



# ADJUDICATION: DEMAND AND RECOVERY OF TAX UNDER GST LAWS

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## Introduction

The term adjudication is the act of making a judicial ruling such as a judgment or decree. It is the giving or pronouncing a judgment in a civil or a criminal action. It is a legal ruling or judgment of a competent authority having power to decide a particular issue brought before it. Adjudication can also be referred to as the process of settling a legal case or claim through the court or justice system. It usually refers to the final judgment or pronouncement in a case brought before it. Most of the executive functions such as registration of tax payers, scrutiny of returns, inspection, search, seizure, detentions and confiscation of goods recovery of tax etc under the GST laws are done by the proper officer.

## Adjudication under the CGST, Act, 2017

The Central Goods and Service Tax Act, 2017 does not define the term 'Adjudication', but defines two important terms i.e. the Proper Officer and the Adjudicating Authority. Section 2 (91) defines, "Proper Officer in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board". This implies that the functions assigned to the Commissioner can be assigned to officers of the central tax, who are assigned these functions by the Commissioner or the Central Board of Indirect Taxes and Customs (CBIC). In most of the sections wherever functions are to be performed under this Act, these functions are performed by the Proper Officer i.e. by the commissioners or the officer of the GST Department, who are assigned these functions by the Commissioner.

Section 2(4) of the Act, defines Adjudicating authority to mean any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Central Board of Indirect Taxes and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority, the Appellate Tribunal and the Authority referred to in sub-section (2) of section 171(i.e. Anti-Profiteering Authority). Any order/decision passed under the Act is called an act of Adjudication. Some of the important issues which require judicial application of mind and application of mind are as under:

1. Tax not paid (Secs. 73 & Sec.74)
2. Tax Short paid (Secs. 73 & 74)
3. Tax erroneously refunded (Sec. 73 & 74)
4. ITC wrongly availed (Sec. 73 & 74)
5. ITC wrongly utilized (Secs. 73 & 74)
6. Tax Collected but not paid (Sec. 76)
7. Tax Collected under wrong head (Sec.77)

For the purpose of this article, the points mentioned at serial number 1 to 5 above shall, in short, be referred to as tax short/non paid etc. The points mentioned at serial number 6 and 7 shall be described separately.

The Proper officer has also to determine whether the actions of the registered tax payers involving non-payment or short payment of tax, or excess claim of input tax credit is for reason of (or not involving) fraud, wilful misstatement, or suppression of facts on the part of the tax payers. In case the non-payment or short payment etc of tax is **for reasons other than** fraud, wilful misstatement or

suppression of fact, the necessary adjudication involves application of Section 73 of the CGST, Act, 2017. However if the non/short-payment of tax, excess claim of input tax credit etc is by way of fraud, misstatement suppression of facts etc. necessary adjudication and other follow is provided under Section 74 of the CGST Act, 2017.

**Officers authorised to issue show cause notice and pass adjudication orders:** The adjudication involves activities such as the scrutiny of returns, collection of information to find out taxable persons who might have not may payment short payment, excess availed input tax credit, or sought refund, giving show cause notice (SCN) seeking replies to from the tax payers, giving opportunity of being heard before passing of final orders.

As per CBIC circular No. 31/05/2018 – GST (F. No. 349/75/2017-GST) dated 09 February 2018, the work relating to the issuance of SCNs and orders under sections 73 and 74 of the CGST Act and also under the IGST Act, monetary limits for different levels of officers of central tax have been prescribed. In pursuance of clause (91) of section 2 of the CGST Act read with section 20 of the IGST Act, the Board has assigned the officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to issue of show cause notices and orders under sections 73 and 74 of the CGST Act and section 20 of the IGST Act (read with sections 73 and 74 of the CGST Act), up to the monetary limits as mentioned in columns (3), (4) and (5) respectively of the Table below:-

**Table**

<b>Sr No</b>	<b>Officers of Central Tax</b>	<b>Monetary limit of the amount of central tax (including cess) not paid or short paid or erroneously refunded or input tax credit of Sl. No. Officer of Central Tax central tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act</b>	<b>Monetary limit of the amount of integrated tax (including cess) not paid or short paid or erroneously refunded or input tax credit of integrated tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act made applicable to matters in relation to integrated tax vide section 20 of the IGST Act</b>	<b>Monetary limit of the amount of central tax and integrated tax (including cess) not paid or short paid or erroneously refunded or input tax credit of central tax and integrated tax wrongly availed or utilized for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act made applicable to integrated tax vide section 20 of the IGST Act</b>
(1)	(2)	(3)	(4)	(5)
1.	Superintendent of Central Tax	Not exceeding Rupees 10 lakhs	Not exceeding Rupees 20 lakhs	Not exceeding Rupees 20 lakhs
2.	Deputy or Assistant Commissioner of Central Tax	Above Rupees 10 lakhs and not exceeding Rupees 1 crore	Above Rupees 20 lakhs and not exceeding Rupees 2 crore	Above Rupees 20 lakhs and not exceeding Rupees 2 crore
3.	Additional or Joint Commissioner of Central Tax	Above Rupees 1 crore without any limit	Above Rupees 2 crore without any limit	Above Rupees 2 crore without any limit

### **SCNs issued by the Officers of Audit Commissionerates and Director General GST Intelligence:**

As per this circular, the central tax officers of Audit Commissionerates and Directorate General of Goods and Services Tax Intelligence ("DGGSTI") shall exercise the powers only to issue show cause notices. A show cause notice issued by them is to be adjudicated by the competent central tax officer of the Executive Commissionerate in whose jurisdiction the noticee is registered. In case there are more than one noticees mentioned in the show cause notice having their principal places of business falling in multiple Commissionerates, the show cause notice is adjudicated by the competent central tax officer in whose jurisdiction, the principal place of business of the noticee from whom the highest demand of central tax and/or integrated tax (including cess) has been made falls.

### **SCNs in which the Principal Places of business of the notices fall in multiple Commissionerates:**

A SCN issued by DGGSTI in which the principal places of business of the noticees fall in multiple Commissionerates and where the central tax and/or integrated tax (including cess) involved is more than Rs. 5 crores shall be adjudicated by an officer of the rank of Additional Director/Additional Commissioner (as assigned by the Board), who shall not be on the strength of DGGSTI and working there at the time of adjudication. Cases of similar nature may also be assigned to such an officer.

### **SCNs issued on similar issues to a noticee(s) made and made answerable to different levels of Adjudicating Authorities:**

In case show cause notices have been issued on similar issues to a noticee(s) and made answerable to different levels of adjudicating authorities within a Commissionerate, such show cause notices should be adjudicated by the adjudicating authority competent to decide the case involving the highest amount of central tax and/or integrated tax (including cess).

**SCN and adjudication of demand under Section 73 of the CGST Act, 2017:** The steps for demand under Section 73 of the CGST Act, 2017 are summarised as under:

1. Determination whether, in the opinion of the Proper Officer, the tax not/short paid etc. is for reason other than on account of fraud, wilful misstatement, suppression of fact.
2. If answer to question number 1 is affirmative, the Proper Officer shall proceed under Section 73 of the CGST Act, 2017, else under Sec 74 of this Act.
3. Pre-SCN intimation to the defaulting taxable person. The Proper Officer to Compute the details of tax, interest and penalty payable, as ascertained by him and communicate the same to the defaulting tax payer, in Part A of Form GST DRC-01A.
4. A taxpayer, on receipt of intimation in Form DRC-01A, may use the second part of the said form i.e. Part B, to communicate to the officer, if he (taxable person) has made whole or part-payment of the ascertained liability, or if the liability is not acceptable by him.
5. In case the taxable person pays the full amount mentioned at serial number 3 above and informs the Proper Officer, the proceedings under Section 73(1) shall stand concluded and there would be no need for issue of SCN.
6. When the amount paid as per the ascertainment of the assessee falls short, the proper officer shall issue a notice for the amount of shortfall.
7. Where the tax payer makes the payment of tax along with interest within 30 days of issuance of Notice 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.
8. 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).
9. The amount of penalty shall be higher of 10% of tax or Rs.10,000.
10. 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.

11. Time limit for issue of the determination order: As per Section 73(10), the Proper Officer is required to pass the order within three years from:
  - a. the due date of filing of Annual Return under Section 44 for the year to which the short payment or non-payment or input tax credit wrongly availed or utilised relates or
  - b. date of erroneous refund.
12. Time limit for issue of SCN: The Proper Officer is required to issue notice at least three months prior to the time limit specified under Section 73(10) for issuance of an order.
13. Notwithstanding anything contained in Section 73(6) and Section 73(8) i.e. bullets 5 and 7 above, penalty under Section 75(9) shall be payable where any amount of:
  - a. Any amount of Self-assessed tax or
  - b. Any amount collected Tax collected as tax

has not been paid within a period of thirty days from the due date of payment of such tax.

**SCN and adjudication of demand under Section 74 of the CGST Act, 2017:** The steps for determination of tax under Section 74 are similar to the steps required under Section 73 above, with the following differences:

1. Determination under this Section is applicable, if in the opinion of the Proper Officer, the tax not/short paid etc. is for reason of fraud, wilful misstatement, suppression of fact.
2. Pre-SCN intimation to the defaulting taxable person. In case the taxable person pays the full amount with interest prescribed under Section 50 and a penalty equal to 15 percent of tax, and informs the Proper Officer, the proceedings under Section 74(1) shall stand concluded and there would be no need for issue of SCN.
3. Where the tax payer makes the payment of tax along with interest and penalty equal to 25% of the tax within 30 days of issuance of Notice and intimates the proper officer of such payment, the proper officer shall issue an order in FORM GST DRC-05 concluding the proceedings.
4. Where the taxable person makes payment of tax, interest as prescribed under Section 50 and penalty at the rate of 50 per cent of the tax payable within 30 days of the receipt of the order, the proceedings initiated under Section 74(1) shall stand concluded.
5. If the payment is not made within 30 days of the receipt of the order, the amount of penalty will be equal to the amount of tax ordered to be paid as per the provision of Section 74(1).
6. 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. Time limit for issue of the determination order: As per Section 73(10), the Proper Officer is required to pass the order within five years from:
  - a. the due date of filing of Annual Return under Section 44 for the year to which the short payment or non-payment or input tax credit wrongly availed or utilised relates or
  - b. date of erroneous refund.
8. Time limit for issue of SCN: The Proper Officer is required to issue notice at least six months prior to the time limit specified under Section 73(10) for issuance of an order.

**Comparative summary of the penalty payable under Section 73 and Section 74:**

The amount of penalty payable under the two sections is summarised as under:

Sr. No	Stage of payment	Section 73	Section 74
1.	Tax and interest paid before issue of SCN	No Penalty	15% of the tax amount
2	Tax and interest paid within 30 days after issue of SCN	No Penalty	25% of the tax amount
3.	Tax and interest paid within 30	10% of the tax or Rs.10,000,	50% of tax amount

	days of communication of adjudication order	whichever is higher	
4.	Maximum penalty: In any other case	10% of the tax or Rs.10,000, whichever is higher	100% of the tax amount.

### General provisions relating to determination of tax (Section 75):

The general provisions relating to determination of demand under Section 73 and Section 74 are summarised as under:

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 of notice and of passing of order.
2. 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.
3. Where notice issued under *Section 74 (1)* 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, the Proper Officer shall determine the tax payable by such person, deeming as if the notice were issued *Section 73 (1)*.
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 PO shall, if sufficient cause is shown by the taxable person, grant time to the said person and adjourn the hearing for reasons to be recorded in writing. However, 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 not to 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. Any 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.
11. The proper officer shall issue an order within one year from the date of issue of the notice.
12. 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.
13. The refund of such CGST/SGST or CGST/UTGST would be granted subject to such conditions as may be prescribed in this regard. However, interest is not required to be paid on the IGST payable in terms of Section 19 (2) of the IGST Act.

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