

Chapter 15

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.*
- (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

¹[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.

²[(1A) The proper officer shall, 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, 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 the provisions of the Act ³[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

¹ Substituted vide Notification No. 16/2019- Central Tax dated 29-03-2019 w.e.f. 01.04.2019

² Inserted vide Notification No. 49/2019 - Central Tax dated 09-10-2019

³ Inserted vide Notification No. 49/2019 - Central Tax dated 09-10-2019

an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.

⁴[(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 ~~[[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)]⁵, he shall intimate the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an order 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 ~~[[tax, interest and penalty payable by the person chargeable with tax]~~ tax, interest and penalty, as the case may be, payable by the person concerned]⁵

(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

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

⁴ Inserted vide Notification No. 49/2019 - Central Tax dated 09-10-2019

⁵ Substituted vide Notf. No. 40/2021-CT dt. 29.12.2021. Applicable w.e.f. 01.01.2022.

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 taxes in 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 the 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. *Ingredients of the provision* :
 - (a) Service of notice by proper officer and
 - (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 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 expiry of the time limit of three years for issuance of order.
- (e) The proper officer 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 the issue of a notice under section 73(1) to a person, where the proper officer finds similar issues for any period, he 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 officer shall along with the statement, provide a summary in Form GST DRC-02, specifying therein the details of 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:
- on own ascertainment of such tax and interest or
 - on 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 in terms of 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 order 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'. The taxable person must take care NOT to become anxious suddenly and admit tax liability and must be well advised to avail this remedy. With the amendment to rule 142 (*vide Notification No. 49/2019-Central Tax dated 9 Oct 2019*), it is mandatory for the 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. Commissioner (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 Mar 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 three 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
 - the 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.	Three 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 three years from the date of erroneous refund.

9. 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, the proper officer will have to pass a 'speaking order'. Care must be taken to ensure that all aspects of natural justice and adherence to due process of law are satisfied in passing such adjudication order. Some such requirements are : (not exhaustive):

- Grant of opportunity 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. The taxpayer is well within his 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. The taxpayer is NOT liable to furnish facts to displace the allegations. The taxpayer merely needs to (i) accept or deny the 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 presumptions are to be understood as 'rebuttable presumptions' 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, the 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 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 officers for issuance of show cause notices and orders under this section. Further, they are also assigned so under the IGST Act as well, as per section 3 read with section 20 of the IGST Act.

10. 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 section 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 per cent of tax or ₹ 10,000/- is also prescribed under section 73(11). Refer 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.
11. Rule 142(3) lays down that if the amount referred to in section 129(1) of the CGST Act, 2017 is paid within fourteen days of detention or seizure of the goods and conveyance, the proceedings in respect of the notice shall be concluded. The said sub-rule has been amended with effect from 01.01.2022 to provide that if the amount referred to in section 129(1) of the CGST Act, 2017 is paid within *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)*, the proceedings in respect of the notice shall be concluded. Further, in sub-rule (5), the words "the person chargeable to tax" have been substituted with the words "the person concerned".
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 ₹ 10 lakhs	Up to ₹ 20 lakhs	Up to ₹ 20 lakhs
Deputy or Assistant Commissioner	Above ₹ 10 lakhs up to ₹ 1 crore	Above ₹ 20 lakhs up to ₹ 2 crore	Above ₹ 20 lakhs up to ₹ 2 crore
Additional or Joint Commissioner	Above ₹ 1 Crore	Above ₹ 2 Crore	Above ₹ 2 Crore

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-
- Amount of tax + interest + penalty 10% of tax
 - Amount of tax + interest + penalty equal to 10% of tax or ₹ 10,000/- whichever is higher
 - ₹ 10,000/-
 - Tax + interest + 25% penalty
- Ans. (b) Amount of tax + interest + penalty equal to 10% of tax or ₹ 10,000/- whichever is higher

Statutory Provisions

<p>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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p>
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- (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 125⁶ 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
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 mis-statement 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

⁶ Amended vide Finance Act, 2021 w.e.f 01.01.2022

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 the computation. It may be noted that the Karnataka High Court has decided in the case of *UoI & Ors v. LC Infra Projects Pvt Ltd (2020) 81 GSTR 281 (Kar)* that the 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'. 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 to note 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 the 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, 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 the tax either
 - as per the own ascertainment of the tax or
 - 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 officer 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 payment of tax and interest along with penalty @ 50 % of tax within 30 days of communication of the order, 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 the 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. [section 74(10)]
Cases involving fraud, wilful mis-statement 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 the 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 proper officers for issuance of show cause notices and orders under this section. Further, they are also the proper officers under the IGST Act as well, as per section 3 read with section 20 of the IGST Act. 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 also 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 section 74. Refer Para 11 of the analysis of section 73.
9. After an adjudication order is passed, the taxpayer may pay 50% of the penalty demanded in such adjudication order within 30 days of the 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, 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

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% and 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 providing for the issue of Form GST DRC-01A to undertake the process of 'pre-notice consultations'. It is important to engage in such consultations by marking all communication '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 the 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 the discretion from 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.

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.*

⁷Explanation –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.

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

75.1. Analysis

These provisions are general provisions for safeguarding the taxpayer's interests 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 one of fraud or for wilful – misrepresentation 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 a case the officer shall determine the tax as if the notice is issued within 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.
4. Opportunity of personal hearing has to be granted when requested for in writing by the person chargeable to tax or where any adverse decision is proposed to be taken against the person.

⁷ "Inserted vide Finance Act, 2021 w.e.f. 01.01.2022"

5. Personal hearing can be adjourned for reasons to be recorded in writing, when sufficient cause is shown by the person chargeable to 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 mentioned in SCN. Failure of adjudication on this aspect alone may be sufficient to get favourable order in appellate proceedings. Drafting of SCN has now assumed 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 the demand for penalty by specifying the obvious deficiency in the SCN. This is evident from the fact that the Legislature has thoughtfully saved omission of ‘interest’ from the 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 sub-section (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 made to the decision in case of *Ramlal and Ors v. Rewa Coalfields Ltd AIR(1962) SC 361*, wherein the Supreme Court has recognized that lapse of time to pass such orders (lapse of limitation) is a right to the taxpayer that should not be easily disturbed. And with a specific embargo, it is well accepted that where the 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 the discussion under section 6 of the CGST Act regarding ‘administrative discipline’ and related circulars on this administrative law principle.

11. An issue on which the 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 as the case may be, for issue of order. It is important to note that the 'exclusion period' due to pendency of an issue is NOT limited to the case of the same taxpayer but of *any other* taxpayer. This is a clear measure to protect the interest of the Revenue provided 'proceedings under section 73 or 74 are initiated'. This is also referred to as 'call book' cases. Reference may be made 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.

75.2. Comparative Review

These provisions of sections 73, 74, and 75 are much broader than the provisions contained in erstwhile Central Indirect Tax laws.

Earlier under the central excise and service tax laws, the demand of tax can be made up to a maximum of 5 years. The normal period for which the notice could be issued is 2 years under the central excise law and 30 months in service tax law. The VAT law seems to be quite different from the central excise and service tax provisions.

However, the conditions for such extended period are the same as under the erstwhile indirect tax laws. The meanings of 'fraud', 'wilful-misstatement' or 'suppression' are still to be understood in the same way as in the erstwhile law i.e., deliberate intent to avoid tax requires to be established and sustained.

Unlike the erstwhile law, the time limit of 3 years and 5 years is from the time of issue of orders and not for serving of show cause notice.

75.3. 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 to exercise powers under sections 73 and 74 can issue notices and orders under the said sections.

Q2. When can proceedings be initiated under section 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 after 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 issuing a repeat notice under section 73(3) for a different period?

Ans. The condition is that the grounds relied upon should be the 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 specifying the alleged amounts is issued.

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

Ans. The time limit to issue notice is 3 months/ 6 months (in case of extended period) 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 following benefit to pay the tax after issue of notice and before issuance of order as follows:

<i>In cases other than fraud, misstatement and suppression</i>	
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
<i>In cases of fraud, misstatement and suppression</i>	
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

75.4 MCQs

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

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

Ans. (c) 5 years

Q2. The time limit for issue of order in cases other than fraud, wilful-misstatement or suppression is -

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

Ans. (d) 3 years

Q3. The maximum number of times an hearing can be adjourned is -

- (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 the person who collected the tax to make the payment forthwith to the Government 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) It needs to be noted 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 for 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 any person who has collected any amount representing as tax requiring 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 the amount till the date of deposit of the 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 CGST Act.
- (xii) There appears to be no time limit to commence proceedings under this section. Experts hold the view that the principle of *res judicata* demands that when there is no time limit prescribed in the law a reasonable time limit must be allowed and nothing is more reasonable than the maximum time limit of 5 years specified 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 the customer being entitled to exemption from payment of duties, the larger Bench of the 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. It may be noted that rate Notification 11/2017-Central Tax (Rate) dated 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-Central Tax (Rate) dated 27.06.2017 prescribing exemption up to certain value limit or in certain circumstances, 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.

76.3 Comparative analysis

Under the erstwhile tax laws, similar provision existed in Central Excise Law⁸, Customs Law⁹ as well as Service Tax Law¹⁰.

⁸ Section 11D of the Central Excise Act, 1944

⁹ Section 28B of the Customs Act, 1962

¹⁰ Section 73 A of the Finance Act, 1994

Also, similar provision existed in almost all the State VAT laws as well.

76.4 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 – Central Tax dated 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.

76.5 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 officer 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, it covers interest implication in a situation where IGST is paid on a 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 to 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, then 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.

It may be noted that the 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.

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. 25th September 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-Central Tax dated 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-Central Tax dated 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, there is no requirement 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

Reference could be made to the following decision of the Kerala High Court decision with regard to the above provision:

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 GST 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 accordingly disposed by the High Court.

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 the 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 recovery proceedings. Note that time limit to file an appeal under section 107 is 3 months and in harmony with that time limit, recovery action is kept in abeyance until that time expires. An 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 the additional time is granted . Additional time is available not as a right but as 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 the 3 month period.

78.3 Comparative review

There is no similar provision under erstwhile Central Indirect Tax laws.

78.4 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.

78.5 MCQs

Q1. Can 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 is

- (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 when -

- (a) It is necessary in the interest of Revenue
- (b) When the 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.

¹¹[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

¹²[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, 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.

¹¹ Inserted vide The Central Goods and Services Tax (Amendment) Act, 2018 read with Notification No. 02/2019 - Central Tax dated 29-01-2019 w.e.f. 01.02.2019

¹² Inserted vide Notification No. 60/2018 - Central Tax dated 30-10-2018

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.*

[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.

- (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.*

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.

- (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 subsection (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.]¹³

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.*

¹³ Inserted vide *Notf. No. 40/2021-CT dt. 29.12.2021*. Applicable w.e.f. 01.01.2022.

- (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 distraint 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

~~*The amounts so realised from the sale of goods, movable or immovable property, for the recovery of dues from a defaulter shall,—*~~

- ~~a) *first, be appropriated against the administrative cost of the recovery process;*~~
- ~~b) *next, be appropriated against the amount to be recovered;*~~

- e) ~~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) ~~any balance, be paid to the defaulter.~~
- (1) 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.]¹⁴

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

¹⁴ Substituted vide *Notf. No. 40/2021-CT dt. 29.12.2021*. Applicable w.e.f. 01.01.2022.

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

The section empowers the Departmental officers to collect/recover any amount which is payable under GST Act. Section 79 provides for the manner in which the 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 the defaulter:

- There should be some money which is being owed by the Government to the 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 the 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 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 the 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 the 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 the 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. The 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 the 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 the 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 requirements 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 modes of recovery exist or not.
- (iii) Further it is also provided that, either SGST Officer/ UTGST Officer while recovering SGST/UTGST arrears may also recover any amount due from the defaulter the amount due from 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 new rule lays down 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.

79.3 Comparative Review

Under the erstwhile tax laws, similar provision existed in Central Excise Law¹⁵, Customs Law¹⁶ as well as Service Tax Law¹⁷. In the context of section 87 of the Finance Act, 1994, the *Karnataka High Court in UOI v. Prashanthi [(2016)TIOL1127(HC-KAR)ST]* held that such recovery cannot be effected before determination of liability under section 73.

Also, similar provision existed in almost all the State VAT laws as well.

79.4 FAQs

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

¹⁵Section 11D of the Central Excise Act, 1944

¹⁶Section 28B of the Customs Act, 1962

¹⁷Section 73A of the Finance Act, 1994

- 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 the 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 attachments 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 resort to more than one of the methods for the recovery proceedings?

Ans. Yes, they can take recourse to one or more methods at the option and choice of the proper officer.

Q3. In the course of tax recovery, the proper officer recovered ₹ 2 Crore. The amount due was however ₹ 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.

79.5 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 tax payers 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 the 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 Comparative review

These provisions are broadly similar to the provisions contained in erstwhile Karnataka VAT Rules, 2005 (Rule 53) However, KVAT law specifies the time frame for interest payments to

be the period up to the month the last instalment is due. Further, the above provision has been replicated in the GST Act, from the KVAT law.

Under the Central Indirect Taxes, it was allowed by the Department in exceptional cases although express provisions were not there.

80.4 FAQs

Q1. Whether an 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 in instalments. (in Form GST DRC-20)

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

Ans. A taxable person only 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. 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 was 06.01.2019. Benefit of instalment was granted by Commissioner on 02.01.2020 to be paid w.e.f. 02.01.2020 onwards over 5 instalment as under:

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 = 432 days	₹ 1,00,000/-

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.

80.5 MCQs

Q1. Which of 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. The maximum number of instalments permissible under section 80 are -

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

Ans. (d) 24

Q3. Which of the following officers 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 prohibiting 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. 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 the mala fides to proceed to recover the tax by reversal of transfers.

Illustrations:

1. Mr. Defrauder was served with a notice of demand for ₹ 20 Lakhs on 10th June 2020. He filed a reply for the said notice on 20th June 2020, stating that he was unable to deposit tax dues as he was financially stressed. On 15th June 2020, Mr. Defrauder transferred all the property worth ₹ 35 Lakhs under his name to 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 and the transfer took place on 15th June 2020, Will the act of Mr. Defrauder be 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 10th June 2020. However, the same was received by Mr. Perfect on 20th June, 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 to be 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 a transaction in property is void as per section 81?

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

81.5 MCQ

Q1. Which of the following 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 a 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 the 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 one reads section 53 of IBC where a 'waterfall' provision lists Government dues way below several others. So, reference may be made to IBC which will prevail over GST law.

82.3 Comparative review

These provisions are broadly similar to the provisions contained in the following -

1. Section 142A of the Customs Act, 1962
2. Section 11E of the Central Excise Act, 1944
3. Section 48 of the Karnataka VAT Act, 2003
4. Section 88 of the Finance Act, 1994

82.4 FAQs

- Q1. When can a charge on property of taxable person be created?
- Ans. A charge can be created only when the 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 or not taxable.

82.5 MCQs

Q1. Which of the following liabilities can be recovered under this section -

- (a) Interest
- (b) Tax
- (c) Penalty
- (d) All the above

Ans. (d) All the above

Q2. Which of the following properties of Mr. Richie Poor could 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) ~~[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.~~

*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".]*¹⁸

(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).*

¹⁸ Sub-section (1) of section 83 substituted vide Finance Act, 2021 and notified vide Notf. No. 39/2021-CT dt. 21.12.2021. Applicable w.e.f 01.01.2022

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 [in **Form GST DRC-22**]¹⁹ 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 Commissioner to that effect [and a copy of such order shall also be sent to the person whose property is being attached under section 83.]¹⁷
- 3) Where the property attached is of perishable or hazardous nature, [~~and if the taxable person~~ and if the person, whose property has been attached]¹⁷ pays an amount equivalent to the market price of such property or the amount that is or may become payable [~~by the taxable person~~ by such person]¹⁷, whichever is lower, then such property shall be released forthwith, by an order in Form GST DRC-23, on proof of payment.
- 4) Where [~~the taxable person~~ such person]²⁰ 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 [~~the taxable person~~ such person]¹⁸.
- 5) Any person whose property is attached may, [~~within seven days of the attachment under sub-rule (1), file an objection~~ file an objection in **FORM GST DRC-22A**]¹⁸ 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 in certain situations to protect the interests of the Government.

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

²⁰ Substituted vide Notf. No. 40/2021-CT dt. 29.12.2021. Applicable w.e.f. 01.01.2022.

83.2 Analysis

- (i) This section applies only during the pendency of any proceedings under: (Old provision)
- (a) Section 62 – Assessment of non-filers of returns.
 - (b) Section 63 – Assessment of unregistered persons.
 - (c) Section 64 – Summary assessment in certain special cases.
 - (d) Section 67 – Power of inspection, search and seizure.
 - (e) Section 73 - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of other than fraud or any wilful misstatement or suppression of facts.
 - (f) Section 74 - 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.

Note: Amendment to the above provision in sub-section (1) of section 83 has been made vide *Finance Act, 2021* (applicable from 01.01.2022)

- (ii) This section applies 'after initiation' of any proceedings under: (New Provision)
- (a) Chapter XII, covering sections 59 to 64 – Assessment.
 - (b) Chapter XIV, covering sections 67 to 72 – Inspection, Search, Seizure and Arrest.
 - (c) Chapter XV, covering sections 73 to 84 – Demands and Recovery.
- (iii) The provisional attachment of property of the 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 in the respective provisions of law. Once proceedings are 'initiated', the said proceedings are 'pending', and these powers become invocable.
- (iv) Note that provisional attachment under section 83 can be 'during investigation' whereas recovery under section 79 can be 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.
- (v) 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.

- (vi) Attachment of property belonging to taxable person alone was permitted. 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.
- (vii) Such provisional attachment would be valid for one year from the date of the order made by the Commissioner in Form GST DRC-22.
- (viii) Where the property attached is perishable or hazardous in nature and if the taxable person pays an amount equivalent to the market price of such property or the amount that is or may become payable by the taxable 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 the taxable 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 taxable person.
- (ix) Any person whose property is attached may, within 7 days of the attachment 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.
- 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.
- (x) Rule 159 (**Provisional attachment of property**) has been amended to provide that the Commissioner shall send the order of attachment in Form GST DRC-22 and a copy of such order shall also be sent to the person whose property is being attached under section 83. Other amendments have also been made in this rule to incorporate the changes made in section 83 vide the Finance Act, 2021 providing for attachment of property of a person other than the taxable person i.e., any person specified in sub-section (1A) of section 122. Further, any objection to the order of provisional attachment of property shall be filed in **Form DRC-22A** whose format has also been notified.
- (xi) **Forms GST DRC-10 and GST DRC-22** have been substituted with new Forms with effect from 01.01.2022. *
- (xii) In **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)**. *

- (xiii) 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. *
- (xiv) A new table has been substituted under clause (a) of entry no. 15 in **FORM APL-01** with effect from 01.01.2022. *
- (xv) 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). *

*Points (xii) to (xvi) have been brought into force vide *Notification No. 40/2021-CT dt. 29.12.2021*.

83.3 Comparative review

These provisions are broadly similar to the following provisions of the erstwhile laws -

- Finance Act, 1994 (Section 73C)
- Central Excise Act, 1944 (Section 11DDA)
- Customs Act, 1962 (Section 28BA)
- Delhi VAT Act, 2004 (Section 46A)

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 to be done before conclusion of proceedings?

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

83.5 MCQs

Q1. The order passed for provisional attachment is valid for -

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

Ans. (b) One year

Q2. The competent authority for passing an order for provisional attachment is -

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

Ans. (c) 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 order for the reduction or enhancement of any demand under section 84 shall be issued in Form GST DRC- 25.

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 order 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.

84.3 Comparative review

The provisions of this section of GST are in line with the provisions of section 45 of the Delhi Value Added Tax Act, 2004.

84.4 FAQs

Q1. How should the recovery proceedings of enhanced demand under an appeal, revision of application or other proceedings 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 enhance 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 the 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 the 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.

84.5 MCQs

Q1. The Commissioner shall issue a fresh notice to recover the Government dues when -

- (a) Demand amount is enhanced
- (b) Demand amount is reduced
- (c) both (a) and (b)

Ans. (a) Demand amount is enhanced

Q2. The Commissioner is not required to serve fresh notice to recover the Government dues when:

- (a) Demand amount is reduced
- (b) Already proceedings for 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. Notice for enhanced demand by appeal, revision of application or other proceedings can be issued by -:

(a) Commissioner

(b) Assistant Commissioner

(c) Joint Commissioner

(d) Any of above

Ans. (a) Commissioner