

Section 168A Of CGST Act, 2017 – Invokable Or Not?

1. A large number of Show Cause Notices (SCN) have been issued under Section 73 of the Central/State Goods And Services Tax Act, 2017 (“CGST”/”SGST”) for the Financial Year 2017-18 in the month of September 2023.

2. In this regard, the Department is apparently relying upon Notification No. 9/2023 Central Tax dated 31.03.2023, issued by the Central Government, in terms of Section 168A of the CGST Act, under which the time limit specified under Section 73(10) for issuance of Order under Section 73(9) of the CGST Act, 2017 in respect of FY 2017-18 was extended upto 31.12.2023. Basis the said extension, in terms of Section 73(2) of the Act, the time limit for issuance of SCNs for the financial year 2017-18 was extended upto 30.09.2023 according to the Department.

3. It is essential to discuss the validity and legality of the SCNs issued by the Department, basis such extension of time limit by the aforesaid Notification.

4. Before advertng to the above discussion, it would be imperative to briefly examine the legal position/provisions, which read as under:

- **Section 73 of the CGST Act, 2017** empowers the Proper Officer to determine the tax liability of a person who has failed to pay the tax or has short-paid the tax or wrongly availed ITC etc. Section 73(10) of the CGST Act, 2017 provides for time limit of three years from the due date, for furnishing of Annual Return for the financial year, for issuance of Order under Section 73(9) of the CGST Act, for recovery of tax not paid or short paid or of input tax credit wrongly availed.
- **Section 44 of the CGST Act** provides for the time limit to furnish an Annual Return for every financial year, before the thirty-first day of December following the end of such financial year.
- Thus, on a co-joint perusal of the above provisions, it can be seen that the time limit to file an Annual Return for the financial year 2017-18 was 31.12.2018. Accordingly, the due date to pass an Order under Section 73(10) of the CGST/SGST Act, 2017 for the financial year 2017-18 was 31.12.2021 and the due date to issue the Notice under Section 73(2) of the CGST Act, 2017 for the said period was 30.09.2021.
- Vide Order No. 08/2019-Central Tax dated 14.11.2019 and Order No. 10/2019-Central Tax dated 26.12.2019, the due date to file Annual Return for financial year 2017-18 was extended to 05.02.2020 / 07.02.2020. Thus, the last date to pass Order under Section 73(10) of the CGST Act, 2017 was extended till 05.02.2023 / 07.02.2023. Accordingly, the last date to issue Notice under Section 73(2) of the CGST Act, 2017 was 07.11.2022.
- However, vide **Notification No. 9/2023-CT dated 31.03.2023 issued by Central Government**, in terms of Section 168A of the CGST Act, 2017, the time limit specified under sub-section (10) of Section 73 for issuance of Order has been extended till 31.12.2023.

5. It needs to be seen whether the said Notification No.9/2023-CT extending the time limit for issuance of Order under Section 73(10) is in violation of Section 168A of the Act?

- The above Notifications have been issued by the Central Government in exercise of powers under Section 168A of the CGST/SGST Act. Section 168A empowers the

Government to issue Notification to extend time limit specified/prescribed/notified under the CGST Act which cannot be complied due to force majeure.

- Section 168A begins with a non-obstante clause. Thus, the time-limit prescribed under the Act can only be extended in special circumstances laid down under the said section. From a perusal of Section 168A of the CGST Act, 2017, it is evident that the same can be invoked only when the required action cannot be completed due to force majeure.
- The expression "force majeure" is defined in the Explanation to the said provision to mean a case of war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature or otherwise, affecting the implementation of any of the provisions of this Act.
- Neither Notification No. 9/2023-CT dated 31.03.2023 nor the Recommendation from the GST Council set out any reason as to why it was not possible for the State/Union officers to complete assessment under Section 73 of the Act, for the period 2017-18, till 05.02.2023 / 07.02.2023.
- From a perusal of the Agenda for the 47th and 49th GST Council Meeting, the reason given for exercise of the power under Section 168A was the spread of the COVID-19 pandemic. However, the Agenda of GST Council Meeting/ Notification No. 9/2023-CT dated 31.03.2023 does not offer any explanation as to how the COVID-19 pandemic affected the implementation of the provisions of the CGST/MGST Act. In the Agenda for 49th Council Meeting, representation from tax administrations were discussed on 18.02.2023, wherein said administrations requested to further extend the timelines under Section 73 of the CGST Act for FY 2017-18, 2018-19 and 2019-20 to 31.12.2024. It was submitted that difficulties were faced by Government Departments during the COVID pandemic due to reduced number of staff; with staggered timings and exemption to certain categories of employees from attending offices during the said period. This led to delay in process of scrutiny and audit, which could be started properly only after COVID restrictions were uplifted. Due to this reason, the GST Council Meeting suggest that the extension vide Notification No. 13/2022-CT dated 05.07.2022 and Notification 9/2023-CT dated 31.03.2023 was recommended only to streamline compliance in GST.

6. Difficulty vis-à-vis impossibility

- From above, it can be seen that the extension was apparently recommended due to difficulties faced by the Department in the COVID-19 period. It is well settled law that force majeure cannot be invoked on mere difficulty to perform the obligation. It was for the Department to show that it was impossible for them to carry out the aforesaid functions, and it is only then that Force Majeure could be invoked.
- In an English judgment, *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH*, 1961 (2) All ER 179, despite the closure of the Suez Canal, and despite the fact that the customary route for shipping the goods was only through the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite the above circumstances, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

- The lockdown because of the Covid-19 pandemic was declared only in March, 2020. Further, despite the said lockdown being declared for citizens, the Office of the State/ Union (being an essential service) continued to remain functional. The office of the State/Union was closed only for the period 24.03.2020 to 07.06.2020 and in the months of April and May, 2021 (during the second wave of the COVID pandemic). Thus, there is no explanation as to why it was impossible for the Department to complete the assessment under Section 73 of the Act, post June, 2020.
- Further, Notification No.9/2023-CT amends Notification No.35/2020-CT dated 03.04.2020 and Notification No.14/2021-CT dated 01.05.2021. Notification No.35/2020-CT dated 03.04.2020 and Notification No.14/2021-CT dated 01.05.2021 were issued by the Central Government in exercise of powers under Section 168A of the CGST Act, extending the time limit for completion or compliance of any action. The reason for exercise of the power under Section 168A as set out in the Notification was the spread of the COVID-19 pandemic across many countries, including India. Vide above Notification dated 03.04.2020 and 01.05.2021, time for completion or compliance of any action was extended to 30.06.2021. Hence, only for compliance of Section 73 of the Act, the time limit was extended till 31.12.2023. For any other compliance or completion of any action, time period was extended only upto 30.06.2021.
- From above, it can be observed that no further extension could have been made post 30.06.2021 under Section 168A of the Act, citing Covid 19 pandemic as a reason for delay in compliance or completion of any action under GST.
- In spite of same, extension was made vide Notification No.13/2022-CT dated 05.07.2022, wherein, the time limit specified under sub-section (10) of Section 73 for issuance of Order under sub-section (9) of Section 73 of the said Act for the period 2017-18, was extended up to 30.09.2023. The above extension was issued on 05.07.2022, allowing the Departmental officers to issue SCNs on or before 30.06.2023. Assuming that the above extension was valid and in terms of Section 168A of the Act, there was no requirement for any further extension vide Notification No. 9/2023-CT dated 31.03.2023. It would therefore appear that the Department is using the COVID 19 pandemic as an excuse and reason to undo their failure of not completing assessments and raising demands under Section 73 of the Act, within time.

7. As jurisdiction goes to the root to the matter, we may see a plethora of Writ Petitions being filed before various High Courts, challenging the validity of Show Cause Notices issued by the Department, basis such extension of time limit by Notification No. 09/2023-CT dated 31.03.2023. Recently, Hon'ble Gujarat High Court in case of M/s SRSS Agro Pvt. Ltd. vs Union of India Special Civil Application No. 19720 of 2023 was pleased to issue notice, wherein, the validity of said Notification has been challenged. It will be interesting to see the outcome of the said Petition.

8. The above discussion is also applicable for extension made vide Notification No. 09/2023-CT dated 31.03.2023 for the period 2018-19 and 2019-20.

(Source: Livelaw.in)