

# Institute of Cost Accountants of India

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## **Goods and Service Tax:** **Adjudication: Demand and Recovery** (Sunday, 29 November, 2020)

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# The presentation covers:

Section	Description
Chapter XV: Adjudication: Demands and Recovery under CGST Act, 2017	
	Introduction: Overall framework of GST law
73	Determination of tax not paid, short paid etc. for reasons other fraud, misrepresentation etc.
74	Determination of tax not paid, short paid etc. for reasons of fraud, misrepresentation etc.
75	General provisions relating to determination of tax.
76	Tax collected but not paid to Government.

# The presentation covers:

Section	Description
Chapter XV: Demands and Recovery	
77	Tax wrongly collected and paid
78	Initiation of Recovery proceedings

# The presentation covers:

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Rule Ref	Description
142	Notice and order for demand
142A	Procedure for recovery of dues under existing laws.
143	Recovery by deduction from any money owed
144	Recovery by sale of goods under control of proper officer
145	Recovery from third person

# Important steps under GST

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1. Assessment (Entire GST laws)
2. Returns (Chap IX: Secs 37 to 48)
3. **Assessment** (Chap XII: Secs 59 to 64)
4. (Adjudication of) **Demand and Recovery** (Chap XV: Secs 73 to 84)
5. Appeals and Revision: (Chap XVIII: Sec 107 to 121).

# Introduction to Assessment under GST

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**Introduction:** GST is a trust based taxation regime

wherein the **assessee is required to self assess his tax, determine tax liability and file return** without any intervention by the tax official.

# Assessment under GST

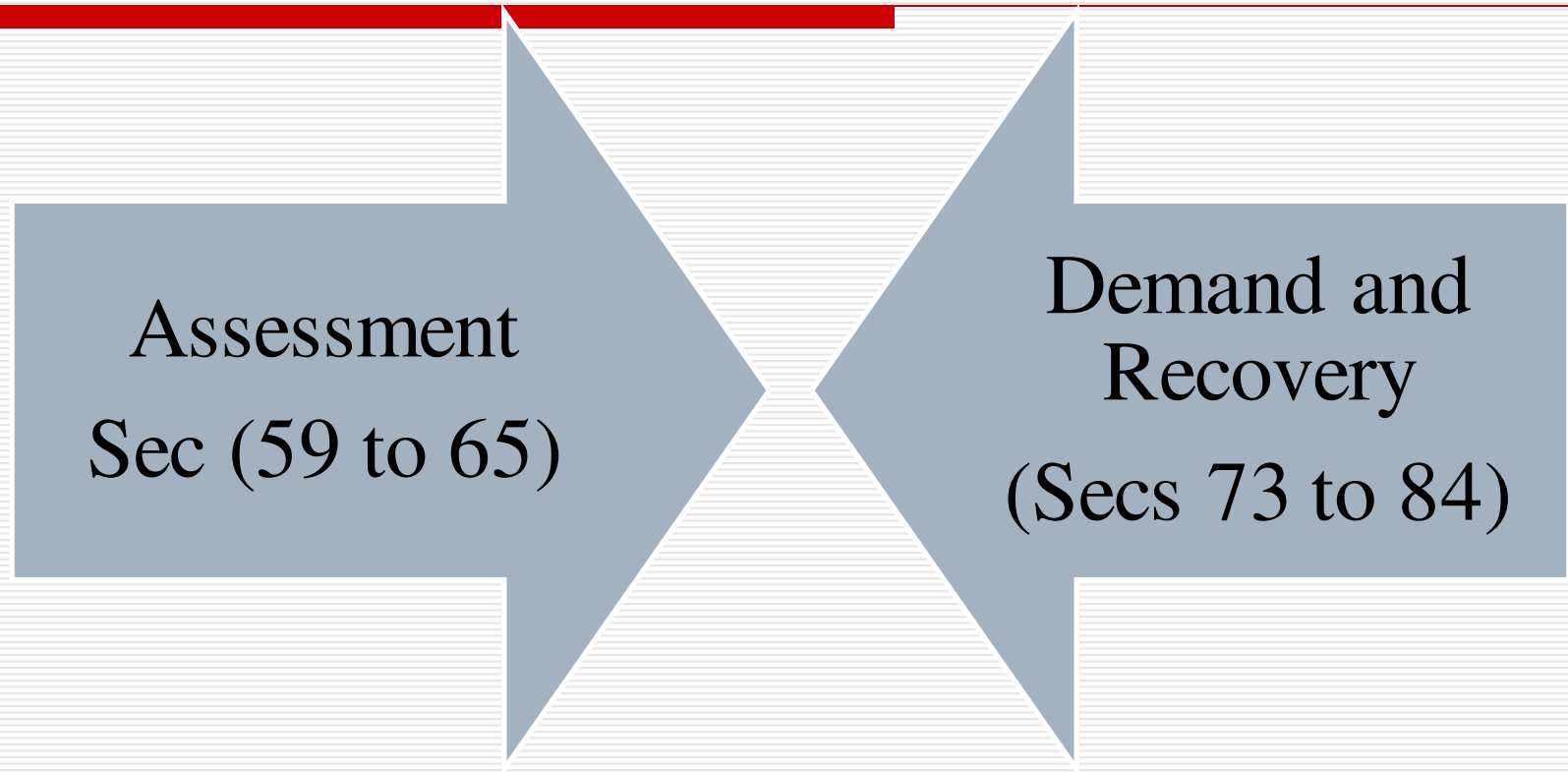
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A tax regime that relies on self-assessment

**has to put in place a robust mechanism for return filing, assessment involving scrutiny and audit, adjudication, recovery, appeals, revisions etc.**

# Assessment Vs Demand and Recovery

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## Sec 2(11): Definition of Assessment

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“Assessment” means determination of tax liability under this Act and includes:

- i. Self-assessment (Sec 59)
- ii. Re-assessment
- iii. Provisional assessment (Sec 60)
- iv. Scrutiny of Returns (Sec 61)

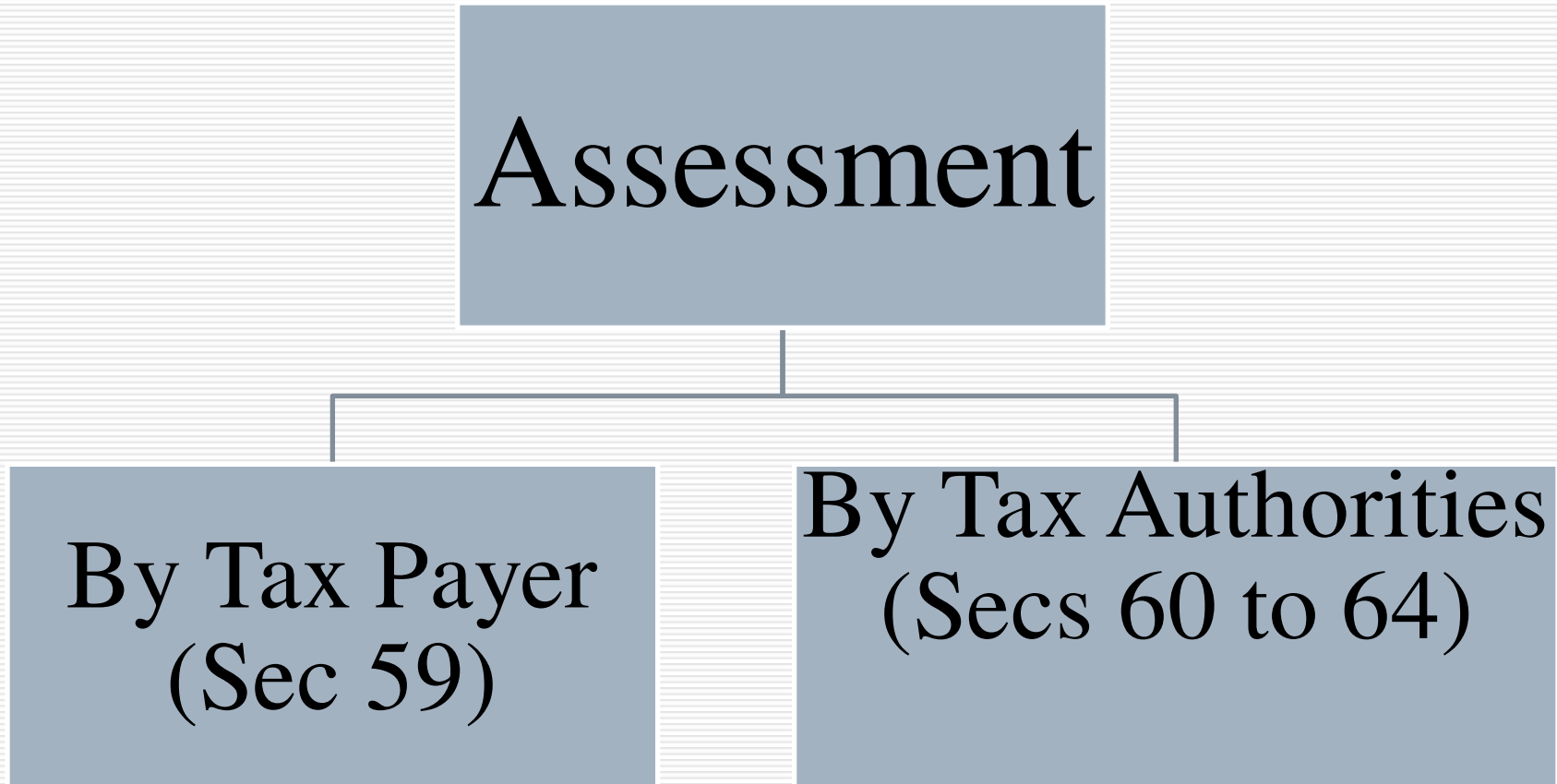
## Sec 2(11): Definition of Assessment

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- v. Summary assessment and (Sec 64)
- vi. Best judgment assessment (Sec 62 and 63)
- vii. Summary assessment (Sec 64)

# Assessment under GST

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## Sec 59: Self Assessment

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Every registered person shall

1. self-assess the taxes payable under this Act and
2. furnish a return for each tax period as specified under section 39.

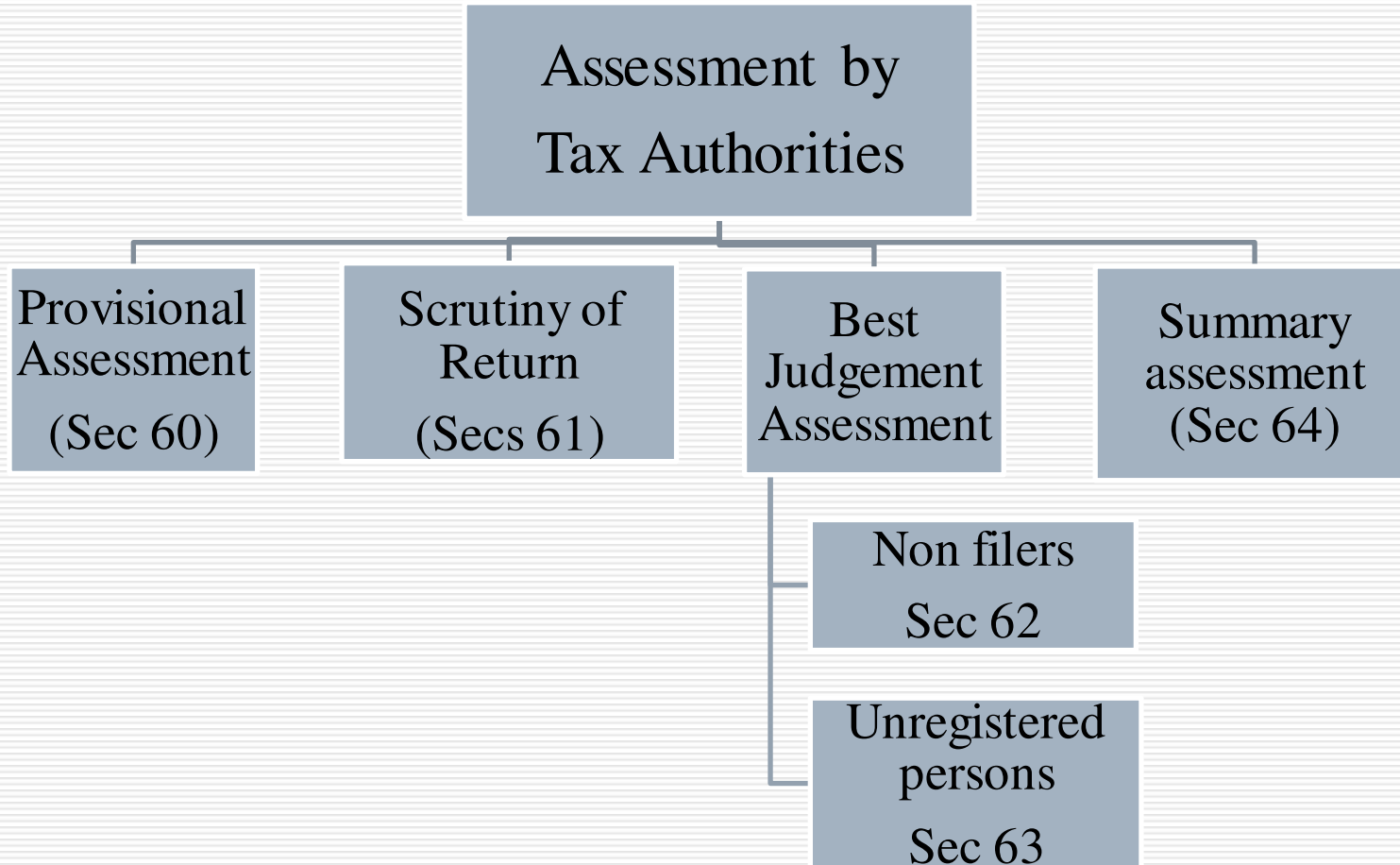
## Sec 59: Self Assessment

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1. Taxpayer must exercise this liberty to self assess tax liability voluntarily.
2. This is with the perils/risk of interest and penalty for any miscalculations or misinterpretations
3. In case of short payment of tax, he is liable to interest/penalty.

# Assessment under GST

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## **Sec 60 Circumstances leading to Provisional Assessment**

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**When the taxable person is unable to:**

**Determine the value**

**Determine the rate**

# Provisional Assessment cannot be resorted to

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The provisional assessment cannot be allowed for any other purpose or subject matter such as the following:

1. The **kind of tax** (IGST or CGST-SGST) applicable
2. Time of supply



## Provisional Assessment cannot be resorted to

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3. Supplies to be treated as “**supply of goods**” or “**supply of services**”.
4. Determination of mixed or composite supply is a rate dispute.

# Provisional Assessment cannot be resorted to

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5. Admissibility of ITC,
6. Quantum of reversal of ITC
7. Whether a particular action is supply or not?
8. Whether a particular supply is exempt from payment of tax?
9. Whether subject to reverse charge

# Sec 60, Rule 98 Procedure for Provisional Assessment

Forms	Description
ASSMT-1	Application form for Provisional Assessment
ASSMT-2	Proper Officer requiring additional information
ASSMT-3	Registered person's reply with additional information
ASSMT-4	Approval letter for provisional assessment
ASSMT-5	Execution of Bond Form
ASSMT-6	Proper Officer calling records for final assessment

# Sec 60, Rule 98 Procedure for Provisional Assessment

Forms	Description
ASSMT-7	Final Assessment order specifying the amount payable or refundable
ASSMT-8	Application for release of security
ASSMT-9	Proper Officers order for release of security

## **Sec 61(1): Scrutiny of returns**

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**The proper officer may scrutinize (i.e. examine or inspect closely and thoroughly) the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed (GST ASMT-10) and seek his explanation thereto.**

## Sec 61(1): Main features of scrutiny

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1. The word used are “**proper officer may scrutinize**” the return.
2. The scrutiny may be of the **return and related particulars furnished by the registered person**
3. The object scrutiny is to verify the **correctness of the return.**

## Sec 61(1): Main features of scrutiny

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4. The objective of scrutiny is to **inform the tax payer of the discrepancies noticed**, if any.
5. The information to the tax payer would be such manner as may be prescribed (**GST ASMT-10**) and seek his explanation thereto.

# Likely discrepancies that may be noticed

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1. Turnover in GSTR 1 and GSTR 3B mismatch or credit in GSTR 2A and GSTR 3B mis-match.
2. Net Tax payable being '**negative**' throughout the year, indicative of missing value addition or
3. possibly investments in capital goods when inverted rate structure known not to exist



## Likely discrepancies that may be noticed

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4. Taxable person **availing composition** scheme while not being entitled to.
5. Availing of input tax credit for items of expenditure falling under Sec 17(5).
6. Discrepancy in application of GST rates
7. Discrepancy in levy of CGST/SGST instead of IGST and vice-verse

# Likely discrepancies that may be noticed

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- 8. Valuation errors
- 9. Deemed supplies without consideration, not included in supplies.
- 10. Mismatch of e-way bills generated with invoices recorded in GSTR-1
- 11. Refund claimed for exports or supplies to SEZ not supported by documentary evidence.

# Likely discrepancies that may be noticed

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12. Taxable supplies passed on as exempt supplies.

13. Non reversal of proportionate ITC on account of exempt supplies non-GST supplies.

14. Non levy of cess

## Scrutiny of Returns may lead to:

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1. Sec 65: Audit by authorities
2. Sec 66: Special audit (by CA/CMA)
3. Sec 67: Inspection search and seizure
4. Sec 73: Determination of tax not paid, short paid etc. for reason other than fraud misrepresentation etc.
5. Sec 74: Determination of tax not paid, short paid etc. by reason of fraud misrepresentation etc.

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# **Demand and Recovery**

## **Secs 73 and 74**

# Meaning of Adjudication

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1. Adjudication means the process or act of making an official decision (judgement) about something, **specially about who is right in disagreement.**
2. **To decide or to settle.**

# Meaning of Adjudication

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1. CGST Act 2017 does not define the word 'Adjudication', but defines:
  - i. Proper Officer and
  - ii. 'Adjudicating Authority'.

## Sec 2 (91) Proper Officer

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1. 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;
2. Proper Officer is one who is authorized under section 5 to carry out this function under the law.



## Sec 5: Powers of Officer

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1. Subject to such conditions and limitations, as the Board may impose, an officer of central tax may **exercise the powers and discharge the duties** conferred or imposed on him under this Act.
2. An officer of central tax may exercise the powers and discharge the duties conferred or imposed **under this Act**  
**on any other officer of central tax who is subordinate to him.**

## Sec 5: Powers of Officer

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3. The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.
4. An Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of central tax.

## Sec 2(4) Adjudicating Authority under GST

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Adjudicating authority means **any authority, appointed or authorized to pass any order** or decision under this Act, but does not include:

1. The CBIC (Sec 3 of Central Boards of Rev. Act, 1963)
2. The Revisional Authority Sec 2(99) read Sec 108
3. the Authority for Advance Ruling (Sec 96)
4. The App. Authority for Advance Ruling (Sec 99)
5. The Appellate Authority (Sec
6. The Appellate Tribunal and
7. The Authority referred to in section 171(2).

# Delegation of powers for issue of SCN

## (Circular No.31/05/2018–GST 09 Feb 2018)

Sr No.	Designation	Limit under CGST	Limit under !GST
1.	Superintendent of Central Tax	Not exceeding Rs. 10.00 lakh	Not exceeding Rs. 20.00 lakh
2.	Dy or Asstt Commissioner of Central Tax	Above Rs. 10.00lakh, but not exceeding Rs.1crore	Above Rs. 20.00 lakh, but not exceeding Rs.2crore
3.	Addl/Joint Commissioner of Central Tax	Above Rs. 1crore without any upper limit	Above Rs.2crore without any upper limit

# Jurisdiction of the Competent Officers

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1. The central tax officers of Audit and DGGI shall exercise the powers only to issue show cause notices.
2. A show cause notice issued by them shall be adjudicated by the competent central tax officer of the Executive Commissionerate in whose jurisdiction the noticee is registered.

# Jurisdiction of the Competent Officers

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1. If there are more than one noticees mentioned in the SCN, the noticee having principal places of business in multiple Commissionerates, the SCN shall be adjudicated by competent central tax officer in whose jurisdiction.
2. the principal place of business from whom the highest demand of central tax and/or IGST (including cess) has been made falls.

# **Power of the Proper Officer includes: Determination of**

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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)

# The reason for demand

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**Reason:** for any reason **other than**

1. Fraud or
2. Any wilful misstatement or
3. Suppression of facts.

To evade payment of tax, the issue will fall under Section 73.

If the the no-payment of tax involces 1 to 3 above, issue will falle under Section 74.



# Fraud and misstatement

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1. **'Fraud'** is normally understood as deceit with an intent to obtain an unjust advantage.
2. **'Willful misstatement'** generally covers a case of deceit, but generally with the connivance of another.

## Explanation 2: Suppression of facts means:

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- 1. 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
- 2. Failure to furnish any information on**  
being asked for, in writing, by the proper officer.

# Case law on Suppression of Fact

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***NESTLER BOILER PVT. LTD. VERSUS  
COLLECTOR OF CENTRAL EXCISE- 1990  
(50) E.L.T. 613 (Tribunal)***

**When declaration was filed with specification, description of blowers, and one such blower was also cleared under a gate-pass on payment of duty,  
the allegation of suppression with intent to evade payment of duty cannot be levelled against them.**

# Case law on Suppression of Fact

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- 2. The Supreme Court decision in Collector of Central Excise v. Chemphar Drugs & Liniments, 1989 (40) E.L.T. 276 is applicable to their case (i.e. the case of taxable person.)**

# Fraud, Misstatement and suppression of facts.

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**Cosmic Dye Chemical Vs CCE (1995) 95 STC 604 (SC)**

- 1. As far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words.**
- 2. But mis-statement or suppression of facts are concerned, they are clearly qualified by the word "willful" preceding the words "mis-statement or suppression of facts"**
- 3. This means with intent to evade duty.**

# Fraud, Misstatement and suppression of facts.

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1. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words **"with intent to evade payment of duty"**.
2. Mis-statement or suppression of fact must be wilful.

## Proper Officer to issue a SCN

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1. To defaulting person as why he should not pay the amount specified in the notice along with interest.

## **Secs 73: Determination of tax not paid . . .**

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Section 73 talks about determination of tax

1. Not paid or
2. Short paid or
3. Erroneously refunded or
4. input tax credit wrongly availed or utilised



## **Secs 73: Determination of tax not paid . . .**

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**Reason:** for any reason **other than**

1. fraud or
2. any wilful mis-statement or
3. suppression of facts.

The Proper Officer shall serve notice on the said person requiring him to show cause as to why he should not pay the amount specified in the notice along with interest

# Form 1-A: Form of SCN

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1. A show cause notice will be issued in similar form as was being done in erstwhile pre-GST era but online.
2. **A summary of the total demand in Form DRC-1-A also will be issued along with the SCN.**

# Time limit for Issue of SCN and passing of order

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1. As per Secs 73(2)/ 73(10), the adjudication order needs to be passed **within three years** from the due date for furnishing of annual return for the financial year to which the tax relates to or
2. Within three years from the date of erroneous refund.

# Time limit for Issue of SCN and passing of order

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3. Under the erstwhile laws, it is usual to find a 'start date' for issuing SCN but to find such an 'end date' is welcome measure.
4. As per section 75(10), if the adjudication is not completed within the 'end date' so specified, then the notice will be 'deemed to be concluded'.

# **Time limit for Issue of SCN and passing of order**

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1. The date within which a SCN shall be issued has been made dependent on the due date of passing of the order.
2. It prescribes that the SCN shall be issued at **least 3 months before the due date of passing of adjudication orders.**

# Illustrative Example on issue of order and SCN

Financial Year	Due date of filing of return	Latest date for issue of SCN	Latest date for issue of order
2017-18	07 Feb 2020	06 Nov 2022	06 Feb 2023
2018-19	31st December, 2020	29th September, 2023	30st December, 2023
2019-20	31December 2020	29 <sup>th</sup> September, 2023	30st December, 2023

# Penalty

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1. The date within which a SCN shall be issued has been made dependent on the due date of passing of the order.
2. It prescribes that the SCN shall be issued at **least 3 months before the due date of passing of adjudication orders.**

# Amount demanded to be given with SCN

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1. The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under Section 73(1), shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.



# No penalty if TP makes payment before issue of SCN

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1. Where, before the service of notice or statement, the taxable person makes payment of the tax and interest in accordance with the provisions of Section 73(5) he shall inform the PO of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.
  2. No penalty will be imposed.
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# **No penalty if TP makes payment before issue of SCN**

---

1. Where, before the service of notice or statement, the taxable person makes payment of the tax and interest in accordance with the provisions of Section 73(5) he shall inform the PO of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.
  2. No penalty will be imposed.
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## If TP makes partial payment

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

# If TP makes partial payment

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1. After consideration of the submission, the Proper person may either withdraw the demand or
2. Issue SCN.

# SCN for the remaining amount

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Where the PO is of the opinion that the amount paid under falls short of the amount actually payable, he shall proceed to issue the notice in respect of such amount which falls short of the amount actually payable.

## **Second opportunity for payment without penalty**

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- 1. Where any taxable person pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice,  
  
no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.**

# **Taxable person responds to SCN, but does not pay**

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The PO shall, after considering the representation, if any, made by taxable person,  
**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.**

# Time Limit for issue of order

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The PO shall issue the order within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or **within three years from the date of erroneous refund.**



# Relaxation in penalty not applicable:

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Penalty under sub-section (9) shall be payable where:

1. Any amount of self-assessed tax or
2. Any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

# Similarities of Demand and Recovery under Secs 73 and 74

Section 73	Section 74
Where it appears to the proper officer that- i. any tax has not been paid ii. Short paid iii. erroneously refunded iv. ITC has been wrongly availed or utilised	Where it appears to the proper officer that- i. any tax has not been paid ii. Short paid iii. erroneously refunded iv. ITC has been wrongly availed or utilised

## Show cause notice under Secs 73 and 74

Section 73	Section 74
Show cause as to why-  he should not pay the amount specified in the notice  along with interest payable thereon under section 50	Show cause as to why-  he should not pay the amount specified in the notice  along with interest payable thereon under section 50

# **Distinction under Secs 73 and 74**

## **Reason for short/non payment of tax**

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<b>Section 73</b>	<b>Section 74</b>
<b>For Reasons other than-</b> <ul style="list-style-type: none"><li>i. Fraud</li><li>ii. Any wilful misstatement</li><li>iii. suppression of facts to evade tax</li></ul>	<b>By reason of-</b> <ul style="list-style-type: none"><li>i. Fraud</li><li>ii. Any wilful misstatement</li><li>iii. suppression of facts to evade tax</li></ul>

# Distinction under Secs 73 and 74

## Time limit for issue of order

Section 73	Section 74
The proper officer shall issue the <b>Order</b> within <b>3 years from</b> the due date for furnishing of annual return for the relevant financial year	he proper officer shall issue the <b>Order</b> within <b>5 years from</b> the due date for furnishing of annual return for the relevant financial year

## Penalties under Sections 73 and 74

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 days of communication of adjudication order	10% of the tax or Rs.10,000, whichever is higher	50% of tax amount

## Penalties under Sections 73 and 74

Sr. No	Stage of payment	Section 73	Section 74
4.	Maximum Penalty	10% of tax	100% of tax

## Limitation on the zero penalty under Sec 73

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The benefit of zero penalty will apply only where the tax amount is other than by way of

1. self-assessed tax or
2. any amount collected as tax which has not been paid within a period of thirty days from the due date of payment of such tax.



## **Limitation on the zero penalty under Sec 73**

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If the amount payable is self-assessed tax or an amount collected in the name of tax and paid after a period of thirty days from the due date of payment,  
then this benefit of zero penalty will not be available.

## Sec 75: General Provisions on determination of tax

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- 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 of passing of order.

## Sec 75: General Provisions on determination of tax

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2. 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 PO shall determine the tax payable by such person, deeming as if the notice were issued *Section 73 (1)*.

## **Sec 75: General Provisions on determination of tax**

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- 3. Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.**

## Sec 75: General Provisions on determination of tax

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4. An opportunity of hearing shall be granted where
  - i. A request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is
  - ii. contemplated against such person.

## Sec 75: General Provisions on determination of tax

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5. **Adjournment:** The PO shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:
6. Provided that no such adjournment shall be **granted for more than three times to a person during the proceedings.**

## Sec 75: General Provisions on determination of tax

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6. **Speaking order:** 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**
8. **No demand shall be confirmed on the grounds other than the grounds specified in the notice.**

## Sec 75: General Provisions on determination of tax

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8. Where the AA or App 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.



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Thank you very much.

Have a nice evening!