

During GST Audit the Proper Officer may initiate action under Section 73 or 74 of the CGST Act

The Hon'ble Madras High Court in the case of *M/s. ABT Ltd. v. The Additional Commissioner of GST and Central Excise [Writ Petition No. 1756 of 2024 dated January 30, 2024]* dismissed the writ petition and held that during the conduct of GST Audit under Section 65 of the Central Goods and Services Tax Act, 2017 ("**the CGST Act**"), if it indicates that tax was not paid or short paid or that Input Tax Credit ("**ITC**") was wrongly availed or utilized, the proper officer may initiate the action under Section 73 or 74 of the CGST Act under Section 65(7) of the CGST Act.

Facts:

M/s. ABT Ltd. ("**the Petitioner**") was a public limited company engaged in the business of supplying light vehicles, their parts, and also the servicing of such vehicles. The Petitioner was a registered person under GST laws in respect of multiple places of business. The books of account of the Petitioner for the financial years 2017-2018 to 2020-2021 were audited by an audit group by issuing notice in Form GST ADT-01 under Section 65 of the CGST Act. Pursuant to such audit, a draft audit report containing audit observations was issued. This was followed by a revised draft audit report and eventually the issuance of an audit report in Form GST ADT-02 on September 07, 2023. Thereafter, a show cause notice dated September 13, 2023 ("**the Impugned SCN**") was issued under Section 73 of the CGST Act in respect of about 11 audit observations and a separate show cause notice under Section 74 of the CGST Act on December 14, 2023 ("**the Impugned SCN**") in respect of about 5 audit observations was issued.

The Petitioner challenged the Impugned SCN on about three grounds:

1. The Audit Report did not record findings of fraud, willful-misstatement or suppression of fact in respect of any of the observations made therein and in the absence of such findings in the audit report, the proper officer does not have the jurisdiction to proceed under Section 74 of the CGST Act.

2. Intimation in Form GST DRC-01A was not issued to the Petitioner and Rule 142(1) of the Central Goods and Services Tax Rules, 2017 (**“the CGST Rules”**) were amended by replacing the word 'shall' with 'may',
3. The Impugned SCN was related to a particular unit of the Petitioner and therefore, expenditure relating to only such unit should have been taken into consideration. Thus, expenses were taken from the consolidated balance sheet was arbitrary.

Issue:

Whether the Proper Officer can initiate action under section 73 or 74 of the CGST Act after issue of Audit Report?

Held:

The Hon'ble Madras High Court **Writ Petition No. 1756 of 2024** in held as under:

- The Petitioner contended that the audit report should also contain findings of fraud or wilful-misstatement or suppression of facts. However, there is nothing in the language of Section 65 to indicate that the audit report should contain such findings. On examining the audit report, undoubtedly, it indicates that tax was not paid or short paid or that ITC was wrongly availed or utilised. The Respondent have an option to initiate action under sub-section (7) of Section 65 of the CGST Act prescribes that *“Where the audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under Section 73 or Section 74.”* Thus, the obligation imposed by the Respondents with regard to the content of the audit report appears to be satisfied.
- Rule 142(1) of the CGST Rules was amended from October 15, 2020, the Impugned SCN in Form GST DRC-01A was issued on December 14, 2023, which is subsequent to the

date of amendment therefore, even if the amendment is prospective, the amendment would apply with regard to the Impugned SCN.

- The Impugned SCN was on the basis that expenses were taken from the consolidated balance sheet, doesn't justify interference with the Impugned SCN under Article 226 of the Constitution of India. Hence, the writ petition was dismissed.

Our Comments:

Section 65 of the CGST Act deals with GST Audit by a tax authority, whereby sub-section (7) of Section 65 of the CGST Act indicates that the audit conducted under sub-section (1) of Section 65 of the CGST Act should result in the detection of tax not paid or short paid or erroneously refunded, or that ITC was wrongly availed or utilised, the proper officer may initiate action under Section 73 or 74 of the CGST Act. Thus, the relevant provision indicates that the proper officer has the option to take action against the assessee if on examining the audit report, undoubtedly, it indicates that tax was not paid or short paid or that ITC was wrongly availed or utilised.

Rule 142(1A) of the CGST Rules has been prospectively amended vide *Notification No.79/2020 – Central Tax dated October 15, 2020*, and will be applicable to show cause notice subsequent to the date of amendment.

Author can be reached at info@a2ztaxcorp.com)

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