



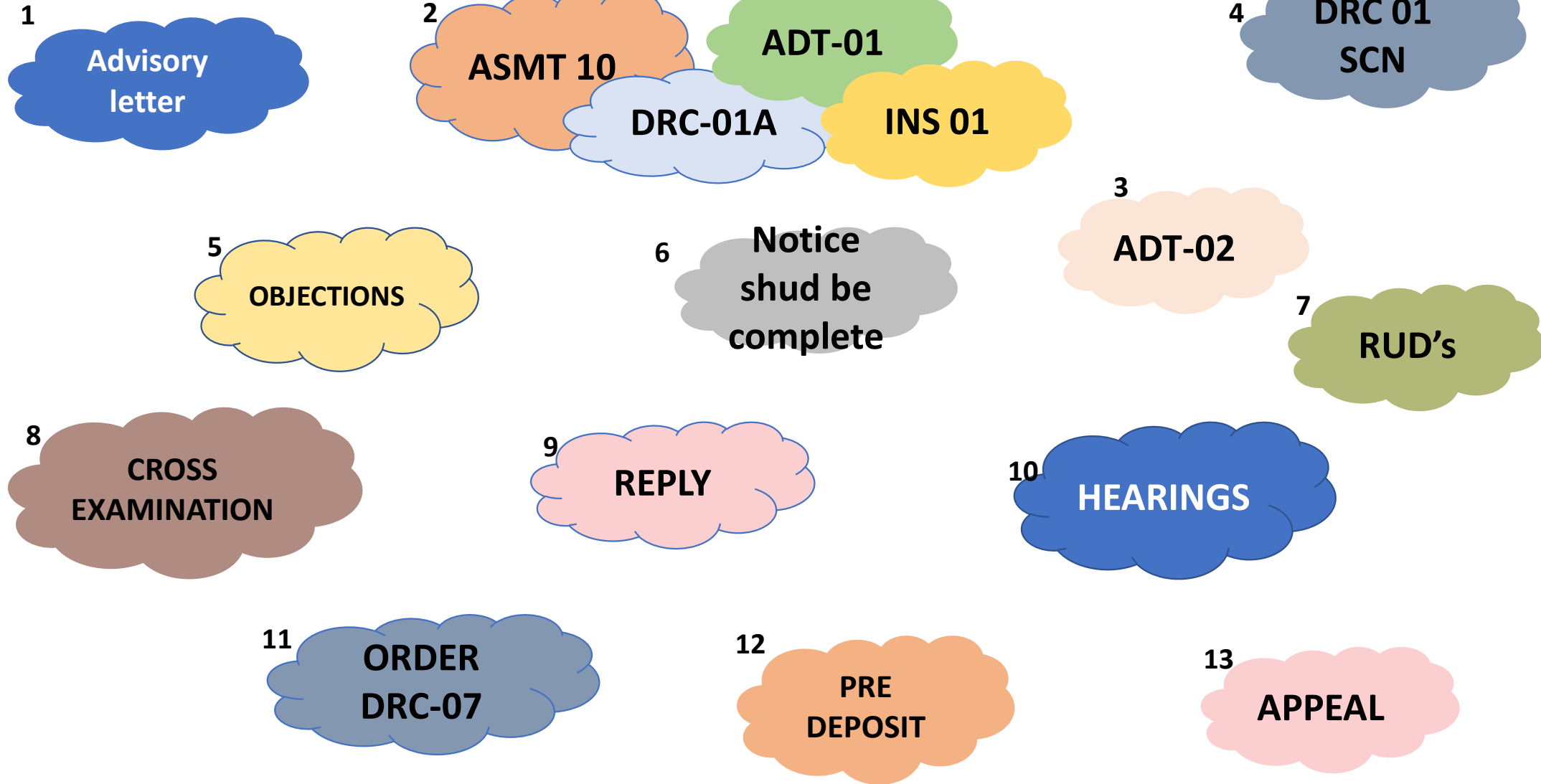
## **Section 73 vs Section 74 under GST:**

**From Jurisdictional Fact to Mechanical Allegation of Fraud---  
has 'Intent to Evade' Lost its meaning?**

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## Basic sequencing in a litigation



## Assessment (Sec. 2(11))

“assessment” means determination of tax liability under this Act and includes self-assessment, re- assessment, provisional assessment, summary assessment, best judgment assessment;



Means Part

determination of tax liability under this Act

Sec 73/74

and

Includes Part

1<sup>st</sup>

Shifts burden of Proof on Deptt. except ITC (sec 155)

Self-assessment

Re-assessment

?????

Scrutiny not covered

Provisional assessment

Summary assessment

Best judgment assessment

R 9988692699

## Sections which may lead to SCN u/s 73 & 74

- **Section-61-Scrutiny of Returns**
- **Section-65-Audit by Tax Authorities**
- **Section-66-Special Audit**
- **Section-67- Power of inspection, search and seizure**
- **Section-70-Power to summon persons to give evidence and produce documents**
- **Section-71-Access to business premises**
- **Section-151-Power to call Information**



**Sec 73 & 74**

## Section- 73

- For reasons **other than-**
  - Fraud
  - Any wilful-misstatement
  - Suppression of facts to evade tax

## Section - 74

- By reason of-
  - Fraud
  - Any wilful-misstatement
  - Suppression of facts to evade tax

If tax:-

- Not paid,
- Short paid or
- Erroneous refund

Section 73 (Other than fraud)

Section 74 (fraud)

SCN

2 years 9 months (i.e. 33 months from due date of annual return)

4 years 6 months (i.e. 54 months from due date of annual return)

Demand order

3 years from due date of annual return

5 years from due date of annual return

## CHAPTER XV DEMANDS AND RECOVERY

**Determination of tax <sup>42</sup>[, pertaining to the period upto Financial year 2023-24,] not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts .<sup>43</sup>**

(1) Where it **appears to the proper officer** that

L any tax has not been paid  
I or  
M short paid  
B or  
erroneously refunded,  
or  
where input tax credit has been wrongly availed or utilised

**CAUSE?? Relevant Material on Record  
Application of Mind  
Mechanical Basis of Notices  
(System Generated)**

for any reason, other than the reason of fraud or any willful-misstatement or suppression of facts to evade tax, **INTENTION-Non Disclosure + Intention**

he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to **show cause** as to why he should not pay the amount specified in the notice along with interest **payable thereon** under [section 50](#) and a **penalty leviable** under the provisions of this Act or the rules made thereunder.



## CASE LAWS:

### ISSUE OF DRC-01A/DRC-01 WITHOUT ISSUING ASMT 10

<u>SR. NO.</u>	<u>Name &amp; Citation</u>	<u>Particulars</u>
1	2022 (10) TMI 784 - MADRAS HIGH COURT  M/S. VADIVEL PYROTECH PRIVATE LIMITED VERSUS THE ASSISTANT COMMISSIONER (ST) , CIRCLE-II, COMMERCIAL TAX DEPARTMENT, NGO COLONY, SATCHIYAPURAM, SIVAKASI	<b>Show cause notice issued and order passed citing discrepancies different from discrepancies mentioned in scrutiny notice in Form ASMT-10, were not sustainable</b> <b>Proper officer cannot issue DRC-01/01A on matters not intimated to taxpayer in form ASMT 10</b> HELD : ASMT-10 notice is mandatory before issuing DRC-01 if same is pursuant to scrutiny under section 61 and not issuing DRC-01 in accordance with ASMT-10 will vitiate entire proceedings - Matter was remanded to Assessing Officer for redoing-assessment
2	2024 (3) TMI 483 - TELANGANA HIGH COURT  M/S. ADIL TRADING. VERSUS SUPERINTENDENT OF CUSTOMS AND ORS.	HELD THAT : Where the issuance of the provisional attachment order, the respondents have not served the petitioner with any notice in Form ASMT-10 In the process, the petitioner was not provided with any notice calling for his explanation for the discrepancy notice and for the payment of tax liability. Instead, the respondent officer has straightaway issued the impugned DRC-22. This order of provisional attachment is un-just, arbitrary and with malafied intentions. The same has also not in conformity to the principles of natural justice and is liable to be set aside/quashed
3	2023 (6) TMI 1300 - ANDHRA PRADESH HIGH COURT  M/S DEVI TRADERS VERSUS THE STATE OF ANDHRA PRADESH, REP. BY ITS PRINCIPAL SECRETARY TO GOVERNMENT, STATE TAX DEPARTMENT	HELD THAT : any proceeding in GST DRC-01A/1 culminating in an Order in GST DRC-07, if pursuant to Scrutiny under Section 61 of the TNGST Act ought to be preceded by issuance of Form ASMT 10.
4	Pepsico India Holdings (P.) Ltd. v. Union of India, 2023] 157 taxmann.com 428 (Gauhati), HIGH COURT OF GAUHATI	Held that: Form GST ASMT-10 was not issued to petitioner - An act of issuance of impugned demand-cum-show cause notice under section 73(1) by proper officer was without compliance of mandatory conditions, more particularly, provisions of section 61 read with rule 99, to derive jurisdiction to issue such a demand-cum-show cause notice under section 73(1) - Therefore, operation of impugned demand-cum-show cause notice was to be stayed.

# LUXOR HOSPITAL V. UNION OF INDIA

[2025] 181 taxmann.com 238 (Gujarat)

Dated: 20.11.2025

Demands- Tax or ITC involving fraud - Show cause notice - Pre-consultation notice, requirement of - Petitioners had filed writ petition **assailing impugned show-cause-cum-demand notice on ground of non-issuance of pre-consultation notice in Form GST DRC-01A under Section 74(5) read with Rule 142(1A)** - Petitioner sought restrain on passing of final order pending writ adjudication challenging show-cause-cum-demand notice – Petitioners sought interim protection till writ was heard - HELD : Considering submissions of petitioner, notice was to be issued - **Ad-interim relief was to be granted** - Petitioners would continue to cooperate in adjudication process of impugned show-cause notice; however respondents would not pass final order during pendency of this petition [Para 4][In favour of assessee]



**Challenge to Validity of show-cause-cum-demand notice issued without prior Form GST DRC-01A under Section 74(5)**

The Gujarat High Court **PROVIDED AD-INTERIM RELIEF** to the petition by co-operating in the adjudication process of the Impugned SCN, issued without the issuance of Intimation Notice in the Form DRC-01 violating the provisions of the Section 75(4) read with Rule 142(1A) and no final order shall be passed by the proper officer till the pendency of the petition.

**Though the requirement of issuance of the pre-consultation notice in Form-DRC-01A is not compulsory as per the amendment brought on the statute with effect from 15th October, 2020, the word "may" is required to be read as "shall" otherwise, Subsection (5) of Section 74 of the Act would become redundant.**

## IMPORTANT POINTERS

Tax demand –can be taken only u/s 73/74

Issuance of SCN marks end of Inquiry proceedings/ Audit/ Scrutiny as it marks formation of opinion before issuance of SCN. Must distinguish between Inquiry Stage and Adjudication Stage [Armour Security Limited- 2025(8) TMI 991- Supreme Court]

Formation of opinion can be based upon section 67, ASMT10, Audit etc.

Sec 73/74 are tax determination sections due to 5 specified reasons but notice must specify non adherence/ non – compliance of which section e.g Sec 74 read with Sec 16(2)(c) or 16(4) or....

Notice received –Why ITC to be allowed –Suspended/Cancelled dealer—must specify charge is of 16(2)(c) or doubt as to non movement 16(2)(b)

Notice u/s 17(5)---- which limb

ONUS:

Suppression/Classification (Output)-----Department

ITC-Taxpayer (Sec 155)

Exemption-Taxpayer [Jurisprudence Dilip Kumar & Co. & Ors.(2018-TIOL-302-SC-CUS-CB) Sun Export distinguished, Govt. of Kerela V/s Mother Superior Adoration Convent-(2021) 126 Taxmann.com 68 (SC) dated 01.03.2021 distinguished Dilip Kumar & Co.]

Scrutiny  
Audit



Assessment which means determination of tax liability ---which is not done in 61/65/66--- as these concludes in SCN which is liability determination. Scrutiny has limited scope.



**Determination of tax** <sup>45</sup>[, *pertaining to the period upto financial year 2023-24,*] **not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful-misstatement or suppression of facts.** <sup>45a</sup>

<sup>46</sup> **74.** (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of **fraud** or any **wilful-misstatement or suppression of facts to evade** tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.



(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

<sup>45</sup> [(12) *The provisions of this section shall be applicable for determination of tax pertaining to the period upto Financial Year 2023-24.*]

*Explanation 1.*— For the purposes of section 73 and this section,—

- (i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;
- (ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under <sup>46a</sup>[*sections 122 and 125*] are deemed to be concluded.

46b [\*\*\*]

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45. Inserted by the Finance (No. 2) Act, 2024, w.e.f. **1-11-2024**.

45a. *See* rules 142 and 121 and Form Nos. GST DRC-01 to DRC-08 of the CGST Rules, 2017.

46. Enforced with effect from 1-7-2017.

46a. Substituted for "sections 122, 125, 129 and 130" by the Finance Act, 2021, w.e.f. **1-1-2022**.

46b. Omitted by the Finance (No. 2) Act, 2024, w.e.f. **1-11-2024**. Prior to its omission, *Explanation 2* read as under:

*"Explanation 2.*— For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

# *MENS REA .... An essential Ingredient of Section 74*

Use of words Fraud, Wilful, Evade Tax shows Mens Rea being an essential  
ingredient

The existence of intent to evade is not an assumption– it is the  
foundation of jurisdiction to invoke Section 74.

## From Jurisdictional Fact to Mechanical Allegation of Fraud--- has 'Intent to Evade' Lost its meaning?

The statement captures:

- **serious paradigm shift under GST**
- the distinction between Section 73 and Section 74—once grounded in a jurisdictional fact of mens rea (intent to evade)—is increasingly being reduced to a mechanical allegation of fraud, suppression or misstatement, thereby **diluting the very meaning of “intent to evade tax”**.

# Statutory Scheme: Clear Legislative Intent

## Section- 73

– Normal Period Applies where non-payment / short payment of tax is “for reasons **other than**”: fraud, wilful misstatement, suppression of facts intent to evade tax→

-Mens rea absent

## Section- 74

– Extended Period Triggered only when tax shortfall is “by reason of”: fraud wilful misstatement suppression of facts intent to evade tax

→ Mens rea is the jurisdictional fact (Key Point)

→ The existence of intent to evade is ***not an assumption—it is the foundation*** of jurisdiction to invoke Section 74.

***Jurisdictional Fact: Not a Procedural Formality***



# Jurisdictional Fact: Not a Procedural Formality

- In tax jurisprudence (including pre-GST regimes):  
A jurisdictional fact must exist objectively It must be established before power is exercised
- A mere allegation does not confer jurisdiction
- Intent to evade tax is not a conclusion—it is a fact that must be demonstrated through conduct, evidence, and surrounding circumstances.

# *The Present GST Reality: Mechanical Invocation of Section 74*

- Section 74 invoked as a default
- SCNs reproduce statutory phrases without factual foundation
- “Intent to evade” is asserted, not proved
- No distinction made between:
  - interpretational disputes e.g. Mining, Personal Guarantee, Secondment
  - clerical errors
  - system-driven mismatches 3B vs GSTR 1
  - bona fide disclosures

## **Section 74 and Its Misuse in GST Show Cause Notices**

Misuse of Section 74 to invoke the extended limitation period in cases where Section 73 is time-barred, without establishing fraud or intent to evade tax.

Section 74 of the GST Act allows to issue SCNs with an extended period of limitation when there is a case of fraud, willful misstatement, or suppression of facts. This provision is critical because it permits the department to take action beyond the usual time limits prescribed under Section 73, but only under specific conditions that must be established.

### **Important Considerations for Challenging Notices Issued under Section 74**

#### **1. Difference in Interpretation Is Not Suppression**

A mere difference in interpretation of statutory provisions between the taxpayer and the department does not amount to suppression or willful misstatement and, by itself, cannot justify invoking Section 74.

#### **2. Proper Disclosure in Books Negates Suppression**

Where transactions are duly and transparently recorded in the books of accounts, they cannot be treated as suppression of facts, as proper record-keeping indicates absence of intent to deceive.

#### **3. Revenue Neutrality**

Section 74 is unjustified in cases where there is no revenue loss to the department.

#### **4. Audit by the Department**

If a prior audit finds no issues, issuing an SCN under Section 74 later is questionable.

#### **5. Statutory Information Only**

Taxpayers are only required to provide legally mandated information; claims of suppression beyond this do not justify Section 74.

#### **6. Public Domain Information**

Information already in the public domain cannot be considered suppressed under Section 74.

Is Section 74 used as a blanket provision to extend the limitation period without fulfilling the stringent requirements ?

### **Intent to evade required:**

- deliberate concealment
- false declarations
- manipulation of records
- conscious violation for gain/advantage
- conscious wrongdoing

### **Current Practice (Mechanical):**

- Any tax difference = suppression
- Any mismatch = wilful misstatement
- Any delay = intent to evade

### **This approach:**

- *obliterates Section 73*
- makes limitation meaningless
- converts “intent” into a *presumption of guilt*

### Legal Consequences of This Dilution

#### **(a) Violation of Legislative Scheme**

If every case is Section 74:

- Section 73 becomes redundant
- Parliament’s conscious bifurcation is defeated

#### **(b) Penalty Without Mens Rea**

- Higher penalty (100%) imposed
- Without proof of deliberate wrong doing
- Contrary to settled principles of penal statutes

#### **(c) Extended Limitation as Routine**

- Extended period becomes the norm
- Normal period becomes the exception
- This is *legally impermissible*

# *Judicial Trend: Reasserting the Distinction*



*Interpretational Error does not amount to suppression of facts with wilful intent to evade tax*

## **C.C.,C.E. & S.T. Bangalore vs. Northern Operating Systems (P.) Ltd.**

[2022] 138 taxmann.com 359 (SC)/[2022] 61 GSTL 129 (SC)/[2022] 92 GST 792 (SC)[19-05-2022]

Demand - Limitation - Extended period - Assessee had **bona fide belief that it was not liable to pay any service tax in relation to seconded employees** - However, revenue discharged assessee two show cause notices - HELD : **Extended period of limitation was not invocable in absence of any 'wilful suppression' of facts, or deliberate misstatement** - Assessee was liable to discharge its service tax liability for normal period [Section [73](#) of Finance Act, 1994] [Paras 64 and 66] [Partly in favour of assessee]

## **KEY POINTS**

- ❖ The assessee, **Northern Operating Systems Pvt. Ltd. (NOS)**, was an Indian company providing back-office and IT-enabled services to its overseas group entities. Overseas group companies seconded their employees to NOS in India to meet specific business and operational requirements. The assessee was under interpretation that no service tax is payable in relation to seconded employees, upon which the department issued SCN on ground of suppression of fact with intent to evade tax and invoked extended period of limitation.
- ❖ However, The Supreme Court held that, on a holistic reading of agreements, the overseas entities effectively provided services to NOS through seconded employees. Therefore, the NOS was the service recipient, and the activity fell within the scope of manpower recruitment or supply agency service. Thus, service tax liability on merits was upheld.
- ❖ Further, **the Supreme Court held that the extended period of limitation is not invocable as the taxpayer has formal written agreement, maintained proper books of accounts and undergone audits by the Department. It was only an interpretational error which could be established as suppression of facts with wilful intention of tax evasion. The RTP has acted in a Bonafide manner and no material finding has been placed on record to substantiate the concealment.**

*Issued with purpose to minimise the wrong application of Section 74, CBIC issued the said Instruction to all the Tax Officials.*

# INSTRUCTION NO. 5/2023-GST

## dated 13.12.2023

*Mechanically Invocation of Extended Period of Limitation under Section 74 is covered by Para 3.3*

*Note: A Clarification on Invocation of Extended Period of Limitation and Section 74 of the CGST Act, 2017. It has been clarified that for applying the provision of section 74 while raising GST demands, there should be presence/evidence of fraud, or any wilful-misstatement or suppression of facts by the Taxpayer with malafide intention to evade tax. Without proving presence of such elements, the issuance of demands by invoking the extended period of limitation is incorrect. (Explained in Para 3.3 of the Instruction)*



**F. No. CBIC-20004/3/2023-GST**  
**Government of India**  
**Ministry of Finance**  
**Department of Revenue**  
**Central Board of Indirect Taxes and Customs**  
**GST Policy Wing**  
\*\*\*\*\*

New Delhi, dated the 13<sup>th</sup> December 2023

To,

All the Principal Chief Commissioners / Chief Commissioners / Principal  
Commissioners / Commissioners of Central Tax  
All the Principal Directors General/ Directors General of Central Tax

Madam/Sir,

**Subject: Judgment of the Hon'ble Supreme Court in the case of Northern Operating  
Systems Private Limited (NOS).**

Attention is invited to the [Hon'ble Supreme Court's judgment dated 19.5.2022 in the case of CC, CE & ST, Bangalore \(Adj.\) etc. Vs. Northern Operating Systems Private Limited \(NOS\) in Civil Appeal No. 2289-2293 of 2021](#) on the issue of nature of secondment of employees by overseas entities to Indian firms and its Service Tax implications. Representations have been received in the Board that, subsequent to the aforesaid judgment, many field formations have initiated proceedings for the alleged evasion of GST on the issue of secondment under section 74(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act').

2.1 The matter has been examined by the Board. It appears that the Hon'ble Supreme Court in its judgment *inter-alia* took note of the various facts of the case like the agreement between NOS and overseas group companies, and held that the secondment of employees by the overseas group company to NOS was a taxable service of 'manpower supply' and Service Tax was applicable on the same. It is noted that secondment as a practice is not restricted to Service Tax and issue of taxability on secondment shall arise in GST also. A careful reading of the NOS judgment indicates that Hon'ble Supreme Court's emphasis is on a nuanced examination based on the unique characteristics of each specific arrangement, rather than relying on any singular test.

2.2 Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai Versus M/s Fiat India(P) Ltd in Civil Appeal 1648-49 of 2004 has given the following observation -

" 66. ....Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."



# INSTRUCTION NO. 5/2023-GST DATED 13.12.2023

## Para 2 of the Instruction:

- Issued subsequent to the Issuance of Supreme Court's Judgement dated 19.05.2022 in case of CC, CE & ST, Bangalore (Adj.) etc. Vs. Northern Operating Systems Private Limited (NOS) (Civil Appeal No. 2289-2293 of 2021).
- Upon perusal of facts of the case including the agreement between NOS and Overseas Group Companies, the Hon'ble Supreme Court held that the secondment of employees by the overseas group company to NOS was a taxable service of 'manpower supply' and Service Tax was applicable on the same.
- It is noted that secondment as a practice is not restricted to Service Tax and issue of taxability on secondment shall arise in GST also. Subsequently, many officers have initiated the proceedings for the alleged evasion of GST on the said issue under section 74 of the CGST Act, 2017.
- However, A careful reading of the NOS judgment indicates that **Hon'ble Supreme Court's emphasis is on a nuanced examination based on the unique characteristics of each specific arrangement, rather than relying on any singular test, as pronounced in case of Commissioner of Central Excise, Mumbai versus M/s. Fiat India (P) Limited (Civil Appeal 1648-49 of 2004 by Hon'ble Supreme Court in Para 66**
- **The ratio laid down by the Hon'ble Supreme Court in the NOS judgment cannot be applied in a blanket or mechanical manner and must be invoked only after a careful examination of the specific facts of each case**, including the contractual arrangements between the overseas entity and the Indian entity, to determine the correct taxability and its extent under GST.

**Instruction No. 05/2023-GST**

2.3 It may be relevant to note that there may be multiple types of arrangements in relation to secondment of employees of overseas group company in the Indian entity. In each arrangement, the tax implications may be different, depending upon the specific nature of the contract and other terms and conditions attached to it. Therefore, the decision of the Hon'ble Supreme Court in the NOS judgment should not be applied mechanically in all the cases. Investigation in each case requires a careful consideration of its distinct factual matrix, including the terms of contract between overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Hon'ble Supreme Court's judgment in NOS case.

3.1 It has also been represented by the industry that in many cases involving secondment, the field formations are mechanically invoking extended period of limitation under section 74(1) of the CGST Act.

3.2 In this regard, section 74 (1) of CGST Act reads as follows:

*"(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, "*

3.3 From the perusal of wording of section 74(1) of CGST Act, it is evident that section 74(1) can be invoked only in cases where there is a fraud or wilful mis-statement or suppression of facts to evade tax on the part of the said taxpayer. Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax. Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis-statement or suppression of fact to evade tax on the part of the taxpayer, provisions of section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.

4. The above aspects may be kept in consideration while investigating such cases and issuing show cause notices.

5. Difficulties, if any, in implementation of these instructions may be informed to the Board (gst-cbec@gov.in).

(Sanjay Mangal)  
Principal Commissioner (GST)

Copy to:

1. The Joint Secretary, GST Council Secretariat, New Delhi, for circulating the same to all States/ UTs for information and necessary action at their end.
2. Webmaster, CBIC (for uploading under 'Instructions' on [www.cbic.gov.in](http://www.cbic.gov.in)).

# INSTRUCTION NO. 5/2023-GST DATED 13.12.2023

## Para 3 of the Instruction:

- *Section 74(1) of the CGST Act, 2017 is a stringent provision and can be validly invoked only where the non-payment or short payment of tax is attributable to fraud, wilful mis-statement, or suppression of facts with an intent to evade tax on the part of the taxpayer.*
- Mere non-payment, short payment, or erroneous availment of ITC, in the absence of a demonstrable mens rea, does not ipso facto justify the invocation of Section 74(1).
- The existence of positive, cogent, and material evidence establishing fraud, wilful mis-statement, or suppression of facts is a sine qua non for invoking Section 74(1).
- Such incriminating material and factual basis must be clearly spelt out and specifically alleged in the Show Cause Notice and cannot be supplied or inferred at a later stage.
- In the absence of explicit allegations and supporting evidence establishing intent to evade tax, proceedings, if any, ought to be confined to the provisions of **Section 73 of the CGST Act**, and not Section 74.
- Accordingly, the applicability of Section 74(1) must be determined on a case-specific factual examination, and its invocation cannot be mechanical, presumptive, or based solely on the outcome of audit or investigation.

# M/S. KHURJA SCRAP TRADING COMPANY VERSUS ADDITIONAL COMMISSIONER GRADE-2 (APPEAL) & ANOTHER

Citation: 2025 (9) TMI 53 - ALLAHABAD HIGH COURT

1. In the view of the *Instruction No. 05/2023-GST dated 13.12.2023*, the Section 74 cannot be invoked in cases where *no finding has been placed on record by the officer substantiating evasion of tax on the part of the taxpayer by way of fraud or wilful-misstatement or suppression. Hence, the burden of proof lies on the shoulder of the officer.*
2. Also, the *denial of ITC cannot be made to the RTP where the supplier registration has been cancelled post the transaction as supplier has duly filed and remitted tax vide GSTR-1 and GSTR-3B and also the tax invoices are reflected in the GSTR-2A of the RTP.*

## Issue 1: Subsequent Cancellation of Supplier's Registration and RTP failed to substantiate the payment made through banking channels

HELD THAT:- It is not in dispute that the transactions between the petitioner and the selling dealer, i.e., M/s Unique Trading Company, were held on 26.11.2021 and 30.11.2021. The registration of the selling dealer was cancelled on 08.04.2022. The record further shows that **GSTR – 1/1FF and GSTR 3-B were also filed, which shows the returns and tax filed by the selling dealer.** Once these facts have been brought on record, the State authorities ought to have verified the same, but instead, proceedings were initiated on the basis of subsequent inspection that the **selling dealer was not found at the place of business and adverse view was drawn.** **This Court in Solvi Enterprises [2025 (3) TMI 1313 - ALLAHABAD HIGH COURT] and R.T. Infotech [2025 (6) TMI 116 - ALLAHABAD HIGH COURT] has taken the view that when the registration of the selling dealer was cancelled subsequent to the transaction, the same can be verified on GST portal on GSTR – 2A.**

## Issue 2: Section 74 invoked by the officer merely on the basis of non-existence of supplier post inspection though no finding has been recorded or placed with regard to fraud, mis-statement or suppression of fact by the petitioner with an intent to evade payment of tax

HELD THAT: The proceedings under section 74 can only be invoked when there is a fraud, wilfull mis-statement or suppression of fact to evade tax on the part of the taxpayer. **Since the benefit of this circular has been given in view of the judgement of the Apex Court in Suraj Impex (India) Private Limited [2025 (5) TMI 1695 - SUPREME COURT] and the judgement of this Court in S/s Agrawal Rolling Mills [2003 (4) TMI 550 - ALLAHABAD HIGH COURT], strict compliance of the circular is required by the State authorities.** The record shows that ***no finding has been recorded at any stage*** that there is a fraud or willful mis-statement or suppression of fact to evade payment of tax.

**The impugned orders cannot be sustained in the eyes of law.**

**Can Notice u/s 74 can be issued???**

# SECTION 74- OF GST ACT NOT TO BE INITIATED AGAINST PURCHASER FOR NON – DEPOSIT OF GOODS AND SERVICE TAX (GST) BY SUPPLIER :

**Subhash Singh v. Deputy Commissioner, SGST [Special Appeal No. 100 of 2024 dated May 03, 2024]**

**162 taxmann.com 534 (Uttarakhand)**

**The Hon'ble Uttarakhand High Court in Subhash Singh v. Deputy Commissioner, SGST [Special Appeal No. 100 of 2024 dated May 03, 2024] has modified the assessment order passed earlier against the purchasing dealer on condition of depositing 10% of the amount demanded and further observed that proceedings under Section 74 of the Central Goods and Services Tax Act, 2017 ("the CGST Act") should not ideally be instituted against the purchasing dealer for availing the benefit of ITC since the same has not been availed in a fraudulent-manner.**

## **Facts :-**

- 1. The appellant is engaged in retail and wholesale business of iron scrap and waste***
- 2. The appellant has purchased goods with proper invoices payments made through banking channel . Details of payment including payment of tax recorded in appellants books of accounts.***
- 3. The Supplier of appellant has received GST, when they have supplied goods to appellant and the appellant has rightly availed the input tax credit for the tax period April 2021- March 2022.***
- 4. The Appellant contended that proceedings under Section 74 of the CGST Act, cannot be initiated against the Appellant for availing the benefit of ITC in a fraudulent manner since the Appellant had paid GST, and it was reflected in invoices and E-way bills. If the Appellant's suppliers committed a default, can the Appellant be liable for the consequences of denying the ITC.***

## **Conclusion: The Uttarakhand High Court's decision:**

**Reinforces the principle that ITC should not be denied to purchasing dealers for the faults of their suppliers. By modifying the assessment order and emphasizing the purchaser's compliance, the court has set a precedent for fair treatment under GST laws. This ruling not only clarifies the obligations of purchasers but also highlights the importance of suppliers' compliance in the seamless functioning of the GST framework.**

## ASSISTANT COMMISSIONER (ST) VERSUS M/S SATYAM SHIVAM PAPERS PRIVATE LIMITED

Citation: [2022] 134 taxmann.com 241 (SC)

Dated: 12.01.2022

Detention and seizure - **Expiry of E-way bill - Demand of GST raised and penalty imposed** - Goods were kept in house of a relative for 16 days by officer and not in designated place for safe keeping - **High Court set aside order levying tax and penalty** and imposed costs of Rs. 10,000 on concerned officer –

*The consideration of the High court in the order impugned and the material placed on record leaves nothing to doubt that the attempted inference on the part of the proper officer, that the writ petitioner was evading tax because the e-way bill had expired a day earlier*

HELD : Inference by officer that petitioner was attempting to evade tax was baseless - Intent in keeping goods in private place was questionable - **High Court meticulously and correctly examined and found that there was no fault or intent to evade tax** - Goods in question could not be taken to destination within time for reasons **beyond control of respondent-taxpayer on account of traffic blockage due to agitation** - State alone remains responsible for not providing smooth passage of traffic - **No question of law relating to operation and effect of section 129 was involved in instant case** - Considering department's conduct and harassment faced by taxpayer, costs of Rs. 59,000 was imposed in addition to costs of Rs. 10,000 imposed by High Court [Section [129](#) of Central Goods and Services Tax Act, 2017/Telangana Goods and Services Tax Act, 2017] [Paras 8 and 9] [In favour of assessee]

**Both High Court & Supreme Court Held:**

**Mere Expiry of E-Way Bill on account of the reasons beyond the control of the Taxpayer not amounts to the intention of the taxpayer to evade tax.**



# Cosmic Dye Chemical vs. Collector of Central Excise, Bombay

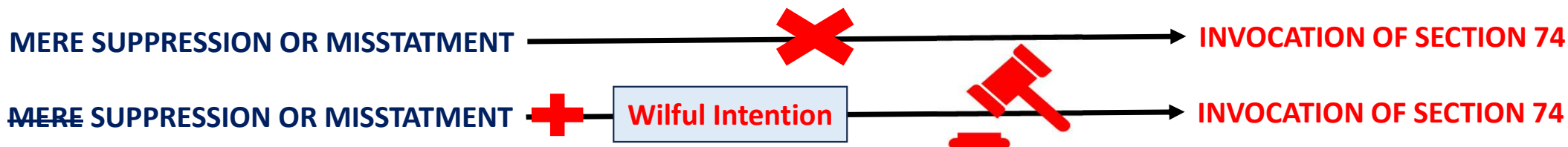
## 1995 taxmann.com 926 (SC)/[1995] 75 ELT 721 (SC)[06-09-1994]

Limitation - Section 11A of the Central Excise Act, 1944 - '**intent to evade duty**' is a **pre-requisite to invoke the extended period of limitation** - Tribunal's finding that mere suppression or mis-statement without being wilful can invoke proviso to section 11-A, not justified - Cegat's order set aside

"Now so 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. So far as **mis-statement or suppression of facts are concerned**, they are clearly qualified by the words **"wilful"** preceding the words "mis-statement or suppression of facts" which means **with intent to evade duty**. 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". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful." (Para 6)



The Hon'ble Apex Court held that for the purpose of invoking the provisions of section 11A of the Central Excise Act, 1944 (or Section 74 of the CGST Act, 2017), the wilful intention of evasion of tax on the part of the taxpayer is a necessity as mere suppression or misstatement cannot invoke the provisions of said sections.



***Fraud is established by material evidence, Section 74 can be invoked as intent to evade tax is built in the word itself***



# Willful Misstatement

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

Now so 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**. So far as 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" which means with intent to evade duty**. 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**". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not willful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be willful.

However, in GST, the positioning of "-" is changed . It reads as " any wilful-misstatement or suppression of facts to evade tax" so wilful word seems to be only with misstatement rather than with Suppression of facts also. However, suppression of facts is coupled with intent to evade tax. So, mere suppression i.e non –declaration in returns cannot be as base for Section 74.

# Escorts Ltd. vs. Commissioner of Central Excise, Faridabad

[2015] 58 taxmann.com 125 (SC)/[2015] 32 GSTR 438 (SC)/[2015] 52 GST 78 (SC)/[2015] 319 ELT 406 (SC)[29-04-2015]

Section 11A of the Central Excise Act, 1944, read with section 73 of the Finance Act, 1994 and section 28 of the Customs Act, 1962 - Department invoked extended period to demand duty on intermediate product 'Transmission Assemblies' [TA] arising during manufacture of exempted tractors - Assessee argued that : (a) department was aware of entire process since 1965; (b) in 1994-95, in correspondence, department had noted down manufacturing process and details of TA but no attempt was made to demand duty; (c) TA was never sold by assessee - Assessee claimed that, owing to said facts, it had bona fide belief that TA was not marketable/dutiable and hence, extended period could not be invoked - Department alleged suppression as details of TA were not given in periodical returns - HELD : **Assessee had declared chassis in returns but no TA, as assessee bona fide believed that declaration of chassis would suffice as, according to them, TA were not dutiable goods - There was no suppression or any intent to evade excise duty in present case** - Hence, on this ground alone, show-cause notice needs to be quashed [Paras 19 and 23 to 25] [In favour of assessee]

- In the present case, the RTP was engaged in the business of manufacturing the tractor (exempt good), whereby Transmission Assemblies (TA) arise during the course of manufacturing. The RTP was in an interpretational error that the TA is not marketable product and is not liable to duty by virtue of not a separate commercially known product. Although all the facts of the process and products were known to the department and was declared in the returns, thus, acted in a Bonafide manner. But the Department initiated the Section 11A of the Central Excise Duty on ground of suppression by invoking the extended period of limitation.
- However, the notice was set aside on the ground that the **Suppression must be followed by wilful intention of evasion of tax and mere declaration, failure to take a particular view and interpretational error does not amount to suppression specially when the facts are known to both the parties and issue involves legal interpretation and therefore, invocation of extended period of limitation is not justifiable.**

*Interpretational Error does not amount to suppression of facts with wilful intent to evade tax*

## **Neeyamo Enterprise Solutions (P.) Ltd. vs. Commercial Tax Officer**

[2025] 180 taxmann.com 480 (Madras)/[2025] 103 GSTL 352 (Madras)

[11-11-2025]

**Department cannot use Section 74 by default**

Demands - Tax or ITC involving fraud - Invoking extended period of limitation - Conditions for - Period 2018-19 to 2022-23 and April 2023 to August 2023 - Inspection was conducted at assessee premises - SCNs were issued and assessee failed to respond to same - **Impugned orders came to be passed under section 74 invoking extended period of limitation and calling upon assessee to pay tax, penalty and interest** - **HELD:** **Extended period was available only when non-payment or short payment was by reason of fraud, wilful misstatement or suppression to evade tax** - SCNs and orders did not charge assessee with any such element nor disclose material supporting such inference - Presence of one or all three elements was a sine qua non for taking action under section 74 - **Show cause notices in instant case by employing expression "determination" betrayed element of pre-determination on part of authority** - Impugned show cause notices and orders were to be quashed with liberty to respondents to proceed under normal provisions [Section [74](#), read with sections [73](#) and [75](#), of Central Goods and Services Tax Act, 2017/Tamil Nadu Goods and Services Tax Act, 2017] [Paras 9, 16, 17 and 18] **[In favour of assessee]**

**Section 74 can be invoked only when there is a clear allegation of fraud, wilful misstatement, or suppression with intent to evade tax.**

**CONCLUSION:** Since the essential conditions for using Section 74 were missing, the Court held that the orders were without jurisdiction and had to be quashed completely. It added that the department may proceed under Section 73, if applicable. **This judgment reinforces that extended limitation under GST is an exception, not a routine tool.**



### Facts of the case

- The dispute involved Neeyamo Enterprise Solutions (P.) Ltd. (assessee) and the Commercial Tax Officer (respondent), covering tax periods from 2018-19 to 2022-23, and April 2023 to August 2023.
- Following an inspection, Show Cause Notices (SCNs) were issued to the assessee. The assessee failed to respond to these SCNs. Consequently, the **Commercial Tax Officer issued orders under Section 74, demanding tax, penalty, and interest, invoking the extended period of limitation.**
- The central issue before the Madras High Court was **whether the tax authorities were justified in invoking Section 74, which requires the presence of fraud, wilful misstatement, or suppression of facts to evade tax.**
- **The assessee challenged these orders, arguing that these prerequisites for Section 74 were not met.**

### Petitioner's Arguments

- The petitioner contended that the impugned show cause notices and orders were invalid as Section 74 of the TNGST Act, 2017 was invoked without alleging or establishing fraud, wilful misstatement, or suppression of facts to evade tax.
- **It was further argued that the use of the term "determined" in the show cause notices reflected pre-determination, rendering the proceedings unsustainable.**

### Respondent's Arguments

- The respondent argued that the petitioner had an effective statutory appellate remedy and, having failed to file appeals within the prescribed time, could not invoke writ jurisdiction.
- **It was further contended that even if the expressions "fraud, wilful misstatement or suppression" were not expressly stated, the conduct of the petitioner justified invocation of Section 74 of the TNGST Act, relying on the decision in *Annai Angammal Arakkattalai (Pre Mahal) v. Joint Commissioner (GST Appeals)*.**

**GR Infra Projects Ltd. vs. State of Madhya Pradesh**

[2025] 181 taxmann.com 923 (SC)

[21-11-2025]

**“Notice issued;  
proceedings stayed”**

Demands - Tax or ITC involving fraud - Show cause notice - Adjudication v. writ remedy - Writ maintainability - Period 2018-19 - Petitioner, engaged in road and highway construction, was issued summons and premises were searched - Intimation in DRC-01A with annexure was issued - Draft notice dated 03.03.2025 was later supplied - Petitioner gave objections to draft notice and to SCN - **SCN invoking extended period proposed demand around Rs 1.53 crores alleging GSTR-3B and e-way bill mismatches, ineligible ITC for site office, and post-supply vendor cancellations** - Petitioner sought quashment in writ on ground of vague fraud allegations and that proceedings should lie under general period due to limitation - **High Court declined to entertain the writ and held that draft notice ran into 191 pages and contained material indicating wilful evasion - Search and seizure yielded basis for invoking extended period for adjudication - Once SCN under extended period was issued, writ scrutiny of sufficiency of fraud or suppression at threshold was impermissible - Further, even after enquiry, if fraud or suppression was not established, order could be passed under general period provision - Plea regarding shorter limitation would be examined by adjudicating authority - No prejudice was caused by participation in adjudication - Therefore, threshold interference was declined** - SLP was filed against impugned order - **HELD : SCN issued under section 74 of GST Act appeared to be bereft of material particulars and contained nothing beyond figures - Notice was to be issued and further proceedings pursuant to impugned show cause notice were ordered to remain stayed** [Section [74](#), read with section [73](#) of Central Goods and Services Tax Act, 2017/Madhya Pradesh Goods and Services Tax Act, 2017] [Paras 5 to 7] **[Notice Issued]**

**This ruling refers to challenge to the validity of Section 74 SCN lacking material particulars and containing figures only without specific allegations. As per extended meaning it can be made out that SCN must be complete in all respects. Mere conduct of search proceedings does not, by itself, justify invocation of Section 74.**

## Background of the case

- GR Infra Projects Ltd., engaged in road construction, was investigated for GST for 2018–19, including search and seizure, after which a draft show cause notice running into 191 pages was issued **alleging mismatches in GSTR-3B and e-way bills, ineligible ITC, and post-supply cancellations, and invoking Section 74 for extended limitation.**
- The petitioner filed objections, contending the allegations were vague, purely numerical, and **lacked specific proof of fraud or suppression.** It sought to quash the notice through a writ petition, **arguing the extended period was wrongly invoked.**
- **The High Court refused to interfere, holding that the detailed draft notice and investigation material provided prima facie grounds for Section 74, that the sufficiency of fraud allegations could not be examined at the SCN stage, and that issues like limitation could be raised before the adjudicating authority.**

## Petitioner's Argument

- The petitioner submits that Section 74 was invoked **without the requisite conditions of fraud, wilful misstatement, or suppression with intent to evade tax.**
- In the absence of these essential ingredients, the **proceedings ought to be governed under Section 73.**
- The petitioner further contends that the **High Court erred in refusing interference**, as the SCN lacks specific material to support allegations of fraud, and such sufficiency should be examined at the SCN stage itself.

## Respondents Argument

- The writ petition is **not maintainable** as the petitioner has an **alternate statutory remedy** of adjudication and appeal under the GST Act
- The SCN was issued after **search and seizure**, and the **191-page draft notice** contains material indicating **wilful evasion**, justifying invocation of **Section 74**

## CONCLUSION

The Supreme Court **prima facie** accepted the **petitioner's contention** that the show cause notice issued under Section 74 was **bereft of material particulars and contained nothing beyond figures.** On this basis, the Court **issued notice in the SLP and stayed further proceedings pursuant to the impugned show cause notice**, without expressing any final opinion on merits



## **Varanasi Sangam Expressway (P) Ltd vs. Commissioner of State Tax**

[2025] 180 taxmann.com 796 (Allahabad)

Demands - Tax or ITC involving fraud - Show cause notice, defects in - Jurisdictional defect - Writ petition under Article 226 was filed challenging show cause notice dated 20.06.2025 issued under Section 74 of UPGST Act - Petitioner contended that **notice carried no specific allegation of fraud, wilful misstatement, or suppression with intent to evade tax and thus exceeded jurisdiction under Section 74** - On examination of notice, contention appeared correct –

**HELD: Statutory ingredients required for invocation of Section 74 were absent on face of notice - Notice did not disclose material or particulars indicating intent to evade tax and merely cited Section 74 in mechanical manner** - In **absence of foundational averments**, assumption of jurisdiction under Section 74 was unsustainable - Show cause notice dated 20.06.2025 was quashed, with liberty to Department to proceed under any other provision of UPGST Act in accordance with law - Writ petition was disposed of [Para 6] [In favour of assessee]



*In Case of Show Cause Notice:*

- ❖ *Bereft of Statutory Ingredients of Section 74 (Fraud, Wilful Misstatement or Suppression) with Intent to Evade of Tax.*
  - ❖ *Absence of Foundational Averments*
  - ❖ *No Material Placed on Record indicating the intent to evade tax*
- In the view of above, Section 74 cited in a mechanical manner and invoked without jurisdiction, thus liable to be quashed.*

## Background of the Case

- Varanasi Sangam Expressway (P) Ltd. filed a writ petition challenging a show cause notice issued by the Commissioner of State Tax under Section 74 of the UPGST Act.
- The company contended that the notice was invalid as it lacked specific allegations of fraud, wilful misstatement, or suppression of facts, which are mandatory for invoking Section 74.

## Petitioner's Argument

The show cause notice issued under Section 74 of the UPGST Act lacked specific allegations of fraud, wilful misstatement, or suppression of facts with an intent to evade tax and that without these mandatory specific allegations, the Department had exceeded its jurisdiction by invoking Section 74.

## Held

- The Allahabad High Court found that the **show cause notice** issued under Section 74 of the UPGST Act **lacked the statutory ingredients required for its invocation.**
- The notice **did not disclose specific allegations or material evidence indicating fraud, wilful misstatement, or suppression of facts with an intent to evade tax.**
- **The Court concluded that Section 74 was invoked in a mechanical manner without the necessary foundational averments.**
- **Decision:** The High Court quashed the show cause notice dated 20.06.2025.
- **Liberty Granted:** The Department was granted the liberty to initiate proceedings under any other applicable provision of the UPGST Act, such as Section 73, if the facts of the case warranted it.





**QUES 1**

**Whether Section 74 proceedings require a specific finding of fraud, wilful misstatement, or suppression to evade tax ?**

**QUES 2**

**When invoices and e-way bills are available, insisting on toll receipts warranted or unwarranted?**

**QUES 3**

**Can State GST authorities assume jurisdiction without cross-empowerment notification?**

**QUES 4**

**Is an allegation of circular trading sustainable without negating physical movement of goods?**

**QUES 5**

**Can documentary evidence be ignored when transactions are reflected in GSTRs and books?**

## **Raghuvansh Agro Farms Ltd. vs. State of U.P.**

[2025] 181 taxmann.com 835 (Allahabad) [17-12-2025]

Demand - Tax or ITC dues involving fraud - Opportunity of hearing - Petitioner was engaged in business of supply of agricultural goods and areca nuts - Survey was conducted on basis of which notice under section 74 was issued - Petitioner filed detailed reply along with relevant documents - **Without providing any opportunity of personal hearing, impugned order was passed –**

**HELD :** **For initiation of proceedings under section 74, authorities are duty bound to show reason of fraud, wilful misstatement, suppression of fact for availment of input tax credit wrongly or excessive claim of input tax credit** - Adjudicating authority neither in show cause notice nor in assessment order had recorded any such finding supported by due evidence –

**Further, specific pleadings had been raised by assessee that petitioner fell within jurisdiction of Central GST department and hence, State GST authority had no jurisdiction to initiate proceeding in absence of any cross empowerment notification - **Neither in impugned orders nor in counter affidavit any material was brought on record to justify acquiring jurisdiction of State GST authorities****

Further, all purchases and sales made by petitioner were duly reflected, not only in books of accounts but also in requisite GSTRs - All transactions were duly made through banking channel and bank statements were also brought on record before authority concerned - Transactions were duly declared on GST portal also - **However, merely on basis of survey, all evidence filed by petitioner was brushed aside** - Further, proceedings were initiated against petitioner on basis of purchases made from one supplier; however, same had been set aside by Deputy Commissioner of Anti Evasion-CGST - Purchases and sales were being duly reflected in GST portal supported by tax invoices, e-way bill and billty - **Supporting ledgers were also brought on record, which clearly showed that due purchases had been made as well as actual physical movement of goods had taken place and no case of circular trading was made out in favour of petitioner** - Impugned order was to be quashed [Section 74 of Central Goods and Services Tax Act, 2017/Uttar Pradesh Goods and Services Tax Act, 2017] [Paras 25 to 34]  
**[In favour of assessee]**

## FACTS OF THE CASE

- Raghuvansh Agro Farms Ltd., engaged in supply of agricultural goods, was subjected to a GST survey by State GST authorities, pursuant to which a show cause notice under Section 74 was issued **alleging circular trading and wrongful availment of ITC**.
- The petitioner produced GST returns, tax invoices, e-way bills, transport documents, and bank statements showing genuine transactions, actual movement of goods, and payments through banking channels, **and also objected to lack of State GST jurisdiction**.
- The High Court noted that the proceedings against the petitioner were founded on transactions with the said supplier, whose case had already been examined by CGST authorities. Despite this, without granting personal hearing or recording any finding of fraud, the State GST authority passed the impugned order, which was challenged before the Allahabad High Court.

## PETITIONER'S ARGUMENT

1. **Lack of Jurisdiction**: The petitioner is under Central GST jurisdiction, and the State Tax authority lacked authority in the absence of any GST Council recommendation or notification for cross-empowerment, except for refunds under Section 54.
2. **Missing Ingredients for Section 74**: The notice did not allege fraud or wilful misstatement, and mere claims of circular trading are insufficient without proof of intent to evade tax.
3. **Valid Documentation**: All transactions were supported by tax invoices, e-way bills, bilties, and bank payments, and were reflected in GSTR-1, 2A, and 3B returns.

### Cases relied upon:

- M/s Vadilal Enterprises Limited Vs. State of UP and others (Neutral Citation No. 2025: AHC:87915-DB) [Para 16].
- HCL Infotech Ltd. Vs. Commissioner, Commercial Tax (Neutral Citation NO. 2024:AHC:158274-DB) [Para 16].
- M/s Ajnara Realtech Limited Vs. State of UP (Neutral Citation No. 2025:AHC:38761-DB) [Para 16].

## RESPONDENT'S ARGUMENT

1. **Circular Trading**: The Additional Chief Standing Counsel argued the petitioner was engaged in circular trading.
2. **No Actual Movement**: Argued that input tax credit was claimed without actual physical movement of goods.
3. **Lack of Proof**: Emphasized the failure to produce toll plaza receipts to justify movement

**Case relied upon**: The State of Karnataka vs. M/s. Ecom Gill Coffee Trading Private Limited ((2023) SCC Online SC 248



**The High Court allowed the writ petition, quashed the impugned orders dated 31.05.2023 and 10.01.2025, and directed refund of any amount deposited by the petitioner within one month of submission of a certified copy of the order.**



1.	<b>Mere allegations of circular trading are insufficient without concrete evidence of non-movement of goods.</b>
2.	Non-production of toll plaza receipts alone cannot establish absence of goods movement.
3.	State GST authorities cannot initiate proceedings against a taxpayer assigned to Central GST jurisdiction without proper cross-empowerment.
4.	Invocation of Section 74 mandates a specific and categorical finding of fraud, wilful misstatement, or suppression of facts.
5.	When invoices and e-way bills are available, insisting on toll receipts as mandatory proof is unwarranted.

Dated: 19.03.2025

# M/s. Agni Estate Foundations (P.) Ltd. v. State Tax officer

Citation: [2025] 173 taxmann.com 14 (Madras)

Demands and recovery - Tax or input tax credit due not involving fraud misstatement or suppression - Assessment Years - 2017 - 2020 - **Assessee challenged assessment orders issued under Section 74 of CGST Act on grounds that show cause notices contained no allegation of suppression of facts, wilful misstatement or fraud required for Section 74 proceedings** - Respondent conceded no power to reclassify proceedings from Section 74 to Section 73 but acknowledged assessee would lose benefit of Amnesty Scheme under Section 128A if proceedings remained under Section 74 - **HELD:** Since **show cause notices lacked ingredients required for Section 74 proceedings** and **assessee had paid entire tax prior to inspection and declared same in GSTR-9/9C**, notices and impugned orders issued under Section 74 shall be deemed as issued under Section 73 to enable assessee to avail benefits under Amnesty Scheme – [Paras 6 and 7] [In favour of assessee]



Notice u/s 74 is invalid as there was no existence of fraud, wilful misstatement or suppression with intent to evade tax in case the taxpayer discharge its tax liability voluntary prior to the initiation of inspection proceedings under section 67 and **declared the said fact in the Annual Return GSTR-9/9C**. Therefore, in the present case, it was adjudicated that all the proceedings u/s 74 shall be deemed to be issued u/s 73, subject to the benefit of amnesty scheme u/s 128A.

**VOLUNTARY PAYMENT BEFORE PROCEEDINGS,  
DECLARED IN ANNUAL RETURN OR  
OTHERWISE**



**NO MENS REA FOR SECTION 74 PERSISTS, THUS,  
NOTICE & ORDER U/S 74 DEEMED U/S 73**

## **Bridging The Gap Between ST-3 Returns And ITR/Form 26**

[2024] 159 taxmann.com 336 (Mumbai - CESTAT)  
CESTAT, MUMBAI BENCH  
Umesh Tilak Yadav  
v.  
Commissioner of Central Excise  
DR. SUVENDU KUMAR PATI, JUDICIAL MEMBER  
AND ANIL G. SHAKKARWAR, TECHNICAL MEMBER  
FINAL ORDER NO. 87105 OF 2023  
SERVICE TAX APPEAL NO. 85246 OF 2023  
NOVEMBER 8, 2023

Demand of service tax merely on difference between figures of ST Return and IT return was **not sustainable without establishing that consideration was received for activity covered under definition of services under Finance Act, 1994**

## FACTS

- Difference between figures of Service Tax Return and Income-tax return - For demanding any amount of service tax under Section 73 of Finance Act, 1994, first requirement for Revenue was to establish that a particular amount of service tax was either not paid or short paid or not levied or short levied
- It was also essential to establish that value on which such service tax was calculated was in terms of section 67 of Act *ibid.* and that it represented consideration for activity which satisfied definition of service under section 65B(44) of Act *ibid.*

Demand of service tax had been made merely on basis of aforesaid difference, *prima facie* examination of fact that appellant had received consideration by providing service, was missing - In view of aforesaid, **impugned demand order was to be quashed [Section 73 of Finance Act, 1994]**



[2022] 136 taxmann.com 109 (Kolkata - CESTAT)

CESTAT, KOLKATA BENCH

Luit Developers (P.) Ltd.

v.

Commissioner of Central Goods and Services Tax & Central Excise,  
Dibrugarh

**Service tax cannot be demanded for mismatch of income reflected in Form 26AS and ST-3 Returns because service recipients deducted TDS on rent/commission along with Service Tax component**; Figures reflected in Form 26AS and figures shown to Income Tax authorities cannot be used to determine Service Tax liability unless there is an evidence shown that it is taxable

- Inflated figure in **Form 26AS** is because some service recipients deducted TDS on rent/commission along with service tax component
- Part of service tax being demanded under reverse charge mechanisms cannot be sustained since service tax was already collected by service providers as seen from invoices and Reconciliation Certificate and for some service providers tax is on forward charge basis
- **Figures reflected in Form 26AS and figures shown to Income Tax authorities cannot be used to determine Service Tax liability unless there is an evidence shown that it is taxable**

Demand of Service tax, interest and penalty not sustainable - Appeal allowed - Sections 73, 75 and 76 of Finance Act, 1994 [Para 10, 11]

[2020] 118 taxmann.com 164 (Allahabad - CESTAT)  
CESTAT, ALLAHABAD BENCH

**Kush Constructions**

**v.**

**Central Goods and Services Tax, NACIN**

FEBRUARY 20, 2019

Demand of tax could not be raised from assessee on basis of difference between figures of ST-3 return and Form 26AS filed under Income-tax Act, 1961, without examining reasons for said difference and without establishing that entire differential amount was on account of consideration for providing services

### FACTS

- Revenue authority compared figures reflected in ST-3 return and those reflected in Form 26AS filed in respect of assessee as required under provisions of Income-tax Act, 1961
- On basis of difference in two figures, revenue authority passed impugned order demanding tax along with penalty

### HELD:

Revenue authority could not raise demand on basis of difference between figures of ST-3 return and Form 26AS filed under 1961 Act without examining reasons for said difference and without establishing that entire differential amount was on account of consideration for providing services .**Therefore, impugned order was to be set aside**

# BALAJI INSULATIONS INDIA PVT. LTD. VS. COMMISSIONER OF GST

2024 (6) TMI 771 – CESTAT MUMBAI

In Favour of Taxpayer

Difference in Services Reflected  
in Service Tax Return ST-03 and  
Income Tax Return

## ▪ Determination of Service Tax not levied or not paid u/s 73 of Finance Act, 1994

The Tribunal noted that u/s 66B of the Finance Act, 1994, service tax is levied at 14% on the value of service, and u/s 67, the value is the consideration in money charged by the service provider. It is crucial to determine the value of taxable service by excluding activities covered by the negative list u/s 66D and those not included in the definition of service u/s 65B(44). Thus, the correct value of taxable service must be determined as the first step to ascertain the amount of service tax not paid or levied.

## ▪ Proper Determination of the Value of Taxable Services

The Tribunal found that the Revenue's determination of a taxable value based solely on data from income tax returns, without examining the appellant's records, was presumptive. The show cause notice lacked evidence to establish that the said amount was consideration received for providing services. The Tribunal referenced several precedent decisions, including Umesh Tilak Yadav, Modern Road Makers Pvt. Ltd., and SBI Life Insurance Co. Ltd., which held that demands based solely on differences between figures in income tax returns and ST-3 returns, without examining the reasons for such differences, are not sustainable. The Tribunal concluded that the show cause notice was NOT SUSTAINABLE in law.

## ▪ Sustainability of the Impugned Order

Given that the show cause notice was found unsustainable, the Tribunal set aside the impugned order passed by the Commissioner (Appeals) and allowed the appeal. Consequently, the cross application filed by the Revenue was dismissed.

The adjudicating authority's computation based on income tax TDS data, without proper examination of the appellant's records, was deemed improper. Thus, the appeal was allowed, and the impugned order was set aside with consequential relief.

# JAGDISH PRASAD NATHULAL GUPTA VS. COMMISSIONER OF CGST

2024 (6) TMI 770 – CESTAT MUMBAI

In Favour of Taxpayer

Difference in Services Reflected  
in Service Tax Return ST-03 and  
Income Tax Return

## ▪ Determination of Service Tax not levied or not paid u/s 73 of Finance Act, 1994

The Tribunal noted that u/s 66B of the Finance Act, 1994, service tax is levied at 14% on the value of service. Section 67 specifies that the value should be the consideration in money charged by the service provider. The definition of service u/s 65B(44) and the negative list u/s 66D must be considered to determine the taxable value. Thus, the correct value of taxable service must be determined as the first step in arriving at the amount of service tax not paid or levied.

## ▪ Proper Determination of the Value of Taxable Services

The Tribunal observed that the Revenue concluded that a taxable value was not subjected to service tax based on data from an outside source without examining the appellant's records. No evidence was provided to establish that this amount was consideration received for providing service. The Tribunal referenced several precedent decisions, including Umesh Tilak Yadav (2024) 159 taxmann.com 336, Commissioner vs. Modern Road Makers Pvt. Ltd. (Appeal No. ST/86984/2021), and others, which held that demands based solely on differences between figures in ST-3 returns and income tax returns without examining the reasons for the difference are not sustainable. The Tribunal concluded that the show cause notice lacked a basis for arriving at the taxable value and was thus NOT SUSTAINABLE in law.

## ▪ Sustainability of the Impugned Order

Since the show cause notice was deemed unsustainable, the Tribunal set aside the impugned order passed by the Commissioner (Appeals) and allowed the appeal. The Tribunal emphasized that the charges in the show cause notice must be based on the assessee's books of account and other admissible evidence, which was missing in this case.

Highlighting the lack of reference to the defense reply in the Commissioner's order and improper computation of the demand based on incomplete TDS data. The appeal should be allowed by setting aside the order passed by the Commissioner (Appeals)

# *BURDEN OF PROOF*

**BURDEN OF PROOF**



Dated: 22-01-2013

## **Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur**

Citation: [2013] 31 taxmann.com 67 (SC)

Section 73 of the Finance Act, 1994 - Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded - Every non-payment/non-levy of tax doesn't attract extended period - There must be some positive action which betrays a negative intention of wilful default - **For operation of extended period of limitation, intention to deliberately default is a mandatory prerequisite and inadvertent non-payment doesn't attract extended period of limitation** - **Burden of proving mala fide on part of assessee lies on shoulders of Department who alleges it and assessee cannot be asked to substantiate his bona fide conduct** - Further, **extended period of limitation finds application only when specific and explicit averments challenging bona fides of conduct of assessee are made** in show cause notice [In favour of assessee]

### **Conclusion**

*For Invoking the Extended Period of Limitation in cases of Section 73 of the Finance Act, 1994 or Section 74 of the CGST Act, 2017, the Specific and Explicit Averments Challenging the Bonafide Conduct of the Registered Taxable Person are required to be made while initiating the proceedings. Further, the **BURDEN OF PROOF OF MALAFIDE CONDUCT ON PART OF THE TAXPAYER LIES ON THE JURISDICTIONAL OFFICER***

**Inadvertence of Non-Payment on the Part of the RTP cannot lead to the invocation of Extended Period of Limitation and Section 74 proceedings**

**Burden of Proof lies upon the person making the allegation. 1<sup>st</sup> Assessment is Self Assessment, so Burden of Proof shifts on department except ITC due to Section 155(Specific Provision). Department to provide Copy of Statement, Basis of Allegation and RTP's right to have the relied upon documents. SCN should not be merely based upon matching of Return data, Auto generated but should be with application of mind. Section - 155, Central Goods And Services Tax Act, 2017 Burden of proof.**

**155.** Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person.



## **BURDEN OF PROOF ON PURCHASING DEALER**

**HELD**

**The State of Karnataka v. M/s Ecom Gill Coffee Trading Private Limited 2023 [2023] 148 taxmann.com 352 (SC)**

- **Input Tax Credit would be available to purchasing dealer only after he discharge burden to establish actual receipt of goods; mere production of invoice and payment to selling dealer by account payee cheque was not sufficient**
- **The provisions of Section 70, in its plain terms clearly stipulate that the burden of proving that the ITC claim is correct lies upon the purchasing dealer claiming such ITC. Burden of proof that the ITC claim is correct is squarely upon the assessee who has to discharge the said burden. Merely because the dealer claiming such ITC claims that he is a bona fide purchaser is not enough and sufficient. The burden of proving the correctness of ITC remains upon the dealer claiming such ITC. Such a burden of proof cannot get shifted on the revenue. Mere production of the invoices or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under section 70 of the KVAT Act, 2003. The dealer claiming ITC has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc.**

# Explanation

For the purposes of this Act, the expression **“suppression”**

shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder

or failure to furnish any information on being asked for, in writing, by the proper officer.



**SUPPRESSION OF FACTS**

## Where the Issue Involved Interpretation of Law, Extended Period Cannot Be Invoked

- In [2010] 1 taxmann.com 778 (Gujarat) HIGH COURT OF GUJARAT Commissioner of Central Excise & Customs v. Mafatlal Industries Ltd.\*  
**Section 11A of Central Excise Act, 1944 - Demand of duties not levied or not paid or short paid - Limitation - extended time limit not invocable as there were ambiguity about applicability of Rules and favourable orders of Tribunal during relevant period - Revenue's appeal dismissed. (Paras 8)**
- In Atul Kaushik and Ors. Vs. C.C. (Export), New Delhi reported in [2017] 43 GSTR 256 (Trib – Delhi)  
the Hon'ble CESTAT New Delhi observed that – “It is a well settled rule that when two reasonable constructions can be put upon the penal provision, court must lean towards that construction which exempts subject from penalty rather than one which imposes penalty. **When no penalty is held to be imposable when the issue involved is interpretational, it almost axiomatically follows that even extended period cannot be invoked in such cases.**”
- In Shri Shakti LPG Limited Vs. Commr. of C. Ex. and Cus. cited in 2005 (187) ELT 487 (Tri. – Bang.) the Hon'ble CESTAT Bangalore held that “Since the issue itself is **amenable to dual interpretation, there is not much force in Revenue's contention in invoking the longer period for demand on grounds of suppression of facts in respect of the appellants.**”
- In Brij Motors Pvt. Ltd. Versus Commissioner Of Central Excise, Kanpur cited in 2012 (25) S.T.R. 489 (Tri. – Del.) the Hon'ble CESTAT New Delhi held that – “.....**the matter was being interpreted by judicial forums in different ways as may be seen from the decisions quoted by the Appellants. The Higher Courts have been taking the view that in such situations the extended period of time cannot be invoked for raising demand.** Even in the case of Bridgestone Financial Services the Tribunal has given the benefit for such reason. So we are of the view that the demand in this case can be sustained only to the extent covered in the normal period of limitation.”
- In Singh Transporters Vs. Commissioner of Central Excise, Raipur cited in 2012 [27] S.T.R. 488 (Tri. – Del) it was held by the Hon'ble CESTAT New Delhi that – “Inasmuch as the issue involved is of legal interpretation of the definition of the various services and being a complicated issue, the assessee cannot be **saddled with any suppression or misstatement or mala fide intention so as to invoke longer period of limitation.**”

**Extended Period Of Limitation Cannot Be Invoked When Income Pertaining To The Issues On Which Tax Has Been Demanded Is Appropriately Reflected In The Financial Statement/Return Which Is A Public Document**

The Fact of **NON-PAYMENT AND CREDITOR STANDING IN THE BALANCE SHEET WAS PRIME FACIE AND CANNOT BE HELD TO BE SUPPRESSION OF FACTS**

***Judgements in Pre-GST Period:***

- **Suppression of facts cannot be alleged when the trading activities in form of Balance Sheet are declared**

**The Hon'ble Karnataka High Court in THE COMMISSIONER OF CENTRAL TAX, BANGALORE NORTHCOMMISSIONERATE VERSUS M/S. ABB LIMITED [2022 (6) TMI 1212 - KARNATAKA HIGH COURT] affirmed the order passed by the CESTAT, Bangalore holding that the assessee is not liable to reverse the CENVAT credit availed, on the grounds of absence of suppression of facts. Held that, balance sheet is conclusive evidence in itself to infer trading activities of an assessee and allegations levelled for suppression of facts are not tenable when the same was already available with the Revenue Department.**

2.8.2) In the matter of **Commissioner Of Service Tax, New Delhi Versus Jitender Lalwani** cited in **2017 (51) S.T.R. 312 (Tri. – Del.)** the Hon'ble CESTAT has held that – ***“It is settled principle of law that extended period is not invocable where the issue involves interpretation of various provisions of law and information is already disclosed in statutory documents such as Balance Sheet or Income Tax Returns.”***

- In **Bismee India Enterprises Vs. Commissioner of Central Excise & S.T., Kanpur** cited in **MANU/CN/0126/2018** the Hon'ble CESTAT, Allahabad, held that ***“The appellants were reflecting value of the services in their profit and loss account maintained in the ordinary course of business. Such reflection of the activities in the profit and loss account has been held to be a reason for not allowing the revenue to invoke the extended period. Inasmuch as, profit and loss account is a public document and reflection of the entire facts in the said documents cannot lead to the presence of malafide suppression on the part of the assessee.”***
- In the matter of **Central India Engineering Co. v. Commissioner of C. Ex., Nagpur** reported in **2016 (44) S.T.R. 657** the Hon'ble CESTAT Mumbai held that ***“the appellant recorded the transaction in the books of account, therefore, there is no mala fide intention on their part which shows reasonable cause for non-payment of Service Tax.”***
- The Hon'ble Mumbai CESTAT in the matter of **Khandwala Securities Ltd. v. Commissioner of Service tax, Mumbai – I** reported in **2015 (40) S.T.R. 738** held that ***“The transactions have been found to be duly recorded in the Books of Account, as found by the Audit party. .... In this view of the matter, I hold neither extended period of limitation is attracted nor any penalty is imposable under Section 76 or 78.”***
- 2.8.6) In the matter of **Valencia Construction Pvt. Ltd. v. Commr. of C. Ex., Cus. & S.T., Nagpur** reported in **2016 (41) S.T.R. 436**, the Hon'ble Mumbai CESTAT held that ***“transaction were recorded in their books of account, therefore they had no intention to evade service tax. Moreover, immediately on pointed out by the department, payment of service tax along with interest was admittedly made by the appellant and there is no contest thereon”***

**EXTENDED PERIOD OF LIMITATION cannot be invoked where assessee had bonafide belief on exemption and evidence not brought by department on evasion of tax.**

Name and Citation	Particulars
<p>[2022] 137 taxmann.com 248 (New Delhi - CESTAT)</p> <p><b>CESTAT NEW DELHI BENCH</b></p> <p><b>Sitaram India Ltd.</b></p> <p><b>v.</b></p> <p><b>Commissioner CE &amp; CGST, Division-E</b></p>	<p>Extended period of limitation is not invokable where there is no suppression of facts, assessee had bona fide belief on exemption and evidence not brought by department on evasion of tax</p> <p>Demand - Limitation - Suppression - Whether extended period of limitation can be invoked where there is no suppression of facts and appellant had bona fide belief on availability of exemption - HELD: <b><u>Extended period of limitation cannot be invoked as appellant did not suppress any fact with intent to evade duty and issue involved interpretation of law</u></b></p> <p><b><u>Absence of corroborative evidence to support that there was a deliberate attempt to suppress material facts with an intent to evade payment of tax</u></b></p> <p><b><u>-Extended period of limitation is not invokable as everything was disclosed to the Department at time of scrutiny -</u></b> Appellant was of bona fide belief that exemption is available and in such cases extended period of limitation is not invokable - Imposition of penalty does not arise as extended period is not invokable [Para 17] [In favour of Assessee]</p>
<p>[2022] 139 taxmann.com 440 (New Delhi - CESTAT)</p> <p><b>CESTAT, NEW DELHI BENCH</b></p> <p><b>Power Finance Corporation Ltd.</b></p> <p><b>v.</b></p> <p><b>Commissioner (Appeal), Central Excise &amp; Service Tax, LTU, New Delhi</b></p>	<p><b><u>In absence of fraud or Collusion or willful misstatement or suppression of facts, demand invoking extended period of limitation and consequent penalties were to be set aside</u></b></p> <p>Demand - Limitation - Show Cause Notice was issued on 12-4-2016 denying service tax taken by appellant during period 1-4-2011 to 31-12-2015 - : Demand invoking extended period of limitation and consequent imposition of penalties were to be set aside as there was no evidence of fraud or collusion or wilful miss statement or suppression of facts in matter</p>

Name and Citation	Particulars
<p>[2022] 137 taxmann.com 288 (Chandigarh - CESTAT)</p> <p>CESTAT, CHANDIGARH BENCH</p> <p>R D Contractors And Consultants</p> <p>v.</p> <p>Commissioner of Central Excise &amp; Service Tax, Panchkula</p>	<p>- Limitation – Extended period - Suppression of facts - Availment of benefit of Notification No. 30/2012-ST and computation of taxable turnover not suppressed by assessee from Department - HELD : <b><u>Absence of malafide on assessee's part, extended period of limitation is not invocable - Penalty is not imposable [Section 73 of Finance Act, 1994]</u></b></p>
<p>[2017] 88 taxmann.com 234 (SC)</p> <p>SUPREME COURT OF INDIA</p> <p>Commissioner of Central Excise, Indore</p> <p>v.</p> <p>Raymond Ltd.</p>	<p><b><u>Where material on basis of which demand had been raised against assessee was before revenue at all material points of time, extended period of limitation provided under proviso to section 11A not available</u></b></p> <p>As the materials on the basis of which the claims/demands have been raised were before the Revenue at all material points of time, No question of suppression or mis-statement can legitimately arise to enable the Revenue to avail the benefit of extended period of limitation.</p>
<p>[2013] 31 taxmann.com 67 (SC)</p> <p>SUPREME COURT OF INDIA</p> <p>Uniworth Textiles Ltd.</p> <p>v.</p> <p>Commissioner of Central Excise, Raipur</p>	<p><b><u>For invocation of extended period of limitation, there must be deliberate default on part of assessee and burden of proving same lies on Department and assessee cannot be asked to substantiate his bona fide conduct</u></b></p> <p><b><u>Section 73 of the Finance Act, 1994</u></b> - Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded - Every non-payment/non-levy of tax doesn't attract extended period - There must be some positive action which betrays a negative intention of wilful default - For operation of extended period of limitation, intention to deliberately default is a mandatory prerequisite and inadvertent non-payment doesn't attract extended period of limitation</p> <p><b><u>Burden of proving mala fide on part of assessee lies on shoulders of Department who alleges it and assessee cannot be asked to substantiate his bonafide conduct</u></b></p> <p>Further, extended period of limitation finds application only when specific and explicit armaments challenging bona fides of conduct of assessee are made in show cause notice [Paras 17, 19, 22, 24 and 25] [In favour of assessee]</p>



Name and Citation	Particulars
<p>[2014] 51 taxmann.com 35 (SC)  SUPREME COURT OF INDIA  Commissioner of Service Tax, Ahmedabad  v.  Vijay Travels</p>	<p>Where High Court held that : (a) hiring of cabs on per Km. basis is also liable to service tax under rent-a-cab services; but (b) <u>extended period was not invocable, as assessee held bona fide belief as to non-taxability, Supreme Court admitted cross Special Leave Petitions filed by assessee and revenue</u></p>
<p>Simplex Infrastructure Ltd. v. Commissioner Service Tax,  Kolkata</p>	<p><u>Extended period not applicable-when assessee is diligent in responding to all notices issued by the Department explaining nature and scope of their business with supporting documents</u></p> <p>-There was <u>full and sufficient disclosure of nature of assessee's business</u></p> <p>- There was <u>no suppression of material facts to keep Department in dark with deliberate intent to evade payment of Service tax - Section 73 of Finance Act, 1994 not invocable.</u></p> <p><u>It is settled law that the element of 'intent to evade' is inbuilt in the expression 'suppression'</u></p> <p>- Reliance in this regard is also placed on 2006 (4) S.T.R. 583 (Tri.-Bang.) in the matter of Elite Detective Pvt. Ltd. v. Commissioner, and Religare Securities Ltd. v. CST, Delhi as reported in 2014 (36) S.T.R. 937 (Tri.-Del.): wherein it was held that the suppression of fact has to be 'with intent to evade'."</p>

**SUPPRESSION OF FACTS there must be deliberate suppression of information for the purpose of evading the tax**

Name and Citation	Particulars
<p>2003 taxmann.com 2501 (SC)/[2002] 128 STC 647 (SC)[27-02-200...</p> <p>[2003] 2003 taxmann.com 2501 (SC)</p> <p>SUPREME COURT OF INDIA</p> <p>Centre for Development of Advanced Computing</p> <p>v.</p> <p>Commissioner of Central Excise, Pune</p>	<p>Section 11 of the Central Excise Act, 1944 - Excise duty - Contention of assessee that he was in bona fide belief that the goods emerging during the research and experiments were fully exempt from payment of duty - No reason to conclude that appellant would not have so believed - <b>No tangible basis for the department to come to conclusion that there was wilful suppression for evasion of duty by the appellant - Provision of section cannot be invoked extending period of limitation of five years.</b></p>
<p>Pushpam Pharmaceuticals Co.</p> <p>v.</p> <p>CCE 1995 (78) ELT 401 (SC)</p>	<p>It is in this context that the Supreme Court observed that since "suppression of facts" had been used in the company of strong words such as fraud, collusion, or wilful default, <b>suppression of facts must be deliberate and with an intent to escape payment of duty.</b></p>
<p>Continental Foundation Jt. Venture Holding v. CCE</p> <p>2007 taxmann.com 532</p>	<p>The Supreme Court held:</p> <p><b>The expression 'suppression' has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty.</b> Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."</p>

Name and Citation	Particulars
<p><b>Bharat Hotels Ltd.</b> <b>(supra)</b> <b>2018 (12) GSTL 368 (Delhi)</b></p>	<p>The Delhi High Court in Bharat Hotels Ltd. (supra) also examined at length the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Act and held as follows;</p> <p>"27. Therefore, it is evident that <b>failure to pay tax is not a justification for imposition of penalty.</b> Also, the word "suppression" in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in Uni worth (supra), <b>"misstatement or suppression of facts" does not mean any omission. It must be deliberate.</b> In other words, <b>there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid excise duty.</b></p>
<p><b>Emaar MGF Land Ltd. V. Commissioner of Central Excise and CGST (CESTAT Delhi)</b> <b>2021 (8) TMI 642 - CESTAT NEW DELHI</b></p>	<p>The Hon'ble CESTAT (<b>Respondent</b>), Delhi observed that the Appeallant did not suppress any facts from the department. <b>There is no reason or discussion given by Respondent for stating the order "in any case, the notice in this case has willfully contravened the provisions of the Finance Act."</b></p> <p><b>Also noted that when the demand u/s 73(1) of the Finance Act cannot be confirmed, it is not necessary to examine the other contentions raised by the respondent to quash the order.`</b></p>

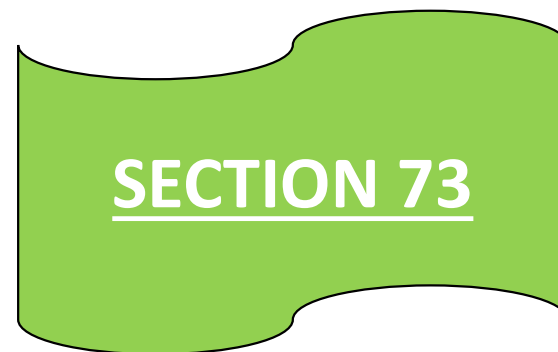
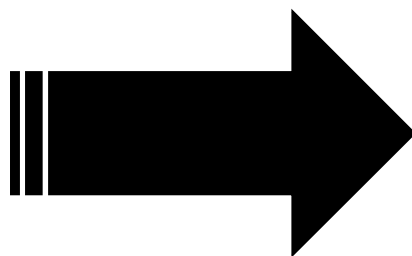
## **Re-imagining the Correct Test for Section 74**

A legally sustainable invocation of Section 74 must answer:

- 1. What was concealed?*
- 2. How was it concealed?*
- 3. Why does it show deliberate intent?*
- 4. What evidence establishes conscious evasion?*

Section 74 was never meant to be a shortcut. It was meant to be a **\*serious charge\***, attracting serious consequences—only when supported by **\*serious evidence\***.

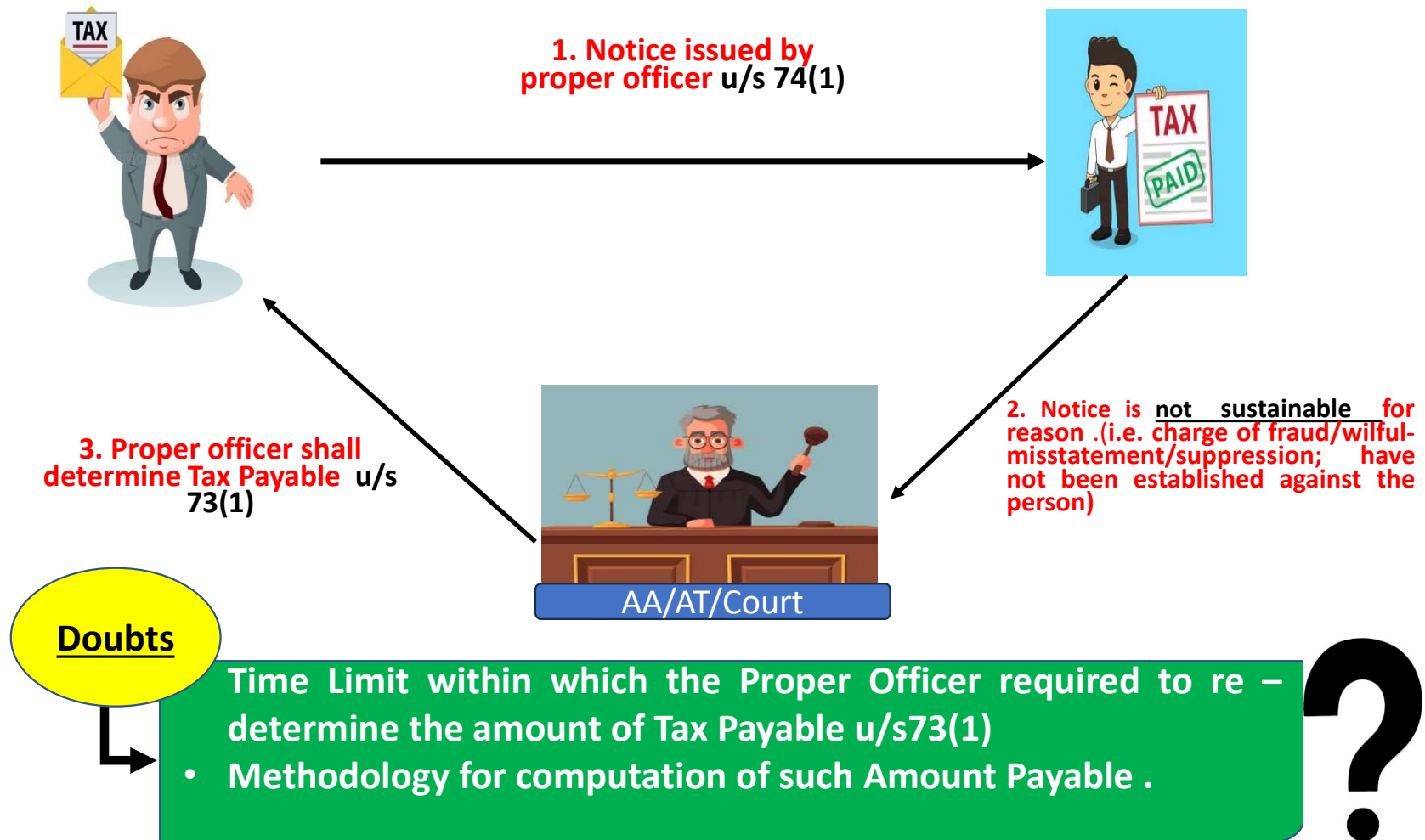
**In a tax system founded on self-assessment, trust cannot coexist with presumption of guilt.**



## Applicability of provisions of section 75(2)

Circular No. 185/17/2022-  
GST

Dated 27th December, 2022



Issue 1.

What would be the Time Period for Re-determination of the tax, interest and penalty payable by the noticee in such cases?



Clarification

**Section 75(3)**  
Order required to be issued

**Within 2 Years**

From the date of communication of the said direction.

**In Case Direction Issued by**

• **The Appellate Authority**

• **Appellate tribunal or Court**

Proper officer is required to issue the order of redetermination of tax, interest and penalty payable within the time limit as specified in u/s 75(3) , **i.e. 2 years from the date of communication of the said direction**

**With the provision of Section 75(2)**

**To Re-determine the amount of tax payable** by the noticee by deeming the notice to have been issued u/s73(1) with the provision of section 75(2)



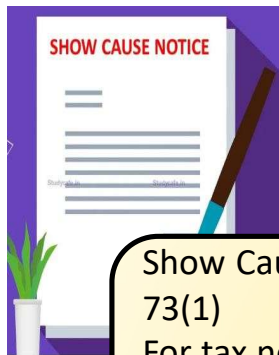
Issue 2.

How the Amount Payable by the Noticee Re-computed/ Re-determined by the Proper officer as per provisions of sub-section (2) of section 75?



Clarification

The demand would have to be **Re-determined** keeping in consideration the provisions of sub-section (2) of section 73, read with sub-section (10) of section 73 of CGST Act.



Show Cause Notice issued u/s 73(1)  
For tax not paid, or Short Paid ,erroneously refunded (**Not involve fraud or willful misstatement**)



**Section 73(2)**

Such show cause notice shall be issued **At least 3 months Prior** to the time limit specified in **section 73(10)** for issuance of order



**Section 73 (10)**

**3 years** from the due date for furnishing of annual return for the Financial year

**CRUX:**

The show cause notice issued within **2 years and 9 months** from the due date of furnishing of Annual Return or date of erroneous refund.

SCN U/S 74(1) was issued **within** 2 years & 9 months from due date of furnishing of **annual return or date of erroneous refund**, as the case may be.

Redetermination of liability



the entire amount of the said demand in the show cause notice would be covered under redetermined amount.

SCN U/S 74(1) was issued **beyond** 2 years & 9 months from due date of furnishing of **annual return or date of erroneous refund**, as the case may be.

Demand has to be dropped

Redetermination of liability



If SCN U/S 74(1) issued for multiple FYs — Each year to be considered separate

# SECTION 73 AND SECTION 74

*The End...*

# AFTER FINANCIAL YEAR 2023-24



## FINANCE Act 2024 VIDE Section 138 INSERTED SECTION 74A

**SECTION  
73**



**SECTION  
74**



**SECTION  
74A**

Lesson learnt from Service Tax Extended Period Orders held invalid later due to no suppression or fraud etc. substantiated



Amended vide Section 136 of FA, 2024

SECTION 73 – DETERMINATION OF TAX PERTAINING TO THE PERIOD UPTO FINANCIAL YEAR 2023-24 NOT PAID OR SHORT PAID OR  
ERROREOUSLY REFUNDED OR INPUT TAX CREDIT WRONGLY AVAILED OR UTILISED FOR ANY REASON OTHER THAN FRAUD

(12) The provisions of this section shall be applicable for determination of tax pertaining to the period upto Financial Year  
2023-24.

Amended vide Section 137 of FA, 2024

Insertion of New Sub Section 12 after Sub Section 11  
to Both Sections 73/74.

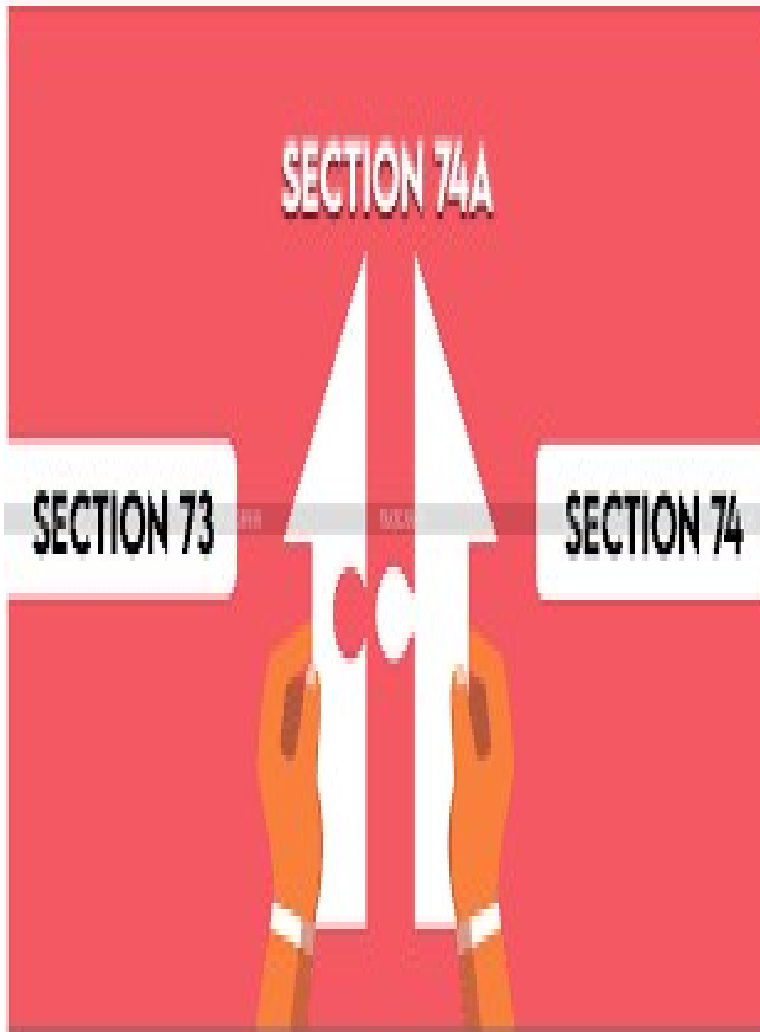
SECTION 74 – DETERMINATION OF TAX PERTAINING TO THE PERIOD UPTO FINANCIAL YEAR 2023-24 NOT PAID OR SHORT PAID OR  
ERROREOUSLY REFUNDED OR INPUT TAX CREDIT WRONGLY AVAILED OR UTILISED FOR ANY REASON OF FRAUD OR ANY WILLFUL  
MISSTATEMENT OR SUPPRESSION OF FACTS

(12) The provisions of this section shall be applicable for determination of tax pertaining to the period upto Financial Year  
2023-24.

~~Explanation 2. For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or  
information which a taxable person is required to declare in the return, statement, report or any other  
document furnished under this Act or the rules made thereunder, or failure to furnish any information  
on being asked for, in writing, by the proper officer.~~

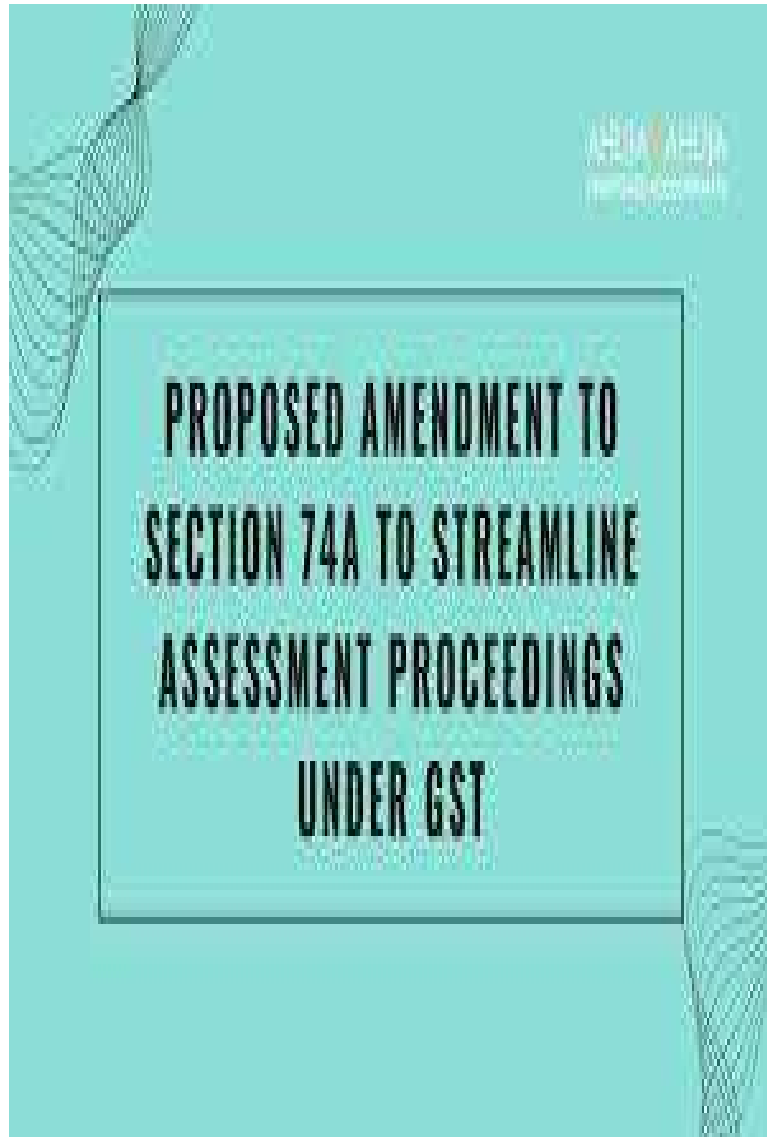
**SECTIONS 73 & 74** —————→ **Applicable till F.Y. 2023-24**

## Background about Section 74A



**Section 74A, to be effective from 1<sup>st</sup> Nov, 2024** through **GST notification No. 17/2024 – Central Tax** on September 27, 2024.

The Finance (No. 2) Bill, 2024, proposed inserting Section 74A, inserted vide section 138 of the Central Goods and Services Tax Act, 2017 (**‘CGST Act’**) to issue notices for recovery of tax, interest, and penalty and establish timelines for adjudication under GST. The Bill was passed by the Lok Sabha on 07.08.2024 and received presidential assent on 16.08.2024.



## What is section 74A?

Section 74A of the CGST Act has been inserted to determine the **tax liability and penalty** in the following cases:

- **Non Fraud Cases** (Earlier covered by Section 73)
- **Fraud cases**: Cases containing Fraud, **Willful Misstatement or Suppression of Facts** (Earlier Covered by Section 74)

The penalty is chargeable in both the above cases if:

- ☐ Tax is not paid
- ☐ Tax is short-paid
- ☐ Tax is erroneously refunded
- ☐ ITC (Input Tax Credit is wrongly availed or utilised)



# How does Section 74A differ from Section 73 and 74 of the CGST Act?



- ✓ Section 73 applies to any tax liability **when there is no** suspicion of fraud, wilful misstatement or suppression of facts.
- ✓ Section 74 applies to a tax liability **only when** there is a suspicion of fraud, wilful misstatement or suppression of facts.

Sections 73 & 74 of the CGST Act will continue to determine the demand for cases **up to Financial Year 2023-24**. So, the new Section 74A of the CGST Act is **applicable from the Financial Year 2024-25 onwards**.

To give you a hint, the most significant changes you will see in Section 74A of the CGST Act compared to Sections 73 & 74 are:

**New time-frames:** The period for issuing notices has been increased to 42 months from 3 years.

**Proportional Penalties:** Penalties have been set depending on the **degree of error**. More penalties are applicable in cases of fraud than general errors. Section 74A combines the provisions of the erstwhile sections 73 & 74.

# Difference in other procedural aspects and its impact



Regarding other procedural aspects, s. 74A of the CGST Act is worded similarly to ss. 73 and 74 of the CGST Act.

A notable difference in the new assessment procedure under s.74A of the CGST Act is that the **limitation period for non-fraud cases has been extended and reduced for fraud cases**. This may send the wrong signal to the business community that honest taxpayers are being penalised, whereas fraudulent taxpayers benefit from a reduction in the period of limitation.

The consolidation into a single section under 74A of the CGST Act aims to **streamline the process, reduce administrative complexity, and mitigate unnecessary litigation, thereby promoting a more efficient and cohesive approach to tax enforcement**.

Inserted Section 74A vide Section 138

**DETERMINATION OF TAX NOT PAID OR SHORT PAID OR ERRONEOUSLY REFUNDED OR  
INPUT TAX CREDIT WRONGLY AVAILED OR UTILISED FOR ANY REASON PERTAINING TO F.Y.  
2024-25 ONWARDS**

Inserted after Section 74

Section 74A is being inserted in section 10, section 21, section 35, section 49, section 50, section 51, section 75, section 61, section 62, section 63, section 64, section 65, section 66, section 104 and section

127

**74A**

- (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder:

**Provided that no notice shall be issued, if the tax which** has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized in a financial year is **less than one thousand rupees.**

- (2) The proper officer shall **issue the notice** under subsection (1) **within forty-two months from the due date for furnishing of annual return for the financial year** to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to **OR within forty-two months from the date of erroneous refund.**
- (3) Where a **notice has been issued** for any period **under sub-section (1),** the proper officer **may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised** **for such periods other than those covered under subsection (1),** on the person chargeable with tax.
- (4) The **service of such statement shall be deemed to be service of notice on such person under sub-section (1),** subject to the condition that the **grounds relied upon for such tax periods** other than those covered under sub-section (1) **are the same as are mentioned in the earlier notice.**
- (5) The **penalty** in case where any tax which has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised,—
- (i) **for any reason, other than** the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, shall be **equivalent to ten per cent. of tax due from such person or ten thousand rupees, whichever is higher;**
- (ii) **for the reason of fraud or any wilful-misstatement or suppression of facts** to evade tax **shall be equivalent to the tax due from such person.**

(6) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(7) The proper officer shall **issue the order under subsection (6) within twelve months from the date of issuance of notice** specified in sub-section (2):

Provided that where the proper officer is not able to issue the order within the specified period, the Commissioner, or an officer authorised by the Commissioner senior in rank to the proper officer but not below the rank of Joint Commissioner of Central Tax, may, having regard to the reasons for delay in issuance of the order under sub-section (6), to be recorded in writing, before the expiry of the specified period, extend the said period further by a maximum of six months.

(8) The person chargeable with tax where any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, may, —

- (i) before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment, and the proper officer, on receipt of such information shall not serve any notice under sub-section (1) or the statement under sub-section (3), as the case may be, in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder;
- (ii) pay the said tax along with interest payable under section 50 within sixty days of issue of show cause notice, and on doing so, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The person chargeable with tax, where any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, may,—

- (i) before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. Of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment, and the proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder;
- (ii) pay the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within sixty days of issue of the notice, and on doing so, all proceedings in respect of the said notice shall be deemed to be concluded;
- (iii) pay the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within sixty days of communication of the order, and on doing so, all proceedings in respect of the said notice shall be deemed to be concluded.

(10) Where the proper officer is of the opinion that the amount paid under Section (i) of sub-section (8) or Section (i) of sub-section (9) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in subsection (1) in respect of such amount which falls short of the amount actually payable.

(11) Notwithstanding anything contained in Section (i) or Section (ii) of sub-section (8), penalty under Section (i) of subsection (5) shall be payable where any amount of self assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

(12) The provisions of this section shall be applicable for determination of tax pertaining to the Financial Year 2024-25 onwards.

Explanation 1.—For the purposes of this section,—

(i) the expression “all proceedings in respect of the said notice” shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under this section, the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression “suppression” shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.



### Analysis of Section 74A:

(1) The Proper officer shall serve a notice to the registered taxable person, where-

- Tax has NOT ben PAID, or
- Tax has been SHORTLY PAID, or
- Tax has been ERRONEOUSLY REFUNDED, or
- Input Tax Credit has been WRONGLY AVAILED or UTILISED

requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder:

From Sub section (1) Fraud, suppression  
etc. Reference deleted—Covering all  
bonafide and non bonafide cases..

Provided that NO NOTICE SHALL BE ISSUED, if

Amount of Tax or Input tax Credit < Rs. 1,000/-

(2) Notice under Sub Section (1) to be ISSUED WITHIN:

FORTY TWO MONTHS from the DUE DATE for FURNISHING ANNUAL RETURN for the CONCERNED FINANCIAL YEAR, in case of Tax NOT PAID or SHORT PAID or ITC WRONGLY AVAILED OR UTILISED

OR

FORTY TWO MONTHS from the DATE OF ERRORNEOUS REFUND

## A GLANCE AT TIME LIMIT FOR NOTICE AND ORDER UNDER OLD AND NEW REGIME

### **BONAFIED CASE:**

PARTICULARS	SECTION 73 (Upto F.Y. 2023-24)	SECTION 74A (From F.Y. 2024-25)
Time Limit to <b>Issue Notice</b>	<b><u>Within 33 Months</u></b> from the Due Date of Furnishing Annual Return	<b><u>Within 42 Months</u></b> from the Due Date of Furnishing Annual Return
Time Limit to <b>Issue Order</b>	<b><u>Within 3 Years</u></b> from the Due Date of Furnishing of Annual Return	<b><u>Within 12 Months</u></b> from the date of Issuance of Notice u/s 74A and can be <b><u>Further Extended by 6 months</u></b>  <b><u>Original = 42M + 12M</u></b> <b><u>Extended = 42M + 18M</u></b>



## UNDERSTANDING TIME LIMIT TO ISSUE NOTICE AND ORDER UNDER OLD AND NEW TAX REGIME IN CASE OF BONAFIED CASES

**Lets Take an Example for F.Y. 2024-25; Due Date of Filing the Annual Return for F.Y. 2024-25 = 31.12.2025**

PARTICULARS	OLD – SECTION 73	New SECTION 74A
Time Limit to <b>Issue Notice</b>	<u><b>Upto 30.09.2028</b></u> , Notice for F.Y. 2024-25 can be Issued	<u><b>Upto 30.06.2029</b></u> , Notice for F.Y. 2024-25 can be issued
Time Limit to <b>Issue Order</b>	<u><b>Upto 31.12.2028</b></u> , Order for F.Y. 2024-25 needs to be issued	<p><u><b>Original Time Period: Upto 30.06.2030</b></u>, Order for F.Y. 2024-25 needs to be Issued. (Suppose Notice issued on 30.06.2029)</p> <p><u><b>Extended Time Period: Upto 31.12.2030</b></u>, Order for F.Y. 2024-25 needs to be Issued after recording in writing reason for delay by the Designated Officer</p>

## A GLANCE AT TIME LIMIT FOR NOTICE AND ORDER UNDER OLD AND NEW REGIME

### NON-BONAFIED CASE:

PARTICULARS	SECTION 74 (Upto F.Y. 2023-24)	SECTION 74A (From F.Y. 2024-25)
Time Limit to <b>Issue Notice</b>	<u>Within 54 Months</u> from the Due Date of Furnishing Annual Return	<u>Within 42 Months</u> from the Due Date of Furnishing Annual Return
Time Limit to <b>Issue Order</b>	<u>Within 5 Years</u> from the Due Date of Furnishing of Annual Return	<u>Within 12 Months</u> from the date of Issuance of Notice u/s 74A and can be <u>Further Extended by 6 months</u>  <u>Original = 42M + 12M</u> <u>Extended = 42M + 18M</u>



## UNDERSTANDING TIME LIMIT TO ISSUE NOTICE AND ORDER UNDER OLD AND NEW TAX REGIME IN CASE OF NON-BONAFIED CASES

**Lets Take an Example for F.Y. 2024-25; Due Date of Filing the Annual Return for F.Y. 2024-25 = 31.12.2025**

PARTICULARS	OLD – SECTION 74	New SECTION 74A
Time Limit to <b>Issue Notice</b>	<u><b>Upto 30.06.2030</b></u> , Notice for F.Y. 2024-25 can be Issued	<u><b>Upto 30.06.2029</b></u> , Notice for F.Y. 2024-25 can be issued
Time Limit to <b>Issue Order</b>	<u><b>Upto 31.12.2030</b></u> , Order for F.Y. 2024-25 needs to be issued	<p><u><b>Original Time Period: Upto 30.06.2030</b></u>, Order for F.Y. 2024-25 needs to be Issued. (Suppose Notice issued on 30.06.2029)</p> <p><u><b>Extended Time Period: Upto 31.12.2030</b></u>, Order for F.Y. 2024-25 needs to be Issued after recording in writing reason for delay by the Designated Officer</p>

(3) **Notice has been issued** for any period **under sub section (1)**,

The **Proper Officer** may serve a **STATEMENT, containing the details** of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised **FOR SUCH PERIOD OTHER THAN THOSE COVERED UNDER SUB-SECTION (1).**

(4) **Service of Statement** (referred in sub section (3)) Shall be Deemed to be Service of Notice u/s 74A(1)

**Condition:** The Grounds relied upon for such Tax Periods (covered in statement) are the same as are mentioned in the earlier notice.

(5) **Penalty** in case of any of the four limbs covered under section 74A:

(i) **For Any Reason, OTHER THAN** the reason of fraud or any wilful-misstatement or suppression of facts to evade tax,

PENALTY = **10% of Tax Due** from RTP

OR

**Rs. 10,000/-**, whichever is **HIGHER**

(ii) **For the reason of fraud or any wilful-misstatement or suppression of facts to evade taxx,**

PENALTY = **100% of Tax Due** from RTP

(6) The proper officer shall, **after considering the representation**, if any, made by the person chargeable with tax, **determine the amount of tax, interest and penalty due from such person and issue an order.**

(7) Period to **ISSUE ORDER UNDER SUB-SECTION (6):**

Within **TWELVE MONTHS** from  
the **DATE OF ISSUANCE** of  
**NOTICE** under Sub-Section (2)

Provided that:

**FAILURE TO ISSUE ORDER WITHIN 12 MONTHS:**

Commissioner, or an officer authorised by the Commissioner senior in rank to the proper officer but not below the rank of Joint Commissioner of Central Tax

Reason for Delay  
to be **Recorded in  
Writing**

**Extend** the said  
specified period  
by a **MAXIMUM  
OF 6 MONTHS**

# Penalty under Section 74A

<u>Situation</u>	<u>Section -74A(8)</u>	<u>Section-74A(9)</u>
Tax & Interest paid before issue of SCN	No Penalty No SCN	15% of Tax
Tax & Interest paid within 60 days of issue of SCN	No Penalty	25% of Tax
Tax & Interest paid within 60 days of communication of Order	10% of Tax or 10,000/-, whichever is higher	50% of Tax
Maximum Penalty	10% of Tax	100% of Tax



(10) In the opinion of the Proper officer:

Amount Paid under Section (i) of  
Sub-Section (8)

OR

Amount Paid under Section (i) of Sub-  
Section (9)

Falls Short of the Amount Actually Payable

**Shall Proceed**

**Issue Notice** under Sub-Section (1) for the **AMOUNT FALLS SHORT**

(11) Notwithstanding anything contained in Section (i) or Section (ii) of sub-section (8) (NON-FRAUD CASES)

**PENALTY UNDER Section (i) of SUB-SECTION (5) shall be payable:**

Where any amount of  
SELF ASSESSED TAX or  
any AMOUNT COLLECTED  
AS TAX

**NOT PAID**

Within a Period of 30  
Days from the Due Date  
of Payment of Such Tax

(12) The provisions of this section shall be applicable for determination of tax pertaining to the Financial Year 2024- 25 onwards.

**Explanation:**

**Explanation 1:**

**Proceedings u/s 74A**

**INCLUDE**

**Proceedings u/s  
132(prosecution)**

Proceedings against all persons to pay penalty u/s 122 and 125 deemed to be concluded



**Where, Notice for Proceedings is Issued to MAIN PERSON and OTHER PERSON and Proceedings  
Concluded against the MAIN PERSON**

**Explanation 2:**

**“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.**

## Why was it introduced?

### Tailing the background through the minutes of the 53<sup>rd</sup> council meeting

- Amendments in Section 73 and Section 74 of COST Act. 2017 and insertion of a new Section 74A in CGST Act. to provide for **common time limit for issuance of demand notices** irrespective of whether case involves fraud, suppression, wilfull misstatement etc., or not.

The Hon'ble Member from Meghalaya supported the viewpoint of Hon'ble Member from Kerala, however, concurred with the recommendation of Law Committee and agreed to implementing the provision recommended by the Law Committee.

**Decision:** The Council agreed with the recommendations of the Law Committee along with the draft Notification. Agenda Item 3 (iv): Amendments in Section 73 and Section 74 of CGST Act, 2017 and insertion of a new Section 74A in CGST Act, **to provide for common time limit for issuance of demand notices and orders irrespective of whether case involves fraud, suppression, wilful misstatement etc., or not.**

- ❖ The Pr. Commissioner. GST Policy Wing stated that different time limits have been specified for issuing demand notice under sections 73 and 74 of the CGST Act. While section 73 covers cases where fraud, suppression, wilful misstatement etc., are not involved, section 74 covers those cases involving fraud or willful misstatement etc. Due to the different time limits for issuing demand notices under sections 73 and 74, **revenue can be lost on account of the demand getting time-barred, when cases initially issued under section 74 are subsequently found to be covered under section 73** as charges of fraud, willful misstatement, etc. are not found substantiated. **This is due to shorter time limit in section 73 in comparison to section 74.** Accordingly, there may be a need to address this concern.
- ❖ Law Committee felt that it may be desirable that **to avoid such revenue loss, there may be a need to have the same the limitation period for issuing demand notices and orders under both type of cases, viz. those involving fraud, suppression of facts, wilful misstatement and those not involving fraud, suppression of facts, wilful misstatement,** while keeping a higher penalty for cases involving fraud, wilful misstatement, or suppression of facts.
- ❖ The **time available for issuance of adjudication order under sections 73 and 74 of the CGST Act of 3 months and 6 months respectively is not sufficient to complete the process in a sound legal way,** as the noticee is required to be provided with an opportunity to explain his stand and present evidence of the same which is a time- consuming process since the noticee may need ample time and opportunity to present his case and for the tax authority to **verify the same.**
- ❖ Law Committee felt a need to amend the provisions to provide for the same time limit for issuing of demand notices under both type of cases, viz, those involving fraud, suppression, wilful misstatement and those not involving fraud, suppression, wilful misstatement. Besides, **the time limit for issuance of demand orders also needs to be increased to provide more time to taxpayers and tax officers for the adjudication process.**

Amended vide Section 119 of FA, 2024 effective vide NOTIFICATION NO. 17/2024-CENTRAL TAX

## SECTION 17(5): BLOCKED CREDIT OR INELIGIBLE INPUT TAX CREDIT

**No Requirement of Tax under section 129 and 130, only Penalty in Lieu of Confiscation.**

### Provision Before Amendment

(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

.....

(i) any tax paid in accordance with the provisions of ~~section 74, 129 and 130~~.

### Provision Post Amendment



74A  
(Fraud etc.  
cases)

(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

.....

(i) any tax paid in accordance with the provisions of **section 74 in respect of any period upto Financial Year 2023-24.**

- Blockage of ITC u/s 17(5) has been removed for payments made under sections 129 and 130.
- Only to Restrict the non-availability in respect of Tax paid under Section 74 only for demands upto F.Y. 2023-24.
- From 2024-25, No Blockage of ITC for Taxes paid by the Supplier through Demand and Recovery Provisions, but subject to the time limit for ITC availment u/s 16(4)

- ❖ Law committee further recommended that the limitation period for issuing demand notices, **may be made forty two months from the relevant date**, and the time limit for issuance of **demand orders may be kept at twelve months from the date of issuance of the demand notice**, irrespective of whether the charges of fraud, suppression or willful misstatement of facts are invoked or not. It was also recommended that *some flexibility of time limit for issuance of demand order may be provided in cases where the proper officer is not able to issue the order within the period specified above due to some situations, and in the deserving cases, the Commissioner, or an officer authorized by the Commissioner senior in rank to the proper officer but not below the rank of Joint Commissioner of Central Tax, may extend the said period further by a maximum of six months, alter recording the reasons in writing.*
- ❖ There is a need to have a **relook** at the time period provided for payment of entire tax demanded **along with interest and reduced penalty by the taxpayer for concluding the proceedings under the said sections**. Law Committee felt that the time period of thirty days is too short for the taxpayers to analyze the said notice, and take a decision for payment of full amount of tax demanded, along with interest, and reduced penalty, as applicable. In view of above, the Law Committee recommended to **increase the said time limit from '30 days' to '60 days' under the sub-section (8) of section 73 and sub-section (8) of Section 74**.
- ❖ Law Committee after due deliberations recommended the insertion of a new section. Section 74A to the CGST Act, 2017, as detailed in the agenda note. The Law Committee also recommended amendments in Sections 73 and 74 of the CGST Act, to **restrict their applicability up to FY 2022-23**.
  - ❖ Consequential amendments need to be done multiple sections of CGST Act. 2017, as detailed in the agenda note. One of the consequential amendment recommended by the Law Committee **pertain to that in section 17(5) of the CGST Act so as to restrict clause (i) of section 17(5) in respect of tax paid up to FY 2022-23**. He mentioned that after insertion of proposed section 74A in CGST Act for determination of tax demands for FY 2023-24 onwards, there shall be no distinction between the tax demanded and **paid in terms of section 73 and section 74, and therefore, there will be no need to block input tax credit** on the tax paid in accordance with section 74 in the said clause for FY 2023-24 onwards. Besides, it was felt that this will also help in recovery of taxes demanded under Section 74A of the CGST Act. 2017.

➤ In Officers' meeting held on 21.06.2024, officer from State of Bihar in mentioned that there are cases where SCNs for FY 2023-24 have already been issued under existing Section 73. He mentioned that it was accordingly suggested in Officers' meeting that the proposed Section 74A may be implemented for demands of FY 2024-25 onwards. He also mentioned that consequential changes, including in section 17(5)(i) of CGST Act may also be done accordingly for implementing them for demands for FY 2024-25 onwards.

➤ The Hon'ble Member from West Bengal raised concerns regarding the merger of sections 73 and 74 of the CGST Act, 2017, questioning the appropriateness of allowing input tax credit (ITC) on taxes paid in cases involving fraud.

In response. Pr. Commissioner, GST Policy Wing clarified that penalties differ significantly between fraud and non-fraud cases, with fraud cases attracting a 100% penalty on the tax demanded compared to 10% for non-fraud cases. He stated that the issue is whether recipient should be denied credit altogether where tax has been paid along with interest and higher penalties are being charged from the taxpayer. The Law' Committee deliberated on this and felt that consequent of having a single provision for demands in cases involving fraud and not involving fraud, there may not be a case for blocking input tax credit on the tax paid.

Responding to the concern raised by the Hon'ble Member from West Bengal, the Secretary stated that denying ITC could lead to double taxation and excessively harsh penalties, including penal interest at 18% per annum. This coupled with a 100% penalty on tax demands, would discourage compliance, if input tax credit is also denied to the recipient. He proposed allowing ITC where taxes have been paid, arguing that penalties are different between fraud and non-fraud cases to maintain fairness. He also added that overly stringent penal provisions, by denial of input tax credit to recipients, would significantly burden taxpayers.

**Decision:** The Council agreed with the said recommendations of the Law Committee, along with the suggestions made in Officers' meeting and to implement the proposed Section 74A for demands for FY 2024-25 onwards.



Agenda No	Issue/Proposal	Status during Officers Meeting
3(iv) [Vol 1- Pg174- 190]	<p>Amendments in Section 73 and Section 74 of CGST Act, 2017 and insertion of a new Section 74A in CGST Act, to provide for common time limit for issuance of demand notices and orders irrespective of whether case involves fraud, suppression, etc. or not</p> <ul style="list-style-type: none"> <li>To provide for a common time limit for issuance of demand notices and orders in cases involving charges of fraud or willful misstatement and not involving the charges of fraud or willful misstatement etc.</li> <li>To provide a time limit of 42-months for issuing demand notices from the due date of annual returns,</li> <li>To provide a time limit of 12-months from the date of issuance of demand notices, for issuing demand orders, along with a power to the Commissioner, or an officers senior in rank to the proper officer but not less than Joint Commissioner, as authorized by the Commissioner, to extend the said time period by a maximum of another six months, in genuine cases, for reasons to be recorded in writing.</li> <li>This may be made applicable for the demands for the period FY 2023-24 onwards.</li> <li>To implement these changes, a new Section 74A may be inserted in the CGST Act for FY 2023-24 onwards.</li> <li>For demands for period upto FY 2022-23, the existing provisions of section 73 and 74 to continue.</li> <li>Consequential amendments in other sections of the Act also to be made.</li> </ul>	<p><u>Agreed.</u></p> <p>State of Bihar mentioned that there are cases where SCNs for FY 2023-24 have already been issued under existing Section 73. <b>Therefore, it is proposed that we may implement the proposed Section 74A for demands of FY 2024-25 onwards.</b> Consequential changes may be done accordingly.</p>



# **The 12 GOLDEN POINTERS to be considered before replying the show cause notices U/S 73 or 74 or Filing of appeals.**

**1. The notice must specify:**

- whether it is: U/s 73 or 74 along with the limb,
- whether it is: tax not paid, tax short paid, erroneously refunded or ITC wrongly availed or utilized.

**2. The monetary limits must be adhered to.**

**3. The Time period limits must be adhered to while issuing the notices.**

**4. The notice must come from **the jurisdictional officer**.**

**5. The requisite approvals must have been taken by the officer.**

**6. The mode of service of the notice must be as per **Sec 169** of CGST act.**

**Note:** Please make sure **there is difference between the mode of service and the communication to the taxpayer.**

7. Order must **not travel beyond SCN**.

8. The order must be passed considering the reply given by the taxpayer.

9. **Personal hearing** must be given to the taxpayer, even if not demanded by the taxpayer and adverse opinion is being formed by the officer.

10. The order passed **must be a speaking order** with all the base documents or evidences placed on record.

11. The order **must be passed with a DIN**, even the notice must have the DIN placed on it if it is **from the central department or state reference number** wherever applicable in the states.

12. **Unsigned Order:** The order passed must be signed order because as for the various judgments, the unsigned order is **VOID AB INITIO**.

# THANK YOU

**Disclaimer**

The views expressed are solely of the author and the content of this document is solely for information purpose and not to be construed as a professional advice. In cases where the reader has any legal issues, he/she must in all cases seek independent legal advice.

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