

Demands and recovery

Demands for tax short paid or not paid or erroneously refunded

- Since tax is payable on **self-assessment basis**, it is possible that the taxable person may not have correctly paid the tax or may not have paid the tax at all. It is also possible that the taxable person might have claimed refund and got refund of tax or input tax credit.
- In such case, department can issue show cause notice and adjudicate the demand.
- In normal cases, such order is required to be passed **within three years from the due date of filing return**. However, if the **non-payment** was on **account of fraud, willful mis-statement or suppression of facts to evade tax**, the order can be passed **within five years from the due date of filing return**. The provisions apply to recovery of interest also.

Authority empowered to issue show cause notice and confirm demand

- **Superintendent of Central Tax** has been designated as 'proper officer' for issue of show cause notice and confirm demand under section 73 of CGST Act (where suppression of facts is not alleged) and section 74 of CGST Act (where suppression of facts or fraud is alleged).
- As per section 5(2) of CGST Act, an officer of central tax may exercise powers conferred on any officer subordinate to him.
- Hence, for optimum distribution of work, the following monetary limits have been fixed based on amount of central tax (including GST Compensation Cess) or integrated tax (including GST Compensation Cess) short paid or not paid or erroneously refunded or input tax credit wrongly availed or utilized.

Officer Authorised	Monetary limit for issue of notice and demand
Superintendent of Central Tax	(a) Rs. 10 lakhs if only CGST and GST Compensation Cess Invoiced (b) Rs. 20 lakhs if only IGST and GST Compensation Cess involved (c) Rs. 20 lakhs if CGST, IGST and GST Compensation Cess involved
Deputy or Assistant Commissioner of Central Tax	(a) Above Rs 10 lakhs but not exceeding Rs one crore if only CGST and GST Compensation Cess Invoiced (b) Above Rs 20 lakhs but not exceeding Rs two crores if only IGST and GST Compensation Cess involved (c) Above Rs 20 lakhs but not exceeding Rs two crores if CGST, IGST and GST Compensation Cess involved
Additional or Joint Commissioner of Central Tax	(a) Above Rs one crore if only CGST and GST Compensation Cess Invoiced (no upper limit) (b) Above Rs two crores if only IGST and GST Compensation Cess involved (no upper limit) (c) Above Rs two crores if CGST, IGST and GST Compensation Cess involved (no upper limit)
Commissioner, Principal Commissioner of Central Tax	Legally, as per section 5(2) of CGST Act they can issue notice and demand without monetary limit, but it seems these adjudication powers have not been vested in them

- **Recurring SCN should be issued by jurisdictional authorities even if original SCN issued by other authority, however, enforcement will be by authority which has initiated the action –**
 - In view of parallel jurisdiction for investigation, it is possible that initial investigation may be made by other Authority with parallel jurisdiction and show cause notice may be issued by them [e.g. by State Government Authorities when Central Government has jurisdiction or vice versa].
 - Even in such cases, **recurring SCN should be issued by jurisdictional authorities even if original SCN issued by other authority**, as jurisdictional authority is in better position to access records and returns of taxpayers.
 - However, **enforcement action will be with authority (State or Centre) which has initiated the enforcement action** (even if it is not jurisdictional tax authority). However, refund will be granted only by jurisdictional tax authority which is administering the taxpayer.

- **Adjudication when SCN issued by Audit Commissionerate of DGGI** - Central Tax Officers of Audit Commissionerate and Director General of Goods and Services tax Intelligence (DGGI) **can issue** show cause notices **but** these will be **adjudicated by competent jurisdictional Central Tax Officer** in Executive Commissionerate **in whose jurisdiction the Noticee is registered**, where jurisdiction falls under jurisdiction of one executive Commissionerate of GST only.

- **Adjudication in case where multiple Central Tax Commissionerate are involved where notice issued by DGGI**
 - In respect of show cause notices issued by officers of DGGI, there may be cases where the principal place of business of noticees fall under the jurisdiction of multiple Central Tax Commissionerate's or where multiple show cause notices are issued on the same issue to different noticees, including the persons having the same PAN but different GSTINs, having principal place of business falling under jurisdiction of multiple Central Tax Commissionerate's.
 - For the purpose of adjudication of such show cause notices, Additional/Joint Commissioners of Central Tax of specified Commissionerate's have been empowered with All India jurisdiction.
 - Such show cause notices may be adjudicated, irrespective of the amount involved in the show cause notice(s), by one of the Additional/Joint Commissioners of Central Tax empowered with All India jurisdiction.
 - Principal Commissioners/Commissioners of the Central Tax Commissionerate's specified in the said notification will allocate charge of Adjudication (DGGI cases) to one of the Additional Commissioners/Joint Commissioners posted in their Commissionerate's.
 - Additional/Joint Commissioner in specified Commissionerate's can adjudicate SCN issued by DGGI Additional Commissioners or the Joint Commissioners of Central Tax, as the case may be, subordinate to the Principal Commissioners of Central Tax (PCCT) or the Commissioners of Central Tax (CCT), are vested with the powers of passing an order of decision in respect of notices issued by officers of DGGI under sections 67, 73, 74, 76, 122, 125, 127, 129 and 130 of CGST Act.

- **Adjudication in case where multiple Central Tax Commissionerate are involved where notice issued by Audit Commissionerate** - In respect of a show cause notice issued by the Central Tax officers of Audit Commissionerate, where the principal place of business of noticees fall under the jurisdiction of multiple Central Tax Commissionerate's, a proposal for appointment of common adjudicating authority may be sent to the Board.

- **Show cause notices issued prior to 11-3-2022 by DGGI** - In respect of show cause notices issued by the officers of DGGI prior to issuance of Notification No. 02/2022-Central Tax dated 11th March, 2022, involving multiple jurisdictions and where no adjudication order has been issued till 11-3-2022, the same may be made answerable to the Additional/Joint Commissioners of Central Tax, having All India jurisdiction, in accordance with the criteria mentioned in above, by issuing corrigendum to such show cause notices
[State Government will prescribe 'proper officer' for purpose of SGST in the respective State].
- **Simultaneous adjudication and prosecution permissible** - Adjudication and prosecution under GST can be started simultaneously - Tejas Pravin Dugad v. UOI (2021) (Bom HC DB).
- **Show cause notice can be issued against adjudication order granting refund** - Show cause notice can be issued against adjudication order granting refund. It is not necessary to file appeal. Order of adjudication of refund can be reopened - Ganesh Ores P Ltd. v. State of Orissa [2022] (Orissa HC).

Demand and Recovery of wrongly availed Cenvat Credit or Cenvat Credit wrongly carried forward

- Recovery of wrongly availed Cenvat in past will be under CGST Act, Similarly Recovery of Cenvat credit wrongly carried forward of wrongly availed Cenvat in past will be under CGST Act.
- Wrongly availed ITC under Excise Act or Service Tax law (existing law) and Cenvat Credit wrongly carried forward as transitory credit in TRAN-1 will be as follows.
- All such liabilities may be discharged by the taxpayers, **either voluntarily in FORM GST DRC-03** or may be **recovered vide order uploaded in form GST DRC-07**, and **payment against the said order shall be made in form GST DRC-03**. The applicable interest and penalty shall apply in respect of all such amounts, which shall also be paid in form GST DRC-03.
- It is further clarified that the alternative method of reversing the wrongly availed CENVAT credit under the existing law and inadmissible transitional credit through Table 4(B)(2) of FORM GSTR-3B would no longer be available to taxpayers.

Demand when no charge of fraud, willful mis-statement or suppression of facts

- Provisions in respect of raising show cause notice demanding tax, interest and penalty have been made in **section 73** of CGST Act in cases where there is **no charge of suppression of facts, willful mis-statement or fraud**.
- **Pre-notice communication may be made -**
 - The proper officer may, **before issue of notice in form GST DRC-01, communicate** details of tax, interest and penalty ascertained by tax officer in **part A of form GST DRC-01A**.
 - The provision of pre-notice communication has been made to enable the taxable person to make payment on own before receipt of proper SCN in form GST DRC-01.
 - The taxable person can make partial payment or make submissions against proposed liability, he can make **submission in part B of form GST DRC-01A**. The matter can be settled by pre-notice communication, wherever possible. The idea is to promote voluntary compliance.
 - However, the provision of pre-notice is optional w.e.f. 15-10-2020 and not mandatory and hence is not likely to be used much by department.

- **Proper Show cause notice if pre-notice communication fails -**
 - 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 **utilized** for any reason, **other than the reason of fraud or any willful-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 utilized input tax credit, requiring him to show cause 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. The provisions apply to recovery of interest also.
 - Superintendent of Central Tax has been designated as 'proper officer' for the purpose of issuing show cause notice [State Government will prescribe 'proper officer' for purpose of SGST in the respective State].
- **Proper show cause notice required, mere summary in GST DRC-01 is not sufficient**
 - The summary of notice shall be in form GST DRC-01, along with show cause notice under section 74(1) of CGST Act.
 - Thus, mere issue of demand in form DRC-01 is not sufficient. Summary of show cause notice in form DRC-01 cannot substitute show cause notice under section 74(1) of CGST Act. Proper show cause notice including ingredients of proper show cause notice is required. (Sidhi Vinayak Enterprises v. State of Jharkhand [2023] (Jharkhand HC DB).
- **Interest cannot be demanded by issuing notice under section 50 of CGST Act - GST DRC-01 notice is required to be served with notice issued under sections 52, 73, 74, 76, 122, 123, 124, 125, 127, 129 or 130 of CGST Act. This does not cover notice under section 50 of CGST Act. Hence, for demand of interest, notice should be issued under GST DRC-07.**
- Notice to be issued **at least three months before** time limit of **issue of order**.
- **Statement instead of detailed SCN if SCN on same grounds was issued for earlier period –**
 - Where a notice has been issued for any earlier period under section 73(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 utilized for such periods other than those covered under earlier SCN, on the person chargeable with tax.
 - The service of such statement shall be deemed to be service of notice on such person, if the grounds relied upon for such tax periods are the same as are mentioned in the earlier notice.
 - The statement under section 73(3) shall be in form GST DRC-02. This is only to save paper work at department, where show cause notice on same grounds was issued for earlier period.
- **Taxable Person can pay tax on own before SCN, or after receiving pre-notice communication**
 - The person chargeable with tax may, before service of notice under section 73(1) or statement under section 73(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. (Sec 73 (5))
 - This payment can be made on own or on basis of communication made by proper officer under rule 142(1A) of CSGT Rules (pre-notice communication). The taxable person shall inform department in **form GST DRC 03**. Proper Officer shall issue an **acknowledgement, accepting payment in form GST DRC-04**.
 - The proper officer, on receipt of such information, shall not serve any show cause notice in respect

of the tax so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.

- Superintendent of Central Tax has been designated as 'proper officer' for the purpose of accepting the intimation and issue an acknowledgement. He will then not issue notice.
- However, if the taxable person has not paid self-assessed tax or any amount collected as tax within 30 days from due date of payment, penalty of 10% of tax will be payable.
- 'Shall not serve show cause notice' means it is a mandatory provision. The issue has to be closed. However, prosecution under section 132 of CGST Act can continue.
- **Amount paid through DRC-03 to be refunded if acknowledgement not made in DRC-04 accepting payment** (Samyak Metals (P.) Ltd. v. Union of India [2023] (Punjab & Haryana HC DB).

➤ **Show cause notice if amount short paid by taxable person** - Where the proper officer is of the opinion that the amount paid under section 73(5) falls short of the amount actually payable, he shall proceed to issue the notice under section 73(1), in respect of such amount which falls short of the amount actually payable.

Note –

- ❖ If SCN was not uploaded on website it is invalid - Ram Prasad Sharma v. Chief Commissioner Ram Prasad Sharma v. Chief Commissioner [2021] (Madhya Pradesh HC DB).
- ❖ Even if physical copy of adjudication order is handed over to assessee, limitation period to file appeal would start only when adjudication order is uploaded on GST portal - Gujarat State Petronet Ltd. v. UOI [2021] (Gujarat HC DB).

➤ **No penalty if tax with interest paid within 30 days from issue of SCN –**

- Where any person chargeable with tax under section 73(1) or 73(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 tax shall be deemed to be concluded.
- 'All proceedings in respect of the said tax shall be deemed to be concluded' means any further notice even to co-noticee for penalty, late fee etc. cannot be issued. However, prosecution under section 132 of CGST Act can continue.
- If the taxable person has not paid self-assessed tax or any amount collected as tax within 30 days from due date of payment, **penalty of 10% of tax** will be payable.
- The taxable person shall inform department in **form GST DRC-03**. **Proper Officer** shall issue an order **concluding the proceedings** in **form GST DRC-05**.
- Superintendent of Central Tax has been designated as 'proper officer' for the purpose of issue of order concluding the proceedings [State Government will prescribe 'proper officer' for purpose of SGST in the respective State].

➤ **Demand with maximum 10% penalty** - If taxable person does not voluntarily pay the tax and interest, 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. Penalty equivalent to 10% means lower penalty cannot be imposed.

➤ **Procedure for making representation** - The representation of taxable person shall be in **form GST DRC-06**.

➤ **Order passed to be uploaded in form GST-DRC-7 -**

- After considering the representation and after giving opportunity of personal hearing, summary of

order passed under section 73(9) or 74(9) or 76(3) or section 125 or section 129 or section 130 shall be uploaded electronically in **form GST DRC-7**, specifying the amount of tax, interest and penalty payable.

- [section 73(9) - Demand when no charge of suppression or fraud or willful misstatement, section 74(9) - Demand when there is charge of suppression or fraud or willful misstatement, section 76(3) - Demand when tax collected but not paid to Government, section 125 - general penalty when separate penalty is not provided, section 129 - Detention and seizure of goods and conveyances in transit, section 130 - Confiscation of goods or conveyances and levy of penalty].
- This order shall be treated as notice for recovery.

➤ **Time limit for issue of order is three years**

- The proper officer shall issue the order under section 73(9) **within three years from the due date for furnishing annual return** for the year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or as the case may be, within three years from the date of erroneous refund.
- Note that the time limit is for issue of demand order and not only for issuing show cause notice.
- However, if the Show Cause Notice was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on same issue, and appeal of department is pending before Appellate Tribunal, High Court or Supreme Court, that time will not be counted for calculating three year/five-year limit.
- Note that this time limit is for issue of order confirming demand. As per section 73(2) of CGST Act, show cause notice for demand is required to be issued **three months prior to time limit**. Hence, show cause notice will have to be issued at least three months prior to aforesaid dates.
- The provisions apply for issuing show cause notices where there is no charge of suppression of facts, fraud or willful misstatement to evade tax. If there is charge of suppression of facts or fraud or willful misstatement to evade tax, the time limit is **five years from due date of filing of annual return**. This period is yet to expire for any financial year.

Demand when there is fraud, willful mis-statement or suppression of facts

- Provisions in respect of raising show cause notice demanding tax, interest and penalty have been made in **section 74 of CGST Act** in cases where there is charge of suppression of facts, willful mis-statement or fraud.
- **Pre-notice communication may be made**
- The proper officer may, before issue of notice in form GST DRC-01 communicate details of tax, interest and penalty ascertained by tax officer in part A of form GST DRC-01A.
 - The provision of pre-notice communication has been made to enable the taxable person to make payment on own before receipt of proper SCN in form GST DRC-01.
 - The taxable person can make partial payment or make submissions against proposed liability, he can make **submission in part B of form GST DRC-01A**.
- **Proper show cause notice if pre-notice communication fails -**
- Where it appears to 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 utilized by reason of fraud, or any willful-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 utilized input tax credit.

- The notice should require him to show cause 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. The provisions apply to recovery of interest also.
- Notice to be issued **at least six months** before time limit.
- **Statement if SCN on same grounds was issued for earlier period** - Same as Sec 73
- **Taxable Person can pay tax with 15% of tax as penalty on own before SCN, or after receiving pre-notice communication –**
 - The person chargeable with tax may, before service of notice under section 74(1), pay the amount of tax along with interest payable thereon under section 50 and **15% of tax as penalty** 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.
 - This payment can be made on own or on basis of communication made by proper officer under rule 142(1A) of CGST Rules pre-notice communication. The taxable person shall inform department in form GST DRC 03. Proper Officer shall issue an acknowledgement, accepting payment in form GST DRC-04.
 - The proper officer, on receipt of such information, shall not serve any show cause notice in respect of the tax so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.
 - The taxable person shall inform department in form GST DRC-03. Proper Officer shall issue a acknowledgement, accepting payment in form GST DRC-04. 'Shall not serve show cause notice' means it is a mandatory provision. The issue has to be closed. However, prosecution under section 132 of CGST Act can continue.
- **Show cause notice if amount short paid** - Where the proper officer is of the opinion that the amount paid under section 74(5) falls short of the amount actually payable, he shall proceed to issue the notice as provided in section 74(1) in respect of such amount which falls short of the amount actually payable.
- **25% penalty if tax with interest paid within 30 days from issue of SCN** -
 - Where any person chargeable with tax pays the said tax along with interest payable under section 50 and **25% of tax as penalty within thirty days of issue of show cause notice**, all proceedings in respect of the said tax shall be deemed to be concluded. 'All proceedings in respect of the said tax shall be deemed to be concluded' means any further notice even to co-noticee for penalty, late fee etc. cannot be issued. However, prosecution under section 132 of CGST Act can continue.
 - The taxable person shall inform department in form GST DRC-03. Proper Officer shall issue an order concluding the proceedings in form GST DRC-05 - rule 142(3) of CGST Rules, 2017.
- **Demand with penalty equal to tax, in case of suppression, misstatement etc. –**
 - If taxable person does not voluntarily pay the tax and interest, the proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and penalty equal to tax, due from such person and issue an order.
 - There is no discretion to reduce penalty in case of fraud, suppression of facts and willful mis-statement. However, if the taxable person **pays tax, interest and 50% penalty within 30 days of communication of order, balance 50% penalty stands waived.**
- **Procedure for representation and order** - The representation of taxable person shall be in form GST DRC-06.
- **Order passed to be uploaded in form GST-DRC-7** - After considering the representation and after giving opportunity of personal hearing, summary of order passed under section 73(9) or 74(9) or 76(3) or 129 or 130 shall be uploaded electronically in form GST DRC-7, specifying the amount of tax,

interest and penalty payable.

In *Akas Garg v. State of Madhya Pradesh* [2020] (MP HC DB), it was held that demand is invalid if not uploaded electronically on website.

➤ **Time limit for issue of order is five years in case of suppression, willful misstatement –**

- The proper officer shall issue the order under section 74(9) **within five years from the due date for furnishing of annual return** for the year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within five years from the date of erroneous refund - section 74(10) of CGST Act.
- Note that the time limit is for issue of demand order and not only for issuing show cause notice.
- However, 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 section 73(10) or section 74(10) where proceedings are initiated by way of issue of a show cause notice under said sections.

Meaning of fraud or any willful mis-statement or suppression of facts to evade tax

- Time limit for raising demand and penalty amount increases if there is charge of fraud or any willful-misstatement or suppression of facts to evade tax. Hence, this issue becomes litigation prone.
- 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.
- There can be no suppression of facts if facts which are not required to be disclosed are not disclosed.
- **Suppression should be willful**
 - Supreme Court in *Rainbow Industries v. CCE* - 1994 (74) ELT 3 (SC) = 1994 (6) SCC 563 = AIR 1994 SC 2783 = 1994 AIR SCW 4465 have held that in order for the extended period to apply, two ingredients must be present - willful suppression, mis-declaration etc., and the intention to evade duty. In this case, it was held that the powers to extend period from one year to 5 years are exceptional powers and hence have to be construed strictly.
- **No suppression if all facts were disclosed** - If all facts have been disclosed to department, extended period is not applicable - *CC v. A S Moloobhoy and Sons* (2015) (SC).
- **Mere inaction or mere non-disclosure is not Suppression of Facts**
 - Suppression means not providing information which the person is legally required to state, but is intentionally or deliberately not stated.
 - Hon. Supreme Court, in *Collector v. Chemphar Drugs* 40 ELT 276 = 1989 (2) SCC 127 = AIR 1989 SC 832, has held that mere inaction or failure on part of manufacturer will not amount to suppression of facts. Conscious or deliberate withholding of information when the manufacturer knew otherwise, is required to be established, before saddling the manufacturer with liability for extended period.
 - Mere omission to give correct information did not constitute suppression unless that omission was made willfully in order to evade duty. Suppression would mean failure to disclose full and true

information with the intent to evade payment of duty.

- **No suppression of facts if taxable person had a bona fide belief** - If a party bona fide believes in a legal position (e.g. that no duty is payable or no licence is required in his case) and if there is scope for such belief and doubt, penal provisions of section 11A will not apply. - Padmini Products v. CCE - 1989 (43) ELT 195 (SC).
- **No suppression if department aware of facts**
Extended period of five years is not applicable for any omission on part of assessee, unless it is a deliberate attempt to escape from payment of duty. When facts were known to the department, extended period of five years is not applicable - Pushpam Pharmaceuticals Co. v. CCE 1995 Supp 3 SCC 462 = 78 ELT 401 (SC).
- **Willful Misstatement**
 - A false statement becomes 'willful' if it is deliberate or intentional. It is not willful if the statement is accidental or inadvertent. A statement will not be misstatement only because full facts were not disclosed. 'Willful' means 'with intent to evade duty' - Cosmic Dye Chemical v. CCE 95 STC 604 = 75 ELT 721 = (1995) 6 SCC 117(SC 3-member bench).
- **Fraud**
 - Basic element of fraud is deceit. Section 17 of Contract Act states that fraud means making a suggestion, as a fact, which the person does not believe it to be true. Fraud also means active concealment of fact. Generally, 'fraud' means deceit, trickery or misrepresentation. Intention to evade duty is built into the words 'fraud' and 'collusion' -Cosmic Dye Chemical v. CCE 95 STC 604 = (1995) 6 SCC 117 = 75 ELT 721 (SC 3-member bench).
 - Fraud is proved when it is shown that a false representation has been made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the Court - Ashok Leyland Ltd. v. State of Tamil Nadu 2004 AIR SCW 1001 = 2004(3) SCC 1 (SC 3-member bench).
 - Suppression of a material document would also amount to fraud on Court.
 - Concealment of relevant and material facts, which should have been declared before Arbitrator, is an act of fraud and is against public policy of India.
 - Misrepresentation itself amounts to fraud.
 - However, mere silence is not fraud, unless it is the duty of the person to speak or silence itself is equivalent to speech.

General provisions relating to demand of tax

- The following provisions apply to both types of demands i.e. with charge of fraud, willful mis-statement or suppression of facts to evade tax or without such charge.
- Period of stay by an order of a Court or Tribunal to be **excluded** for computing period of three/five years. The stay should be for service of notice or issuance of order. Mere stay of recovery is not sufficient.
- **If charge of suppression, fraud not established** - If Appellate Authority or Appellate Tribunal or Court concludes that the charge of fraud or any willful mis-statement or suppression of facts to evade tax has not been established, the proper officer shall determine the tax payable by such person for the period of three years, i.e. without charge of suppression etc.
- **Time limit for issue of order on direction of Tribunal or Court** - 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**. This

happens when matter is remanded to lower authority with certain directions for determining the issue.

- **Opportunity of personal hearing** - An opportunity of personal 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.
- **Personal Hearing through video conferencing only** - There will be no physical hearing. Personal hearing will be through video conferencing only.
- **Adjournment of hearing** - The proper officer shall, if sufficient cause is shown adjourn the hearing for reasons to be recorded in writing. Maximum three adjournments can be given -- section 75(5) of CGST Act.
- **Order with reasons** - The proper officer, in his order, shall set out the relevant facts and the basis of his decision.
- **Demand cannot be more than specified in notice and cannot be confirmed on other ground** - 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 grounds other than the grounds specified in the notice.
- **Interest and penalty get automatically modified, if tax amount increased or reduced** - 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.
- **Interest mandatory even if not specified in order** - Interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability.
- **Adjudication concludes if order not issued within three/five years** - However, if the Show Cause Notice was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on same issue, that period shall be excluded.
- **No penalty under section 73(11) if return filed and tax paid** - It has been clarified that provisions of section 73(11) of CGST Act are invoked only when section 73 is invoked. In case of delay in filing return in form GSTR-3B, section 73 cannot be invoked as tax is paid along with return. In that case, penalty under section 73(11) of CGST Act cannot be imposed. However, general penalty under section 125 of CGST Act for contravention of provisions of CGST Act can be imposed after following due process of law (like SCN, hearing etc.) [The maximum penalty is Rs 25,000 under CGST Act plus Rs 25,000 under SGST/UTGST Act] - para 2 CBI&C circular No. 76/50/2018-GST dated 31-12-2018.
- **No other penalty once penalty imposed under section 73 or 74** on the same person under any other provision of this Act.
- **Burden of proof is on taxable person in respect of input tax credit** - If any person claims that he is eligible for input tax credit, the burden of proving such claim or claims shall lie on him. Further, in case of other demands, burden of proof is on department [though practically they do not prove anything and just confirm demand left and right]
- **Demand cannot be invalidated on minor ground, apparent mistake can be rectified** Demand cannot be invalidated on minor grounds. Show Cause Notice cannot be challenged if acted upon. Errors apparent from records can be rectified. Rectification of order should be in form **GST DRC-08**. Superintendent of Central Tax has been designated as 'proper officer' for the purpose of rectification of order.
- **If Appellate Authority decides that there is no suppression of facts and only demand within normal time period is sustainable**
 - In cases where any direction is issued by the appellate authority or appellate tribunal or the court to re-determine the amount of tax payable by the noticee by deeming the notice to have been issued

under section 73(1) of CGST Act in accordance with the provisions of section 75(2) of the CGST Act, the proper officer is required to issue the order of redetermination of tax, interest and penalty payable within the time limit as specified in section 75(3) of the CGST Act, i.e. **within a period of two years from the date of communication of the direction** by appellate authority or appellate tribunal or the court, as the case may be.

- **Show cause notice is to be issued within 2 years and 9 months from due date of annual return if no charge of suppression.**
 - **Demand upto 2 years and 9 months sustainable if it was issued within 2 years and 9 months** - Only the amount of tax short paid or not paid, or input tax credit wrongly availed or utilized, along with interest and penalty payable, in terms of section 73 of CGST Act relating to such financial years can be re-determined, where show cause notice was issued within 2 years and 9 months from the due date of furnishing of annual return for the respective financial year. Similarly, the amount of tax payable on account of erroneous refund along with interest and penalty payable can be re-determined only where show cause notice was issued within 2 years and 9 months from the date of erroneous refund.
 - **Entire demand becomes time barred if SCN was issued beyond a period of 2 years and 9 months** - In case, where the show cause notice under section 74(1) was issued and the appellate authority concludes that the notice is not sustainable under section 74(1) of CGST Act, the entire proceeding shall have to be dropped, being hit by the limitation of time as specified in section 73. Similarly, where show cause notice under section 74(1) of CGST Act was issued for erroneous refund beyond a period of 2 years and 9 months from the date of erroneous refund, the entire proceeding shall have to be dropped.
- **Mode of service of notice** - Any decision, order, summons, notice or other communication under the Act or the rules made thereunder shall be served by any one of the following methods, as specified in section 169(1) of CGST Act:
- (a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxpayer or to his manager or Authorised representative or an advocate or a tax practitioner holding authority to appear in the proceeding on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person, or
 - (b) by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his Authorised representative, if any at his last known place of business or residence, or
 - (c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time, or
 - (d) by making it available on common portal, or
 - (e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain, or
 - (f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence, and if such mode prescribed is also not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.
- **Date of service of decision or notice** - Every decision, order, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in section 169(1) - section 169(2) of CGST Act.

- **Presumption of delivery when communication sent by registered post** - When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by a registered letter in transit unless the contrary is proved. The only way by which non-delivery can be proved is by filing affidavit of non-delivery.
- **Notice served valid if acted upon or not challenged at earliest opportunity** - The service of any notice, order or communication shall not be called in question if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or where such service has not been called in question at or in the earliest proceedings commenced, continued or finalized pursuant to such notice, order or communication.

Tax collected but not deposited with Government

- 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 deposit the said amount to the credit of the, regardless of whether the supplies in respect of which such amount was collected are taxable or not. these provisions are overriding provisions.
- Proper Officer can issue show cause notice to him and confirm demand after giving him personal hearing.
- The person shall be liable to pay interest as specified in section 50 from date of collection of tax to date of payment of tax with Government. Penalty upto tax so collected can be imposed.
- The person who has borne the incidence of the amount may apply for the refund of the same and for such refund provisions of unjust enrichment under section 54 will apply.
- **Deputy/Assistant Commissioner of Central Tax** has been designated as 'proper officer' for purpose of section 76, i.e. to issue notice and demand where tax has been collected but the person but has not deposited it with Government.
- **Procedure for representation and order** - The representation of taxable person shall be in form GST DRC-06.
- **Order passed to be uploaded in form GST-DRC-7** - After considering the representation and after giving opportunity of personal hearing, summary of order passed under section 73(9) or 74(9) or 76(3) or section 125 or section 129 or section 130 shall be uploaded electronically in form GST DRC-7, specifying the amount of tax, interest and penalty payable. This order shall be treated as notice for recovery.

CGST/SGST/UTGST paid when IGST was payable and vice versa

- A taxable person who has paid CGST/SGST/UTGST (in SGST/UTGST Act) on a transaction considered by him to be an intra-state supply, but which is subsequently held to be an inter-state supply, shall, upon payment of IGST, be allowed to take the amount of CGST/SGST/UTGST (in SGST/UTGST Act) so paid as refund subject to such conditions as may be prescribed. Interest will not be payable. (Sec 77)
- Parallel provision is made in IGST, which reads as follows - A taxable person who has paid IGST on a transaction considered by him to be an inter-state supply, but which is subsequently held to be an intra-state supply, shall, upon payment of CGST and SGST/UTGST in the appropriate State, be allowed to take the amount of IGST so paid as refund subject to such conditions as may be prescribed. Interest will not be payable - Section 19 of IGST Act.
- **Unfair provision** - Really there should be adjustment between Central Government and State Government in such cases. That will be fair to taxable person. If the recipient has availed input tax

credit, refund will not be admissible. This will cause double jeopardy to the taxable person. At least IGST and IGST could be adjustable as both are with Central Government.

Demand of tax if goods or services not accounted for or there is shortage –

- If the registered person fails to account for goods or services or both under section 35(1) of CGST Act, the proper officer shall determine the tax payable on such goods or services as if such or services or both have been supplied. Provisions of sections 73 and 74 will apply mutatis mutandis for recovery of such tax. Superintendent of Central Tax has been designated as 'proper officer' for the purpose of raising demand.
- **Meaning of 'Account for'** - 'Account for' does not mean 'making entry in books'. It only means 'explaining correct position'. In *Pepsi Foods v. CCE 2002(139) ELT 658 (CEGAT)*, it was held that 'account for' means explaining correct position of excisable goods as per law and not 'account' which would relate to making of correct entries in account books.
- **Burden of proof of clandestine removal is on department**
Mere suspicion cannot take place of proof. Findings of revenue authorities based on pure assumption and conjectures and on no evidence should be quashed - *Gian Mahtani v. State of Maharashtra - AIR 1971 SC 1898*.
It is now well settled that strong suspicion, strange coincidences and grave doubts cannot take place of legal proof - *State of Kerala v. M M Mathew (1978) 42 STC 348 (SC)*.
Clandestine removal is a positive act and the burden to prove the same is on department. Demand based on presumptions and conjectures has to be set aside.
Charge of clandestine removal is quasi-criminal and serious. It has to be proved by production of positive and tangible evidences - *Chandan Tobacco Co. v. CCE (2011) 270 ELT 87 (CESTAT)*.

Recovery of tax (Section 78 of CGST and SGST Act)

- Once the demand is confirmed, the amount demanded should be paid **within three months from date of service of such order**. If the amount **is not paid**, **recovery proceedings** shall be **initiated** - section 78 of CGST and SGST Act.
- The period of three months can be reduced by 'proper officer' for reasons to be recorded in writing.
- Power to reduce the period of three months for the purpose of CGST is **Principal Commissioner/Commissioner of Central Tax** [State Government will prescribe 'proper officer' for purpose of SGST in the respective State].
- **Recovery proceedings without issue of show cause notice if self-assessed tax and interest thereon not paid –**
 - 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 of CGST Act.
 - For the purposes of section 75(12), the expression "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under section 37 of CGST Act [details of outward supplies in form GSTR-1], but not included in the return furnished under section 39 of CGST Act [GSTR-3B]. because sometimes, the supplier uploads details of tax invoices and debit notes in his GSTR-1 (so that recipient can avail ITC) but does not include that turnover in his GSTR-3B return. Recovery under section 79 of CGST Act can commence, without issuing notice

under section 73 or 74 of CGST Act.

- GSTR-1 is filed under section 37(1) of CGST Act. It only shows supplies made. It is not declaration of tax payable. The tax payable is shown in GSTR-3B return filed under section 39(1) of CGST Act, which shows net tax liability after adjustment of Input Tax Credit. Tax payable is assessed only when GSTR-3B is filed as it shows ITC available and net tax payable. However, in view of explanation added, the tax shown as per GSTR-1 will be treated as tax payable, after deducting ITC that might have been shown in GSTR-3B return.
- Penalty equal to **10% of tax is payable** if self-assessed tax is not paid **within 30 days** from due date. This is notwithstanding any relaxation in penalty given under sections 73(6) and 73(8) of CGST Act for voluntary payment of tax.

➤ **Recovery proceedings if outward supplies declared in GSTR-1 do not match with turnover declared in GSTR-3B of same month, after seeking clarification for mismatch –**

- As per explanation to section 75(12) of CGST Act, recovery proceedings can commence under section 79 of CGST Act, if outward supplies declared in GSTR-1 do not match with turnover declared in GSTR-3B of same month. There may be some cases where there may be a genuine reason for difference between the details of outward supplies declared in GSTR-1 and those declared in GSTR-3B.
- In such cases, the proper officer may send a communication (with DIN) to the registered person to pay the amount short paid or not paid, or to explain the reasons for such short payment or non-payment of self-assessed tax, within a reasonable time, as prescribed in the communication.
- If, the concerned person is able to justify the differences between GSTR-1 and GSTR-3B, or is able to explain the reasons of such short-payment or non-payment of tax, to the satisfaction of the proper officer, or pays the amount such short paid or not paid, then there may not be any requirement to initiate proceedings for recovery under section 79 of CGST Act.
- However, if the said registered person either fails to reply to the proper officer, or fails to make the payment of such amount short paid or not paid, within the time prescribed in the communication or such further period as may be permitted by the proper officer, then the proceedings for recovery of the said amount as per provisions of section 79 of CGST Act may be initiated by the proper officer.

➤ **Power of recovery to AC/DC** - 'Proper Officer' to initiate and conduct recovery proceedings for the purpose of CGST is **Deputy Commissioner/Assistant Commissioner of Central Tax**. All powers of recovery under rules 143 to 156 of CGST Rules have been delegated to Deputy/Assistant Commissioner of Central Tax [State Government will prescribe 'proper officer' for purpose of SGST in the respective State].

➤ **Recovery of tax dues can be made from establishment with separate registration with same PAN** - A taxable person can have different GST Registrations in different States or even in same State with same PAN. They are defined as 'distinct persons' under section 25(4) and section 25(5) of CGST Act. However, recovery of dues can be made under section 79 of CGST Act from such distinct persons also.

➤ **Modes of recovery** - As per section 79(1) of CGST Act, the proper officer (AC/DC) shall proceed to recover the amount. Recovery can be done by one or more of the modes mentioned below: -

- **Deduct from other amount payable** owing to such person which may be under the control of the proper officer or such other specified officer.

Such order should be issued in form **GST DRC-09** - rule 143(1) of CGST Rules, 2017.

- **Detaining and selling goods under control of department**

- ❖ 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.
- ❖ Inventory and estimated market value shall be made. Goods should be sold by **auction or e-auction** for which **notice** should be in **form GST REG-10**.
- ❖ Notice of auction should be **minimum 15 days, except in case of perishable goods**.
- ❖ Pre-bid deposit should be obtained. **Notice to successful bidder** shall be in **form GST DRC-11**. On payment of amount, **certificate** shall be issued to **successful bidder in form GST DRC-12**.
- ❖ If defaulter pays the amount with expenses, process of auction should be cancelled.
- **Garnishee proceedings**
 - ❖ 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 credit of the Central or a State Government either 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, 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.
 - ❖ The **notice of such recovery** shall be in **form GST DRC-13**. When third person **pays** the amount, the **certificate** shall be in **form GST DRC-14**.
 - ❖ Every person to whom the notice is issued under this section 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.
 - ❖ In case the person to whom a notice under this section has been issued, fails to make the payment in pursuance thereof to the Central or a State 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.
 - ❖ The officer issuing notice (garnishee notice) may, at any time or from time to time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice.
 - ❖ Any person making any payment in compliance with a garnishee notice issued under section 79(1)(i) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the appropriate 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.
 - ❖ Any person discharging any liability to the person in default after service on him of the notice issued under section 79(1)(i) shall be personally liable to the Central or a State 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.
 - ❖ Where a person on whom a notice is served under section 79(1)(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 credit of the appropriate Government any such money or part thereof.

- **Distrain and sale any property belonging to the person –**

- ❖ The proper officer may, on an Authorisation by the competent authority and in accordance with the rules 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.
- ❖ **Disposal of proceeds of sale of goods or conveyance and movable or immovable property** - As per rule 154(1) of CGST Rules, as substituted w.e.f. 1-1-2021, the amounts so realized 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 section 129(3) of CGST Act 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 section 129(3) of CGST Act, 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 CGST and SGST Act, the said amount shall be credited to the bank account of the person concerned.

Where it is not possible to pay the balance of sale proceeds, 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.

- **Certification proceedings - Recovery as arrears of land revenue** - 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 authorized 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. The certificate shall be issued **to Collector** in form **GST DRC-18**.
- **Application to Magistrate to recover amount as fine** - 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. Application to **Magistrate** shall be made in form **GST DRC-19**.
- **Application for enforcement of order of Court** - If any amount is payable to defaulter in the execution of decree of a civil court for payment of money or enforcement of mortgage, request should be issued to **Court in form GST DRC-05** and Court shall execute the decree.
- **Recovery by sale of movable and immovable property of defaulter** - Recovery can be made by sale of movable and immovable property of defaulter. The detailed procedure has been specified in

rule 147 of CGST Rules.

- **No auction on holidays**
- **Assistance of police** - Help of police can be taken for discharge of duties of proper officer. Superintendent of Central Tax has been designated as 'proper officer' for the purpose for asking help from police.
- **Attachment of debts and shares** - A debt not secured by a negotiable instrument, a share or movable property not in possession of defaulter can be attached by issuing order in form GST DRC-06. Copy of such order shall be issued to debtors, the company and the person in possession of movable property.
- **Other modes of recovery** - Attachment of property in custody of courts or public officer can be made. Attachment of interest in partnership can be made - rule 152 of CGST Rules, 2017.

➤ **Recovery if bond was executed** - 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 section 79(1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section- section 79(2) of CGST Act.

➤ **Dues to Central Government can be recovered by State Government officer** - Where any amount of tax, interest or penalty is payable by a person to the credit of the Central Government under any of the provisions of this Act or the rules made thereunder and which remains unpaid, the proper officer of SGST/UTGST, during the course of recovery of SGST/UTGST arrears, may recover the amount from the said person as if it were an arrear of SGST/UTGST and credit the amount so recovered to the account of the Central Government. If amount recovered is less, it will be apportioned proportionately between Central Government and State Government/Union Territory in proportion of amount due to each Government/Union Territory.

➤ **Procedure for recovery of tax section 79 of the CGST Act**

- Where, in accordance with section 75 read with rule 88C, or otherwise, any amount of tax or interest has become recoverable under section 79 and the same has remained unpaid, the proper officer shall intimate, electronically on the common portal, the details of the said amount in **FORM GST DRC-01D**, directing the person in default to pay the said amount, along with applicable interest, or, as the case may be the amount of interest, **within seven days of the date of the said intimation** and the said amount **shall be posted in Part-II of Electronic Liability Register in FORM GST PMT-01**. [Rule 142B(1)]
- **Intimation is notice of recovery** - The intimation referred to in rule 142B (1) shall be treated as the notice for recovery.
- **Procedure for recovery** - Where any amount of tax or interest specified in the intimation referred to in rule 142B(1) remains unpaid on the expiry of the period specified in the said intimation, the proper officer shall proceed to recover the amount that remains unpaid in accordance with the provisions of rule 143 or rule 144 or rule 145 or rule 146 or rule 147 or rule 155 or rule 156 or rule 157 or rule 160. (Modes of Recovery)

➤ **Department cannot take extra-legal steps like forcefully collecting cheque during raid**

Collection of cheques for recovery of dues is not permitted - Sonali Dyeing v. UOI (2009) 20 STT 441 (Guj HC DB) * Digipro Import v. UOI (2017) 350 ELT 145 = 353 ELT 3 (Del HC DB). * Remark Flour Mills (P.) Ltd. v. State of Gujarat [2018] 92 taxmann.com 337 (Gujarat)

➤ **Recovery under service tax, excise and Vat laws**

- Any demand under 'existing law' unless recovered under that law may be recovered under GST Act. The **demand** may be uploaded in **form GST DRC-07A** electronically for recovery. Demand of the order shall be posted in **part II of Electronic Liability Register in form GST PMT-01**.
- If the demand is **modified or rectified or quashed** in any **proceedings**, a **summary** thereof shall be uploaded on **common portal in form GST DRC-08A** and part II of Electronic Liability Register in form GST PMT-01.

No recovery if appeal is pending

If taxable person files appeal before Appellate Authority or Appellate Tribunal against a demand, he is required to pre-deposit specified amount. Once such pre-deposit is made, there will be no recovery proceeding for balance amount demanded.

Payment of tax and other amount in instalments

- On an application filed by a taxable person, the **Commissioner/Chief Commissioner** may, for reasons to be recorded in writing, extend the time for payment or allow payment of any amount due under the 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 with such conditions and limitations as may be prescribed.
- Application seeking extension in time or allowing payment in instalments, application shall be made in **form GST DRC-20**. On **receipt of report from jurisdictional officer**, Commissioner may issue order in form **GST DRC-21**.
- This facility is not allowed if recovery if recovery process is on or amount is less than Rs 25.
- However, 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.

Transfer of property to be void in certain cases

- Where a person, after any tax 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.
- However, 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 proceeding 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.
- 'Proper Officer' to permit creation of charge, for the purpose of CGST is **Additional Commissioner/Joint Commissioner of Central Tax**.

Tax to be first charge on property except under Insolvency Code

Insolvency Code overrides section 238 of CGST and SGST Act - Insolvency Code overrides section 238 of CGST and SGST Act. Thus, if property was attached for recovery of GST dues, the property is required to be detached and handed over to Resolution Professional - Ritesh Prakash Adatiya v. Deputy Commissioner of State Tax (Enforcement) Division-8 Surat [2020] 115 taxmann.com 163 (NCLT).

Provisional attachment to protect revenue in certain cases

- Property of following can be provisionally attached - (a) person who is availing bogus Input Tax Credit

(b) Person to whom SCN has been issued under section 73 or 74, or recovery proceedings under section 79 have been commenced (c) Audit, search, seizure or arrest is under progress.

- **Proceedings should be pending** - Powers under section 83(1) to provisionally attach property including bank account could be invoked only during pendency of proceedings.
- **Provisional attachment can be upto one year** - Such provisional attachment can continue upto one year from date of order.
- **Provisional attachment order ceases to operate on expiry of one year**
- **Order by Commissioner for release of provisional attachment** - There is no specific procedure prescribed for release of provisional attachment. Hence, GST Investigation wing of CBIC, vide circular No. GST/INV/ Provisional Attachment/Advisory/ 2023-24 dated 2-9-2023, has advised that when period of provisional attachment has expires, the Commissioner shall issue communication/an intimation to the concerned authority/bank, drawing attention to the particulars of the **Order/Form DRC-22** (which made the provisional attachment) and the provisions of section 83(2) of the CGST Act, 2017, and further indicating the release/restoration of the relevant property/account, in terms of those provisions. This intimation shall be copied to the person concerned.
- **Powers of provisional attachment should be used carefully as powers are drastic** - In *Radha Krishan Industries v. State of Himachal Pradesh* [2021] 6 SCC 771 = 86 GST 665 = 127 taxmann.com 26 (SC), it was observed that power to order a provisional attachment of property of taxable person including a bank account is draconian in nature. Exercise of power for ordering a provisional attachment must be preceded by formation of an opinion by Commissioner that it is necessary so to do for purpose of protecting interest of government revenue. Under provisions of rule 159(5), person whose property is attached is entitled to dual procedural safeguards - (a) An entitlement to submit objections on ground that property was or is not liable to attachment; and (b) An opportunity of being heard.
- **Provisional attachment not for cash credit account** - Provisional attachment can be only when there is balance in bank account. An account with debit balance (cash credit account) cannot be attached.
- **Provisional attachment ceases after final order passed** - Once final order is passed under section 74(9) of CGST Act, proceedings under provisional attachment order come to an end.
- **Procedure for provisional attachment and release of property** - **Order** for provisional attachment shall be in **form GST DRC-22**. **Objection to order of attachment** shall be in **form GST-DRC-23A**. If **payment is made** by defaulter, the property can be **released** by issuing order in form **GST DRC-23**.
- **Departmental guidelines for provisional attachment** – Dept. have issued guidelines for provisional attachment. The guidelines are summarized below -
 - The powers of provisional attachment are extraordinary and should be resorted to with utmost circumspection and with maximum care and caution.
 - Collective evidence should indicate prima facie case against tax payer before going ahead with provisional assessment.
 - If property attached is perishable/hazardous nature, it shall be released to taxable person after payment of market price of such property or amount payable by taxable person, whichever is lower.
 - Provisional attachment should not be resorted to in case of violations of technical nature. These should be resorted mainly in cases of evasion of tax or availment of wrongful Input Tax Credit. Like bogus invoices, frauds etc.
 - Normally, only immovable property should be attached. Movable property should be attached only if immovable property is insufficient to protect interests

of revenue.

- Property attached should not be excessive. More than one property can be attached and at different points of time.
- Attachment should not hamper normal functioning of taxable person. Thus, raw materials and inputs for production or finished goods should not be normally attached.
- Title deeds of immovable property should be checked
- After provisional attachment, investigation and adjudication should be completed fast so that tax, interest and penalty can be recovered and purpose of provisional attachment is achieved.
- Following property cannot be attached - (a) Property exempted from attachment by Code of Civil Procedure, 1908 (b) Property for sale for execution of a decree of Civil Court.

- **Provision of provisional attachment as existing upto 1-1-2022** - Where during the pendency of any proceedings under section 62 (assessment of Job-filers of return), section 63 (Assessment of Registered persons), section 64 (Summary Assessment) or section 67 (Inspection, search and seizure) or section 74 (Determination of tax where suppression of facts, fraud or willful mis-statement is present), 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 belonging to the taxable person in such a manner as may be prescribed - section 83(1) of CGST Act [as existing upto 1-1-2022]

Continuation and validation of certain recovery proceedings if amount increased/reduced in appeal

- Where any notice of demand in respect of any tax, penalty, interest or any other amount payable under this Act, (hereinafter in this section referred to as "Government dues"), is served upon any taxable person and any appeal, revision application is filed or other proceedings is initiated in respect of such Government dues, then, if Government dues are enhanced in appeal, revision or other proceedings, the proceedings shall continue. Fresh proceedings are not required.
- If Government dues are reduced in appeal, revision or other proceedings, fresh demand notice is not required. Only reduced Government dues will be recovered.
- Recovery proceedings initiated on the basis of the demand served upon him 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.
- **Intimation or notice** for reduction or enhancement of any demand under section 84 shall be in **form GST DRC-25**

Liability in some specified cases

GST Law has made specific provisions relating to liability in various situations and cases. These are summarized below.

➤ **Liability in case of transfer of business**

- Where a taxable person, liable to pay tax under this Act, transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever, the taxable person and the person to whom the business is so transferred shall jointly and severally be liable wholly or, as the case may be, to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person up to the time of such transfer, whether such tax, interest or penalty has been

determined before such transfer, but has remained unpaid or is determined thereafter.

- Where the transferee or the lessee of a business referred to in section 86(1) carries on such business either in his own name or in some other name, he shall be liable to pay tax on the supply of goods or services or both effected by him with effect from the date of such transfer and shall, if he is an existing taxable person, apply within the prescribed time for amendment of his certificate of registration.

➤ **Liability of agent and principal**

Where an agent supplies or receives any taxable goods on behalf of his principal, such agent and his principal shall be jointly and severally liable to pay the tax payable on such goods under the Act.

➤ **Liability in case of company in liquidation** - When any company is being wound up whether under the orders of a court or Tribunal or otherwise, every person appointed as receiver of any assets of a company (hereinafter referred to as the "liquidator"), shall, **within thirty days after his appointment**, give intimation **of his appointment to the Commissioner**.

➤ The Commissioner shall, after making such inquiry or calling for such information as he may deem fit, notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the amount which in the opinion of the Commissioner would be sufficient to provide for any tax, interest or penalty which is then, or is likely thereafter to become, payable by the company.

➤ **Notice to liquidator** shall be issued by Commissioner in **form GST DRC-24**.

➤ **Liability under tax laws continues even after dissolution** - Even if name of company is struck off or is dissolved, the tax liability exists and proceedings under tax law can continue - CIT v. Gopal Shri Scripts P Ltd. (2019) 262 Taxman 356 = 104 taxmann.com 192 (SC) [decision under income tax law but principle applies to other tax laws also].

➤ **Liability of directors in case of company under winding up**

When any company is wound up and any tax, interest or penalty determined under this Act on the company for any period, whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a director of such company at any time during the period for which the tax was due, shall jointly and severally be liable for the payment of such tax, interest or penalty, unless he proves to the satisfaction of the Commissioner that such non-recovery is not attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

➤ **Liability of directors of private company**

Notwithstanding anything contained in the Companies Act, 2013, where any tax, interest or penalty due from a private company in respect of any supply of goods or services for any period or from any other company in respect of any supply of any period during which such other company was a private company cannot be recovered, then, every person who was a director of the private company during such period, shall, jointly and severally be liable for the payment of such tax, interest and penalty unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

➤ **Liability when private company was converted into public company**

Where a private company is converted into a public company and the tax assessed in respect of any supply of goods or services for any period during which such company was a private company cannot be recovered, then, nothing contained in section 89(1) shall apply to any person who was a director of such private company in relation to any tax, interest or penalty due in respect of any supply of such private company. However, personal penalty imposed on director can be recovered.

➤ **Liability of partners and LLP of firm to pay tax**

- LLP (Limited Liability Partnership) shall be considered as firm for purposes of Chapter XVI of CGST Act [Liability in certain cases].

Notwithstanding any contract to the contrary, where any firm is liable to pay any tax, interest or penalty under this Act, the firm and each of the partners of the firm shall jointly and severally be liable for such payment.

- **Liability of partner who has retired** - Where any partner retires from the firm, he or the firm, shall intimate the date of retirement of the said partner to the Commissioner by a notice in that behalf in writing and such partner shall be liable to pay tax, interest or penalty due up to the date of his retirement whether determined or not, on that date.

If no such intimation is given within one month from the date of retirement, the liability of such partner under the first proviso shall continue until the date on which such intimation is received by the Commissioner.

- **Liability even if business discontinued or change in constitution or dissolved** - Liability of firms and each of partners will continue even if business discontinued or there is change in constitution or firm is dissolved.

➤ **Liability if partnership firm or LLP is dissolved**

Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person, liable to pay tax, interest or penalty under this Act, is a firm, and the firm is dissolved, then, every person who was a partner shall, jointly and severally, be liable to pay the tax, interest or penalty due from the firm under this Act up to the time of dissolution whether such tax, interest or penalty has been determined before the dissolution, but has remained unpaid or is determined after dissolution.

LLP (Limited Liability Partnership) shall be considered as firm for purposes of Chapter XVI of CGST Act [Liability in certain cases].

➤ **Liability of guardians, trustees etc.**

Where the business in respect of which any tax, is payable under this Act is carried on by any guardian, trustee or agent of a minor or other incapacitated person on behalf of and for the benefit of such minor or other incapacitated person, the tax, interest or penalty shall be levied upon and recoverable from such guardian, trustee or agent, as the case may be, in like manner and to the same extent as it would be determined and recoverable from any such minor or other incapacitated person, as if he were a major or capacitated person and as if he were conducting the business himself, and all the provisions of this Act shall, so far as may be, apply accordingly.

➤ **Liability of Court of Wards etc.**

Where the estate or any portion of the estate of a taxable person owning a business in respect of which any tax, interest or penalty is payable under this Act is under the control of the Court of Wards, the Administrator General, the Official Trustee or any receiver or manager (including any person, whatever be his designation, who in fact manages the business) appointed by or under any order of a court, the tax, interest or penalty shall be levied upon and be recoverable from such Court of Wards, Administrator General, Official Trustee, receiver or manager, as the case may be, in like manner and to the same extent as it would be determined and be recoverable from the taxable person as if he were conducting the business himself, and all the provisions of this Act shall, so far as may be, apply accordingly.

➤ **Liability if a person dies**

Save as otherwise provided in Insolvency and Bankruptcy Code, where a person, liable to pay tax under this Act, dies, then-

- (a) if a business carried on by the person is continued after his death by his legal representative or any other person, such legal representative or other person, shall be

- liable to pay tax, interest or penalty due from such person under this Act, and
- (b) if the business carried on by the person is discontinued, whether before or after his death, his legal representative shall be liable to pay out of the estate of the deceased, to the extent to which the estate is capable of meeting the charge, the tax, penalty or interest due from such person under this Act,

whether such tax interest or penalty has been determined before his death but has remained unpaid or is determined after his death.

➤ **Liability in case of partition of HUF or AOP**

Save as otherwise provided in Insolvency and Bankruptcy Code, where a taxable person, liable to pay tax under this Act, is a Hindu Undivided Family or an association of persons and the property of the Hindu Undivided Family or the association of persons, as the case may be, is partitioned amongst the various members or groups of members then each member or group of members shall jointly and severally be liable to pay the tax, interest or penalty due from the taxable person under this Act upto the time of the partition whether such tax, penalty or interest has been determined before partition but has remained unpaid or is determined after the partition.

Liability even if business discontinued or change in constitution or dissolved - Liability of HUF or AOP and each of its members will continue even if business discontinued or there is change in constitution or HUF or AOP is dissolved - section 94 of CGST Act.

➤ **Liability when guardianship or trusteeship is terminated**

Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person liable to pay tax, interest or penalty under this Act, (a) is the guardian of a ward on whose behalf the business is carried on by the guardian; or (b) is a trustee who carries on the business under a trust for a beneficiary, then, if the guardianship or trust is terminated, the ward or the beneficiary shall be liable to pay the tax, interest or penalty due from the taxable person upto the time of the termination of the guardianship or trust, whether such tax, interest or penalty has been determined before the termination of guardianship or trust but has remained unpaid or is determined thereafter.

Summary of provisions relating to demands for tax, input tax credit and penalty

Description	No suppression of facts to evade tax, willful statement or fraud	There is suppression of facts to evade tax, willful statement or fraud
Reason for demand	Tax not paid or short paid, erroneous refund or wrong availment/utilization of input tax credit.	Tax not paid or short paid, erroneous refund or wrong availment/utilization of input tax credit.
Time limit for issue of demand from due date for furnishing annual return for the financial year	Two years and nine months [section 73(2)]	Four years and six months [section 74(2)]
Time limit for issue of order confirming demand from due date for furnishing annual return for the financial year	Three years [section 73(10)]	Five years [section 74(10)]
Issue of statement instead of detailed show cause notice if for notice was issued for earlier period	Permissible - section 73(3) and 73(4)]	Can be issued but not alleging fraud, suppression or willful misstatement [as department was already aware of facts]

on same grounds		[section 74(3) and 74(4)]
Tax and interest payable under section 50 paid on own ascertainment or on basis of tax ascertained by proper officer before Show Cause Notice (SCN) and inform proper officer [such self-ascertainment can be during investigation, audit, raid or verification also]	No penalty payable. After such payment, show cause notice shall not be served in respect of the tax paid or penalty payable under any provision of Act. Thus, obviously, matter stands concluded, even against co-noticees [section 73(5) and 73(6)].	Penalty of 15% of tax due payable with tax due and interest. After such payment, show cause notice shall not be served in respect of the tax paid or penalty payable under any provision of Act. Thus, obviously, matter stands concluded, even against co-noticees [section 74(5) and 74(6)].
Tax and interest paid within thirty days of date of issue of show cause notice (but before issue of adjudication order)	No penalty payable. After such payment, all proceedings in respect of notice shall stand concluded. Thus, obviously, matter stands concluded, even against co-noticees [section 73(8)].	Penalty of 25% of tax due payable with tax due and interest. After such payment, all proceedings in respect of notice stand concluded. Thus, obviously, matter stands concluded, even against co-noticees [section 74(8)]
Tax, interest and reduced penalty paid after adjudication order	Penalty of 10% of tax or Rs 10,000 whichever is higher plus tax and interest payable [section 73(9)]	Penalty of 100% of tax plus tax and interest payable [section 74(1)] Penalty 50% if tax, interest and 50% of penalty paid within 30 days from communication of order [section 74(11)] After such payment, all proceedings in respect of notice shall stand concluded.
Recovery proceedings of tax and interest without show cause notice [show cause notice not required as per section 75(12)].	Recovery proceeding under section 79 can commence. Penalty of 10% payable if self-assessed tax not paid within 30 days - section 73(11)]	No question of suppression or willful misstatement or fraud, as tax payable has been indicated in the return.