded electronically in FORM GST DRC-07.*
- (4) *The person referred to in sub-section (2) of section 64 may file an application for withdrawal of the assessment order in FORM GST ASMT-17.*
- (5) *The order of withdrawal or, as the case may be, rejection of the application under sub-section (2) of section 64 shall be issued in FORM GST ASMT-18.]*

**Related provisions of the Statute**

<b>Section or Rule</b>	<b>Description</b>
Section 2(97)	Definition of Return
Section 2(11)	Definition of Assessment
Section 39	Furnishing of returns.
Section 44	Annual return
Section 45	Final return
Section 47	Levy of late fee.
Section 50	Interest on delayed payment of tax.
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 wilfull-misstatement or suppression of facts.

<sup>2</sup> Substituted vide Nof No. 16/2019-CT dt. 29.03.2019 wef 01.04.2019

### 62.1 Introduction

This section commences with a *non obstante* clause, meaning whenever the provisions of section 73 or 74 applies, the provisions of section 62 of the Act cannot be invoked. However, the provisions of section 62 can be invoked only in case of registered taxable persons who have failed to file returns, as required, under section 39 or as the case may be, or final return on cancellation of registration under section 45 of the Act. Issuance of notice under section 46 appears to be a pre-condition for initiating proceedings under Section 62 of the Act. However, Section 62 cannot be invoked for non-filing of GSTR-1, GSTR-2 and GSTR-9.

### 62.2 Analysis of Provisions

Non-compliance with the notice issued under Section 46 paves the way for initiating the proceedings under this section. So, a notice under section 46 is inescapable and compulsory for any action under section 62 to be taken up. Please note that with the applicability of 'service by email' and 'service on portal' permitted in GST, it is imperative to look out for any such notice being sent via registered email or posted on portal. If the assessee fails to furnish the return within 15 days of issue of notice under section 46 then the Proper Officer may assess the tax liability in accordance with the provisions of Rule 100 i.e. to the best of his judgment, taking into account all the relevant material available on record, and issue an assessment order. This is also known as 'best judgment assessment'. It can be completed without giving notice of hearing to the assessee. However best judgment assessment should be made on the basis of material available or material gathered by proper officer.

Please note that only returns under sections 39 and 45 are covered by section 62. Annual Returns filed under section 44 cannot be treated under section 62. Non-filing of annual returns will attract penalty and hence there can be no 'best judgement assessment' on this basis. It is important to question any order under section 62 as to 'how was jurisdiction acquired' for such a proceeding. In other words, non-filing of GSTR 3 (or GSTR 3B) and GSTR 10 (final return) will attract best judgement assessment. Failure to file GSTR 1 does not attract section 62. Reference may be had to newly enacted section 43A where outward supplies returned will be deemed to be tax payable and attracts recovery actions.

Order under section 62 must be issued within a period of five years from the date specified under section 44 for furnishing annual return for the financial year to which the tax not paid relates. Section 44(1) states that due date for furnishing the annual return is on or before 31<sup>st</sup> December following the end of financial year to which such annual return pertains. However, extension of due date for furnishing the annual return may be considered.

Non-issuance of notice under Section 46 closes the door for invoking Section 62 although other provisions are available to recover the tax dues. If, however, a registered person furnishes a 'valid return' within 30 days of the service of assessment order, the said assessment order shall be 'deemed to be withdrawn'. 'Valid return' is defined in Section 2(117) to mean a return filed under Section 39(1) of the Act on which self-assessed tax has

been paid in full. Valid return may not (or does not necessarily imply to) be perfect in all respects and is, therefore, not barred from containing (inadvertent) errors. In other words, presence of such errors does not render the return 'defective' and become non-existent in the eyes of law. Erroneous return is also a valid return. Errors may be of omission or commission. Experts advise that care must be taken to file such valid return free of errors and after order passed under section 62 being vacated, Proper Officer would take up proceedings based on such valid returns under section 61.

Section 62 starts with the words '*notwithstanding anything contrary to section 73 and 74*'. Section 73 and 74 mandates issue of SCN and providing opportunity of being heard before passing order for demanding tax. Further, tax can be demanded for the period as prescribed in section 74, if the existence of omissions and commissions, as mentioned u/s 74, are proved. The pre-condition of issuing SCN, providing opportunity of being heard for demanding tax for the period prescribed u/s 74 in the presence of omissions and commissions listed u/s 74 is sought to be overcome by the non-obstante clause u/s 62. The assessment u/s 62 however can be made only upto 5 years from the due date of furnishing of annual return u/s 44. Consequence of late fee under Section 47 and interest under Section 50 will both be applicable in cases of conclusion of best judgement assessment made under this Section, even if the assessment order u/s 62 is withdrawn.

**Best Judgement Assessment:**

'Best judgement assessment' must not be 'worst' judgement assessment, that is, the determination of tax liability cannot be aggressive estimation of turnover based on some arbitrary growth rate oblivious of the nature of business activities. Some experts are of the view that where turnover projection is made based on turnover in previous months, there is nothing in section 62 to indicate that possible credits should not be estimated on the premise that claiming credit requires positive action by taxpayer under section 16(2) (d). Best judgement assessment must not be worst judgement and determine high turnover but ignore seasonal downward variations and even benefit of estimate of credits. There is nothing in the law to support view that 'tax liability' to be determined on best judgement basis should be 'gross liability' and not 'net tax liability'. Courts will have final say in the matter and when one has failed to file returns, it is scarce that such a taxpayer can find favour of courts in the manner of arriving at best tax liability.

Another important aspect is, in case an order of best judgement is passed under section 62 and returns are not filed within 30 days, the order becomes final and even if returns are filed subsequently, the order CANNOT be withdrawn. Only remedy will be to file such returns and also prefer appeal under section 107.

As section 107 prescribes maximum 3 months days to file appeal before First Appellate Authority who has a further time limit of 1 month to condone explainable delay in filing appeal. Now, if after date of order under section 62, a time of more than 5 months (30 days to file returns after order PLUS 3 months to file appeal PLUS 1 month of delay in filing appeal that

may be condoned) has passed, then the demand arising from this best judgement order will be final and payable. And this will be recoverable even if in fact there were no real taxable supplies made during the relevant tax period. Care must be taken to monitor email or portal service of orders under section 62 so as to avoid such irreversible demands due to lapse of time to redress.

An order passed under this section shall be communicated to the registered person in **FORM GST- ASMT 13 + DRC 7**. Since DRC7 will also be issued, best judgement assessment under section 62 proceeds on the understanding that the demand made in order in ASMT13 will lead to recovery of tax assessed. It is for this reason that if a valid return is not filed within 30 days to vacate this order, to set aside this demand will be to file appeal under section 107 is the only remedy.

### **62.3 Comparison with equivalent provisions in other laws**

It appears that section 62 of the CGST Act is incorporated predominantly on the basis of provisions contained in the erstwhile State VAT Acts.

Section 72 of the Finance Act, 1994 provides for assessment of persons liable to pay service tax, but who has failed to furnish return under section 70, of the Act. However, procedure contained in section 72 requires that every such person shall be given a reasonable opportunity of being heard before the order is passed.

### **62.4 Issues and Concerns**

The consequence of non-filing of returns may lead to adverse GST compliance rating which will have an impact on the matters such as claiming of refund. Registered persons who are non-filers of returns will always be under the scanner of the authorities for every activity carried out by such registered person. Further, it also affects the vendor relationship due to non-compliance of the provisions of the GST laws.

A non-filer would not have filed his periodic returns and therefore the Annual returns in Form GSTR- 9 and Reconciliation Statement in Form GSTR- 9C would not be possible. However, if they have filed returns for part of the year then Annual returns could be filed considering such filed returns and based on his books of accounts.

### **62.5 FAQs**

Q1. Whether Proper Officer is required to give any notice to taxable person before completing assessment u/s 62?

Ans. The assessment u/s 62 can be initiated only after the service of notice under section 46 i.e. notice to return defaulters.

Q2. If a registered person files a return after receipt of notice u/s 46 but fails to make the payment disclosed by him in the return, can assessment order u/s 62 be passed in this case?

Ans. An assessment order u/s 62 is deemed to have been withdrawn if the registered person furnishes a valid return (including payment of taxes).

**62.6 MCQs**

Q1. The proper officer can complete assessment under section 62 without issuing any notice to the registered taxable person before passing assessment order.

- (a) True
- (b) False

Ans. (b) False

Q2. What is the time limit for issuing order under section 62?

- (a) 9 months from the end of financial year.
- (b) 3 years for cases covered U/s 73 or 5 years for cases covered under 74
- (c) 5 years for cases covered U/s 73 or 3 years for cases covered under 74
- (d) 5 years from the due date of filing annual return.

Ans. (d) 5 years from the due date of filing annual return

Q3. The assessment order u/s 62 shall be deemed to be cancelled:

- (a) Where the registered person furnishes a valid return within 30 days of the service of the assessment order.
- (b) Where the registered person furnishes a valid return within 90 days of the service of the assessment order.
- (c) Assessment order under section 46 cannot be cancelled.
- (d) Where assessee intimates to the Proper Officer that he has filed the valid return.

Ans. (a) Where the registered person furnishes a valid return within 30 days of the service of the assessment order.

Q4. After serving of notice u/s 46, the proper officer is not required to give notice of hearing to the registered tax person before passing assessment order.

- (a) True
- (b) False

Ans. (a) True.

**Statutory Provisions****63. Assessment of unregistered persons**

*Notwithstanding anything to the contrary contained in section 73 or section 74, where a taxable person fails to obtain registration even though liable to do so, or whose registration has been cancelled under sub section (2) of section 29 but who was liable to pay tax, the proper officer may proceed to assess the tax liability of such taxable person to the best of his judgement for the relevant tax periods and issue an assessment order within a period of*



*five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates:*

*Provided that no such assessment order shall be passed without giving the person an opportunity of being heard.*

#### Related provisions of the Statute

Section or Rule	Description
Section 2(11)	Definition of Assessment
Section 22	Person liable for Registration
Section 24	Compulsory Registration
Section 29	Cancellation of Registration
Section 44	Annual return
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.
Rule 100	Assessment in certain cases

#### 63.1 Introduction

This section commences with a *non obstante* clause, meaning whenever the provisions of section 73 or 74 applies, the provisions of section 63 of the Act cannot be invoked. This Section is applicable to unregistered persons i.e., persons who are liable to obtain registration under Section 22 and have failed to obtain registration, will come within scope of operation of this section. This provision also covers cases where registration was cancelled under section 29(2). Section 29(2) of the Act covers 5 instances where registration may be cancelled by proper officer:

- (a) A person who contravenes the provisions of this Act or Rules made thereunder; or
- (b) A composition person who fails to furnish returns for 3 consecutive tax periods; or
- (c) A person other than composition person who fails to furnish returns for 6 consecutive months or
- (d) A person who has sought voluntary registration but has failed to commence business within 6 months; or
- (e) Where registration has been obtained by way of fraud, willful misstatement or suppression of facts.

### 63.2 Analysis

This is a remarkable provision where even when a taxable person is 'unregistered', Proper Office is vested with jurisdiction to not only identify taxable transactions but also pass an order of assessment on best judgement basis and fasten an enforceable demand. This section too begins with the phrase "Notwithstanding anything to the contrary contained in section 73 or section 74". It therefore permits assessment under section 63 to be carried out independent of section 73 and Section 74, however, procedures contained in section 73 or 74 to the extent they are not inconsistent such as 73(5) or 74(5) are to be followed while completing this assessment. As in the case of section 62, this section 63 too contains a period of limitation of 5 years from due date applicable for filing annual return for the financial year to which tax not paid relates.

It is interesting to note the following ingredients for this section 63 to be attracted:

- Taxable person – is the one in respect of whom this procedure may be adopted. As a result, all ingredients to establish a person to constitute 'taxable person' as per section 2(107) must be satisfied. In the absence of SCN, Proper Officer appears to come under great scrutiny for invoking this jurisdiction. All aspects that the Proper Officer admitted at the time of invoking these provisions will need to stand scrutiny. But that would be the proceedings by way of response to the notice granting opportunity under section 63 (not section 73 or 74) or in further appellate proceedings;
- Fails to obtain registration – is a positive act on the part of such taxable person. 'Fail' is not the same as 'omits' to obtain registration. Clearly, being conscious of the requirement to obtain registration will be required and as such come in for examination. While no 'intent' needs to be established for such failure but clearly it cannot be supported merely on account of an inference about taxability or bona fide view on non-taxability of a transaction or judicial interpretation; or
- Registration cancelled but liable to pay tax – here, reference is provided to cancellation under section 29(2). The entire section 29(2) is where 'cancellation' is done by Proper Officer. It is not taxable person's responsibility if Proper Officers decides to cancel registration (in the five circumstances listed) and then proceeds to invoke jurisdiction under section 63 to pass a best judgement order. It is a wonder that on one hand Proper Officer will cancel registration under section 29(2) and then proceed to fasten a demand on taxable person by an assessment order under section 63 without issuing an SCN. Experts view that the use of this section will come in for severe judicial scrutiny for failure to retain the registration and issue SCN on all grounds that would afford taxable person to not only defend on continuance of registration but also suspected tax liabilities. It would be appropriate that Proper Officer 'suspend' registration under rule 21-A (2) instead of cancelling the registration.

Please refer discussion on 'best judgement assessment' under section 62.

For assessment under this section, notice has to be issued as per Rule 100(2) in **FORM GST ASMT-14 + DRC 1** by the proper officer. The notice would contain the reasons / grounds on which the assessment is proposed to be made on best judgment basis. The registered person is allowed a time period of 15 days to furnish his reply, if any. After considering the said explanation, the order has to be passed in **FORM GST ASMT- 15 + DRC 7**.

Special attention is to be paid to the appended forms in DRC1 with the order which contains the detailed grounds on which the said best judgement assessment would be passed and then DRC7 would accompany final demand (see rule 100(2) for details).

### **63.3 Comparison with equivalent provisions in other laws:**

Section 23(4) of the MVAT Act contains similar provision as that contained in Section 63 of the CGST Act.

### **63.4 Issues and Concerns**

The application of the aforesaid section is a discretionary power vested in the officer when it comes to his notice that a person although liable to registered has not obtained registration. The powers vested in the section 63 can be invoked only when the proper officer is in possession of information that is material for initiating the proceedings.

An unregistered person does not qualify as a registered person under section 2(94) of the CGST Act, 2017, hence annual return and audit is not applicable for him.

#### ***Judicial Review:***

Any procedure that side-steps the 'rule of law' in the form of issuing an SCN is always open for judicial review for (a) illegality, (b) irrationality, (c) procedural impropriety and (d) proportionality. Judicial review is a remedy in public law where HC or SC will interfere when failure of a public authority in discharging its duties takes place. Civilized society must declare its 'law' and implement those laws with 'certainty'. Uncertainty of both the law and procedure, – are the hallmarks of a society where there's absence of 'rule of law' (which is also referred as 'due process'). Concept of 'rule of law' is well guarded in art. 21 of our Constitution.

It is important to invoke Court intervention when reason for judicial review (four causes stated above) have occurred and this must be brought to Court's attention. When the Proper Officer who is to follow the 'rule of law' is found to violate these four grounds, then Courts are not reluctant to issue 'writ' or a direction. High Court which has powers of judicial review will not go into appreciating evidence or verification of claims, etc. It will only issue writ to the public authority and:

- (a) command public authority to (i) do what it ought to do or (ii) abstain from doing what it is attempting to do;
- (b) censure public authority carrying role of administrative tribunal (i) not to steer from vested jurisdiction (ii) deviate from following natural justice (iii) supervise and oversee discharge of that role and (iv) avoid manifest error in law or procedure;

- (c) prohibit proceedings before public authority that are not yet concluded that would result in illegality (any of four causes types listed earlier) if the said proceedings were permitted to continue;
- (d) question 'authority' of the public authority right at the threshold when any proceedings are commenced.

A rough test laid down in *SL Hegde v. MB Tirumale* AIR 1960 SC 137 where it does not take prolonged arguments to bring it (cause for intervention by SC or HC) to the surface. High Courts will reject petitions if it is not found to be maintainable on grounds such as (a) petitioner lacking any locus to approach court (b) availability of alternate remedy (c) mere apprehension of any violation without any real basis and (d) inordinate delay in approaching the court. High Courts have power not only to protect any instance of violation of fundamental rights but also craft a remedy that threatens to be an affront to the 'rule of law' that is committed in the Constitution.

### 63.5 FAQs

Q1. What is the time limit for passing order u/s 63?

Ans. The proper officer has to pass an assessment order u/s 63 within a period of five years from the due date for filing the annual return for the financial year to which such tax unpaid relates to.

Q2. Can an assessment order be passed without affording an opportunity of being heard to the person liable to be registered?

Ans. No, an assessment order cannot be passed without giving him an opportunity of being heard.

### 63.6 MCQs

Q1. What is the time limit for passing order u/s 63?

- (a) 5 years from the date due date for filing of the annual return for the financial year to which tax not paid relates
- (b) 5 years from the end of financial year in which tax not paid relates to
- (c) No time limit

Ans. (a) 5 years from the date due date for filing of the annual return for the year to which tax not paid relates

Q2. No Notice is required to be given before passing assessment order under section 63?

- (a) True
- (b) False

Ans. (b) False

Q3. Section 63 deals with

- (a) Assessment of taxable persons who have failed to file the returns.
- (b) Assessment of registered taxable person who have filed returns as per the law.
- (c) Assessment of unregistered taxable persons.
- (d) Assessment of any taxable person, whether registered or unregistered.

Ans. (c) Assessment of unregistered taxable persons

### Statutory Provisions

#### **64. Summary assessment in certain special cases**

- (1) *The proper officer may, on any evidence showing a tax liability of a person coming to his notice, with the previous permission of Additional/Joint Commissioner, proceed to assess the tax liability of such person to protect the interest of revenue and issue an assessment order, if he has sufficient grounds to believe that any delay in doing so may adversely affect the interest of revenue:*

*Provided that where the taxable person to whom the liability pertains is not ascertainable and such liability pertains to supply of goods, the person in charge of such goods shall be deemed to be the taxable person liable to be assessed and liable to pay tax and any other amount due under this section.*

- (2) *On any application made by the taxable person within thirty days from the date of receipt of order passed under sub-Section (1) or on his own motion, if the Additional or Joint Commissioner considers that such order is erroneous, he may withdraw such order and follow the procedure laid down in Section 73 or section 74.*

### Related provisions of the Statute

Section or Rule	Description
Section 73	Determination of tax not paid, short paid, erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts
Section 74	Determination of tax not paid, short paid, erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts
Rule 100	Assessment in certain cases

#### **64.1 Introduction**

The word “summary assessment” is generally used in a tax legislation to denote ‘fast track assessment’ based on return filed by the assessee. It allows the Tax Officer to make *prima facie* adjustments based on errors or factors based on the available information without an

occasion for calling for further information from an assessee or inspecting his records. In the GST Act, it is used to denote those assessments which are completed ex-parte and on priority basis when there is reason to believe that there will be loss of tax revenue, if such assessment is delayed. This provision is only the first step in invoking the machinery provided to enforce recovery of dues from potential defaulters, and this requires an assessment of the tax liability. Such amounts are commonly known as protective assessments which in a sense protects Government revenue. This section pre-supposes the fact that the proper officer must be in possession of sufficient grounds to believe that any delay will adversely affect revenue.

### 64.2 Analysis

The summary assessment can be undertaken in case the following conditions are satisfied:

- The Proper Officer must have evidence that there may be a tax liability. It is this ingredient that furnishes jurisdiction for the Proper Officer to invoke section 64. Experts hold the view that the 'evidence' is not merely 'reason to believe' but something more. And if it were merely reason to believe, then that would not have been open for examination in further proceedings. Since it refers to something more by the words 'evidence' that supports Proper Officer's expectation of plausible tax liability, then such evidentiary material can be called in for examination in further proceedings. Proper Officer's apprehension that there may be tax payable is not sufficient to vest with necessary jurisdiction; and
- The Proper Officer has obtained prior permission of Additional / Joint Commissioner to assess the tax liability summarily. The proper officer must have sufficient ground to believe that any delay in passing assessment order would result in loss of revenue. Now, steps proposed by the Proper Officer requires be fettered with some checks. Checks on the exercise of this authority are ensured by permission from ADC/JC who would appreciate the quality of such evidence and then grant permission. Once ADC/JC has granted permission, Proper Officer may proceed to pass the assessment order. Examination of the evidence after summary assessment order has been passed would only help in establishing impropriety of the entire proceedings in judicial review.

Summary assessment under this Section of the CGST Act can therefore be construed in some sense as a 'protective assessment' carried out in special circumstances, where there are sufficient grounds to believe that taxable person will fail to make payment of any tax, penalty or interest, if the assessment is not completed immediately. Such failure to pay tax, interest or penalty must be due to reasons attributable to the tax payer (ex: insolvency, instances of defaulting, absconding etc). Hence, summary assessment under this Section is not a substitute for assessment that are nearing the time limitation prescribed for issue of SCN. Further, mere possibility of non-payment cannot be a grounds for resorting to summary assessment, unless there are factors indicating that such non-payment pertains to admitted or undisputed tax liability. As per the provision of Rule 100(3) the summary assessment order should be in **FORM GST ASMT-16 + DRC 7**.

This section appears to overlap with section 62 and 63 but please note:

- Persons who have obtained registration but have failed to file returns will come within the operation of section 62; and
- Persons who are liable to obtain registration but have failed to seek registration or whose registration has been cancelled under section 29(2) will attract section 63.

Section 64, however, requires the ingredients discussed earlier to exist in order for summary assessment to be undertaken. Please note that along with summary assessment order, a demand order in DRC7 is also to be passed for proceedings with recovery unless further appeal is filed under section 107 to stay the demand.

The section allows the person who is assessed and is served with the order so passed, to come forward and make an application in accordance with Rule 100(4) in **FORM GST ASMT-17** to the Additional / Joint Commissioner, who will examine the same and if the Additional/ Joint Commissioner is satisfied, the summary assessment order may be withdrawn. As regards the contents of this application, it may be understood that the applicant may attempt to challenge the facts or reasons for the belief about risk of revenue loss and further accept to be available to respond, if proceedings under Section 73/74 were to be undertaken. Besides, the Additional / Joint Commissioner may, on his own motion, withdraw such order and follow the procedure laid down in Section 73 or as the case may be Section 74 for determination of taxes not paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised if he considers that such order is erroneous.

From the above, it appears that every summary assessment order so withdrawn under sub-Section (2), may be followed by a notice under Section 73 or as the case may be section 74 of the Act.

On receipt of application the proper officer has to pass the order of withdrawal or, rejection of the application in accordance with Rule 100(5) in **FORM GST ASMT-18**.

Many times, summary assessments are undertaken in circumstances, when a taxable person to whom liability pertains is not ascertainable. In such cases, the law provides that, if the liability pertains to supply of goods, then person in charge of such goods shall be deemed to be the taxable person liable to be assessed and pay tax and amount due on completion of summary assessment. There is no deeming provision when unpaid tax liability relates to supply of services.

Within 30 days from passing of such summary assessment order, based on application to ADC/JC by taxable person, such order may be withdrawn. Please note that this provision in section 64(2), the main aspect is the 'time limit' of 30 days provided to make this application. An order passed under 64(2) is an appealable order to be carried before First Appellate Authority under section 107.

Summary assessment is NOT the same as best judgement assessment. Summary assessment must be based on qualitative data and records far superior that in the case of best

judgement assessment. Experts opine that determination of tax liability in this case would not be able to allow credits as Proper Officer may not be in a position to ensure conditions of section 16(2) are satisfied. However, while arriving at tax liability, credit availed cannot be glossed over and must be adjusted to arrive at final net tax liability. Experts hold the view that the meaning of the expression 'tax liability' all sister provisions from 61 to 64 will be highly debated in courts in the days to come.

### 64.3 Issues and Concerns

The law provides for treating the person in charge of goods as the "taxable person" in cases where the person liable to pay tax cannot be ascertained. This provision will require the transporter to take due care to ensure that his position in terms of compliance with the law will not be compromised, while several transporters may themselves be unaware of the provisions of the law.

### 64.4 FAQs

Q1. When can Summary Assessment be initiated?

Ans. Summary Assessments can be initiated by a proper officer on seeking permission from the Additional Commissioner / Joint Commissioner and proving that the taxable person is liable to pay tax.

### 64.5 MCQs

Q1. What is the time period within which a person can apply to the Additional/ Joint Commissioner for withdrawal of such order under this Section?

- (a) 30 days
- (b) 45 days
- (c) 60 days
- (d) No time limit.

Ans. (a) 30 days