

Recovery under GST without issuance of SCN is not permissible

There was amendment in sec 75(12) of the Central Goods and Services Tax Act, 2017 (“**the CGST Act**”), which were introduced vide the Finance Act, 2021 but brought into effect only from January 1, 2022 through Notification no. 39/2021-central tax dated December 21, 2021.

“Section 75 General provisions relating to determination of tax.

(12) Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.

Explanation.—*For the purposes of this sub-section, the expression “self-assessed tax” shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39.”*

The above amendment has been made to clarify that “self-assessed tax” shall include the tax payable in respect of outward supplies which have been furnished in Form GSTR-1 under sec 37 of the CGST Act, **but not included in the return furnished in Form GSTR-3B under sec 39 of the CGST Act.**

Hence, recovery under GST may be initiated straightaway under sec 79 of the CGST Act (i.e. through various modes like detaining/selling goods belonging to defaulter which are under control of the department, garnishee proceedings, distaining and selling of movable or immovable property belonging to the defaulting person, etc.) without even resorting to issuance of SCN under sec 73 (Non-Fraud Cases) or sec 74 (Fraud Cases) of the CGST Act.

The stated move was aimed at curbing the menace of fake billing whereby sellers was showing higher sales in GSTR-1 to enable a purchaser to claim an input tax credit (“ITC”) but report suppressed sales in GSTR-3B to lower GST liability.

In this context, various doubts are being raised by the trade and the field formations regarding modalities for initiation of the recovery proceedings and in the interest of ease of doing business, the Central Board of Indirect Taxes and Customs (“**CBIC**”) issued guidelines vide **Instruction No. 01/2022-GST dated January 7, 2022 stating that an opportunity needs to be provided to the concerned businesses for short payment or non-payment of the amount of self-assessed tax liability.**

It is to be noted that in some cases, there may be a genuine reason for the differences between the details of outward supplies declared in GSTR-1 and those declared in GSTR-3B.

For example, if a taxpayer has wrongly furnished its outward supply in GSTR-1 as Rs 10,00,000 whereas it should have been only Rs 1,00,000 and has paid GST in GSTR-3B on Rs 1,00,000. Consequently, there would be a difference between outward supply shown in GSTR-1 vs. GSTR-3B of the relevant period.

Another example, the registered person may have a omissions in the GSTR-1 or GSTR-3B of a particular month.

So, now question arises whether any recovery proceedings can be initiated without issuance of SCN u/s 73 or 74 of the CGST Act:

In our submission as reproduced below, recovery should not be initiated without issuance of SCN.

1. Any errors or omissions can be rectified by the registered person in a subsequent GSTR-1 or GSTR-3B as per the sec 37(3) or sec 39(9) of the CGST Act as the case maybe .
2. Any initiation of recovery proceedings under sec 78 of the CGST Act is permissible for failure of payment any amount payable by a taxable person in pursuance of an order passed under the CGST Act within a period of three months from the date of service of such order.

Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him.

Therefore, if the registered person either fails to reply to the communication, or fails to make the payment of such amount short paid or not paid, within the time prescribed as per the CGST Act, then the tax officer may proceed for recovery.

Legal Jurisprudence:

The Bombay High Court in the case of *“Sheetal Dilip Jain v. the State of Maharashtra & Ors. [Writ petition (L) no.17591 of 2022 dated September 20, 2022]”* has struck down the recovery proceedings without issuance of SCN and held that the order is erroneous because in the SCN only 7 days was given to reply to the SCN and on the 8th day the order came to be passed. Therefore, the question of not paying within 30 days of the issue of the notice will not arise.

Relevant extract of the judgment is reproduced hereunder:

“5. These acts/omissions of Respondents’ officers is adding to the already overburdened dockets of the Court. Valuable judicial time is wasted because such unacceptable orders are being passed by Respondents’ officers. The officers do not seem to understand or appreciate the hardship that is caused to the general public. In this case, Petitioner could afford (we have assumed) to spend on a lawyer and approach this Court but for every Petitioner, we would hazard a guess, atleast ten would not be able to afford a lawyer and approach the Court and their registrations may get cancelled by the very same officers who have passed such patently illegal orders. Cost of Rs. 10000/- imposed on GST officer.”

Similar Judgments in this regard are as under:

- *Karnataka High Court in the case of M/s. LC Infra Projects Pvt. Ltd v. the UOI [WRIT PETITION No.28876 of 2019 (T-RES) dated July 22, 2019] has held that the issuance of SCN is sine qua non to proceed with the recovery of interest payable thereon under sec 50 of the CGST Act and penalty leviable under the provisions of the Act or the Rules made thereunder. Determination of the interest payable under sec 50 of the CGST Act without issuing SCN is in breach of principles of natural justice and therefore, it cannot be sustained. Sec 75(12) does not empower the authorities to proceed with the recovery without issuing SCN.*

Further, the above order was also upheld by the Karnataka HC [Division Bench] in *UOI v. LC Infra Projects Pvt Ltd [W.A No. 188 (T-RES) of 2020 dated March 3, 2020]* Relevant extract of the judgment is reproduced hereunder:

“13. *Therefore, the Learned Single Judge rightly held in Paragraph 6 of the impugned judgment that issuance of show cause notice is sine qua non to proceed with the recovery of interest payable in accordance with sub-section (1) of Section 50 of the GST Act.*

14. *The impugned demand has been set aside only on the ground of the breach of the principles of natural justice by granting liberty to the respondents to initiate action in accordance with law obviously for recovery of interest.*

15. *Though a perusal of Paragraph 4 of the impugned order shows that the same is based on concession made by the Learned Counsel for the appellant, in Paragraph 6 the Learned Single Judge has laid down the law.*

16. *For the reasons which we have recorded earlier, we concur with the ultimate view taken by the Learned Single Judge that before recovery interest payable in accordance with Section 50 of the GST Act, a show cause notice is required to be*

issued to the assessee. Hence, no case for interference is made out. The appeal is accordingly dismissed. Interim applications do not survive.

17. *Further, we make it clear that as far as Annexure-K is concerned, as the main demand for interest has been set aside, Annexure-K, which is the order of attachment, also will have to be set aside. We make it clear that we have not gone into the question whether the principles of natural justice are required to be complied with before taking action in accordance with Rule 145 of the Rules framed under the GST Act.”*

Note: Notice has been issued [2021 (53) GSTL J10 (Supreme Court) on the issue that whether demand of interest without issuing any show cause notice amounts to violation of principles of natural justice.

- The Jharkhand HC in the case of *Mahadeo Construction Company. v. UOI [W.P. (T) No. 3517 of 2019 dated April 4, 2020]* has held that liability of interest was required to be adjudicated in event an assessee disputed computation or very levability of same, Thus, without initiation of any adjudication proceedings, no recovery proceedings under sec 79 of the CGST Act could be initiated for recovery of interest amount.

Relevant extract of the judgment is reproduced hereunder:

“22. *The next issue for adjudication in the instant writ application is as to whether garnishee proceedings under Section 79 of the CGST Act can be initiated for recovery of interest without adjudicating the liability of interest, when the same is admittedly disputed by the assessee. Section 79 of the CGST Act empowers the authorities to initiate garnishee proceedings for recovery of tax where “any amount payable by a person to the Government under any of the provisions of the Act and Rules made thereunder is not paid”. Since in the preceding paragraphs of our Judgment, we have already held that though the liability of interest is automatic, but the same is required to be adjudicated in the event an assessee disputes the computation or very levability of interest, by initiation of adjudication proceedings under Section 73 or 74 of the CGST Act, in our opinion, till such adjudication is completed by the Proper Officer, the amount of interest cannot be termed as an amount payable under the Act or the Rules. Thus, without initiation of any adjudication proceedings, no recovery proceeding under Section 79 of the Act can be initiated for recovery of the interest amount.*

23. *Accordingly, the impugned order dated 8-3-2019 issued by Respondent No. 3 (Superintendent, Daltonganj Range) (as contained in Annexure-7) is hereby quashed/set aside and, further, garnishee notice contained in the Order dated 22-5-2019 (Annexure-10 of the Supplementary Affidavit) issued under Section 79 of*

the CGST Act to the Banker of the petitioner for recovery of interest amount of Rs. 19,59,721/- is also, hereby, quashed/set aside.”

Note: Notice has been issued in the above matter [2021 (52) GSTL J120) Supreme Court].

Conclusion: Any recovery proceedings can be initiated only after issuance of SCN, followed by adjudication proceedings u/s 73 or 74 of the CGST Act in terms of Sec 78 read with Sec 79 of the CGST Act.

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