

Handbook on Interest, Late Fee and Penalties under GST

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The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi



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on
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Foreword

The introduction of Goods & Service Tax (GST) in India is one of the biggest indirect tax reforms since Independence. The reform that took more than a decade of mutual co-operation, continuous discussion and intense debate between Central and State Governments about implementation methodology, was finally implemented with effect from 1st July 2017, subsuming almost all indirect taxes at the Central and State levels. As the journey of GST Implementation progressed in India, the authorities have been quick to address the various challenges faced by the Industry and public concerns by issuing a series of notifications, clarifications, press releases and FAQs, to resolve a wide range of concerns.

The GST alongwith its challenges has brought in various benefits also like creation of National market by bringing down fiscal barriers amongst the States and has mitigated the cascading effect of taxes by allowing seamless credit of Input Tax across goods & services. The Institute of Chartered Accountants of India (ICAI) through its GST & Indirect Taxes Committee has been playing a vital role in implementation of GST in India by providing suggestions to the Government at each stage of development of GST. Further, the Institute has been playing proactive role and is a catalyst in dissemination of knowledge and awareness through technical publications, newsletters, E-learning and organizing various programmes, Certificate courses, webcasts etc. for all stakeholders.

I am happy to note that the GST & Indirect Taxes Committee of ICAI has now taken an initiative to issue a series of Handbooks covering various procedural aspects of GST and in that series is bringing out **Handbook on Interest, Late Fee and Penalties under GST** with an objective to provide a basic understanding of the topic. The handbook explains the concepts / procedures relating to Interest, Late fee and Penalties in an easy to understand lucid language and it aimed at updating the knowledge base of members in a simple and concise manner.

I congratulate CA. Rajendra Kumar P, Chairman, CA. Sushil Kumar Goyal, Vice Chairman and other members of GST & Indirect Taxes Committee for coming out with this Handbook and for taking active steps in providing regular guidance to the members and other stakeholders at large.

I am sure that the members will find this publication very useful in discharging the statutory functions and responsibilities in an efficient and effective manner.

CA. Atul Kumar Gupta
President, ICAI

Date: 30.05.2020

Place: New Delhi

Preface

Goods and Services Tax (GST) was introduced in India from 1st July, 2017. It is one of the major tax reforms since independence in the area of indirect taxation. It was introduced with the objective to mitigate the cascading effect of taxes by allowing seamless credit across goods and services, facilitate free flow of goods and services across India and boosting tax revenue from better compliance and widening the tax base. A remarkable feature of GST implementation is that all the States in India came together with the Centre to form a unique federal body called GST Council, which is entrusted with the objective of recommending policies and procedural matter in the formation and implementation of GST legislation. The spirit of co-operative federalism took deep roots there by ensuring that large federal countries like India implement the GST Law.

In order to facilitate in understanding various compliance under GST, GST & Indirect Taxes Committee of ICAI has taken an initiative to prepare Handbook on procedural aspects like registration, refund, return, Invoice etc. One of the result of such initiative is **Handbook on Interest, Late Fee and Penalties under GST**. An attempt has been made to cover all aspects related to Interest, Late Fee and Penalties at one place and is intended to give general guidance to all stakeholders and also help them in resolving issue that they may face during the course of their compliance aspect in GST. This Handbook on Interest, Late Fee and Penalties under GST is comprehensive containing analysis of the entire provisions under the law including notifications, circulars or orders upto 31st March, 2020 issued by the Government from time to time along with few FAQ's, MCQ's, Flowcharts, Diagrams and Illustrations etc. to make the reading and understanding easier.

We stand by the Government in our role as “Partner in GST Knowledge Dissemination” and have always been supporting Government with our intellectual resources, expertise and efforts to make GST error-free.

We sincerely thank to CA. Atul Kumar Gupta, President and CA. Nihar Niranjan Jambusaria, Vice-President, ICAI for their encouragement to the initiatives of the GST & Indirect Taxes Committee. We express our gratitude for the untiring effort of CA. Rajesh Saluja who has authored this handbook and CA. Harini Sridharan P and CA. Ganesh Prabhu B for reviewing the same. We place on record the services and unstinted support provided by the Secretariat of the Committee.

We trust this Handbook will be of practical use to all the members of the Institute and other stakeholders. We also welcome suggestions at gst@icai.in and request to visit our website <http://www.idtc.icai.org> and provide valuable inputs in our journey to make GST truly a good and simple tax.

CA. Rajendra Kumar P
Chairman
GST & Indirect Taxes Committee

CA. Sushil Kumar Goyal
Vice- Chairman
GST & Indirect Taxes Committee

Date: 30.05.2020

Place: New Delhi

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Chapter 1

Interest

I. Interest on delayed payment of tax: Section 50 of the Central Goods and Services Tax Act, 2017 ('the CGST Act' or "the Act")

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent, as may be notified by the Government on the recommendations of the Council.

18% rate of interest was notified vide Notification No. 13/2017-C.T., dated 28-6-2017, for payment of interest under Section 50(1) of the CGST Act.

The importance of the phrase 'on his own' cannot be undermined. It is quite plain that Interest liability is automatic. The taxpayer is obliged to pay interest immediately on defaulting the payment of tax on due date. But if the taxpayer raises objections on the quantification of interest, the department cannot decide it unilaterally, especially when the objection is with regard to the period or quantum of unpaid tax. The arithmetic exercise of quantification will have to be done after considering the objections of the taxpayer. This is supported by the Hon'ble Madras High Court in its decision in the case of *Daejung Moparts Private Limited (Writ Appeal No. 2127 and 2151 of 2019)*.

As per the general provisions relating to determination of tax, Section 75(12) of the Act *inter alia* provides that non-payment or short payment of any interest wholly or in part shall be recovered under Section 79 of the Act.

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

Although no separate method has been prescribed for calculating interest, the relevant rules make it abundantly clear that Interest is to be paid on per day basis, for the period of delay from the due date of payment of tax.

(3) A taxable person who makes an *undue or excess* claim of input tax credit under sub-section (10) of section 42 or **undue or excess** reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.

24% rate of interest was notified *vide* Notification No. 13/2017-C.T., dated 28-6-2017, for payment of interest under Section 50(3).

In context of GST law, anything done with respect to claiming of input tax credit (“ITC”) or/and while calculating output tax liability which is not acceptable or reasonable as per provision(s) of law would be termed as “undue”.

Any claim of ITC or/and any reduction in output tax liability which is in excess of the permitted limits as per the provision(s) of GST law would be termed as ‘Excess’.

Sections 42 and 43 of the Act clearly indicate that if, the undue/ excess claim of ITC or reduction in output tax liability is not fixed within the time limit prescribed under Section 39 (9) of the Act, then Interest under section 50(3) @ 24% will be applicable.

Further, the time limit provided in Section 39(9) of the Act is the earliest of:

- the due date for furnishing of return for the month of September, or due date for furnishing of return for the second quarter following the end of the financial year to which such details pertain
- Actual date of furnishing of relevant return.

In all other cases mentioned under Sections 42 and 43 of the Act, Interest under section 50(1) @ 18% would be first payable by the recipient under section 42 and supplier under section 43 and later refunded to the electronic cash ledger upon the other party accepting the same in the valid returns within the time limit specified under section 39(9) of the Act.

It is important to note that, Section 50(3) refers to Sections 42(10) and 43(10) which deal with matching, reversal and reclaim of ITC and output tax liability through **FORM GSTR-1, 2 and 3**, and since the **Form GSTR-2 and 3** returns have been deferred, the matching system of **FORM GSTR-1, 2 and 3** never saw the light of day. Can we thus say that section 50(3) is majorly inapplicable?

With that understanding it would be safe to interpret that the application of 24% rate of interest on any default is not in place. At the same time, some experts are of the view that in cases like excess claim of credit, where the rectification has not been done within the due date, as stated in Section 39(9) of the Act, interest would be applicable @24%. Law vs. the GST portal

Though Section 50 of the CGST Act 2017 imposes interest only on the portion of the unpaid tax, the GST portal is designed in such a manner that it will not accept the return in **FORM GSTR-3B**, unless the entire tax liability is met (paid) by the taxpayer. So, even if the taxpayer has ITC to the extent of 95% of the total liability, he cannot file the return unless the remaining 5% is also paid, though this restriction is not imposed by law.

Gross or net

The legislation effective from 1st July 2017 did not provide the needed clarity on whether the levy of interest is on gross liability or net liability remaining after setting off the ITC.

In the 31st GST Council meeting held in New Delhi on 22nd December 2018, in-principle approvals were obtained for certain amendments, including the one related to Interest provisions. The relevant excerpts from the Press release [Release ID: 1557062] of the Ministry of Finance in this regard read as follows:

“Amendment of Section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e., interest would be leviable only on the amount payable through the electronic cash ledger.

The above recommendation of the Council will be made effective only after the necessary amendment in the GST Acts are carried out”

Amendment was inserted through the Finance Act, 2019 enacted on 1st August 2019, but that same is not yet notified.

It is imperative to mention here that, the **Gujarat High Court judgment** in the case of *Megha Engineering & Infrastructure Limited (Writ Petition No. 44517 of 2018)* delivered on 18th April 2019 was the first ever decision in this regard. Writ against levy of Interest on gross tax liability was dismissed by stating that no claim to ITC can be made unless the returns are filed. Relevant excerpts from the judgement are given below for reference:

“until a return is filed as self-assessed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place. As a consequence, no payment can be made from out of such a credit entry. It is true that the tax paid on the inputs charged on any supply of goods and / or services is always available. But, it is available in the air or cloud. Just as information is available in the server and it gets displayed on the screens of our computers only after connectivity is established, the tax already paid on the inputs, is available in the cloud. Such tax becomes an input tax credit only when a claim is made in the returns filed as self-assessed.”

The Hon'ble Gujarat High Court denied interpreting Section 50 of the CGST Act, 2017 in the light of the proposed amendment in the 31st GST Council meeting, since it was still on paper.

Amendment to Section 50 of the CGST Act, 2017:

Finally, the approval obtained in the 31st GST Council meeting was enacted on 1st August 2019 by way of amendment to Section 50 of the CGST Act, 2017, but with a date yet to be notified.

Proviso was inserted to Section 50 of the CGST Act, 2017, which is as follows:

“Provided that the interest on tax payable in respect of supplies made during a tax

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period and declared in the return for the said period furnished after the due date in accordance with the provisions of Section 39, except where such return is furnished after commencement of any proceedings under Section 73 or Section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger”.

The proviso seeks to note that the interest liability arises only on the amount to be paid but not paid in cash. The only exception provided is the filing of returns upon determining the tax not paid / short paid / erroneously refunded / ITC wrongly availed or utilized by a proper officer of the department.

When the taxpayers were about to heave a sigh of relief, by concluding that no interest would get attracted on amount available in Electronic Credit Ledger (“ECL”) in case of delayed filing of self-assessed returns, the question that cropped up was whether this amendment is prospective or retrospective or even effective?

Delhi High Court in the case of *M/s. Landmark Lifestyle (Civil Writ Petition No. 6055 of 2019 and Civil Miscellaneous No. 26114 of 2019)* and the **Gujarat High Court** in the case of *Amar Cars Private Limited (Special Civil Application No. 4025 of 2020)* granted stay on recovery of interest on gross tax liability until further orders.

But the wizardry came from the **Madras High Court** in the case of *Refex Industries Limited (Writ Petition No. 23360 and 23361 of 2019 & Writ Miscellaneous Petition Nos. 23106 and 23108 of 2019)*, that Interest is applicable only on net cash liability retrospectively and held as follows:

- (i) proper application of Section 50 is one where interest is levied on a belated cash payment. Interest is not to be levied on ITC available all the while with the Department to the credit of the assessee. The ITC available with the Department is neither belated nor delayed.
- (ii) Credit will be valid till such time it is invalidated by recourse to the mechanisms provided under the Statute and Rules.
- (iii) Proviso inserted to Section 50(1) seeks to correct an anomaly in the provision as it existed prior to such insertion. Hence such Proviso is to be read as clarificatory and operative retrospectively.

Amendment would be retrospective- reaffirmed by the GST Council:

The GST Council in its 39th meeting held on 14th March 2020 in New Delhi held that Interest is payable retrospectively on Net cash liability i.e. w.e.f. 1st July, 2017

As “Happy endings come after a story with lots of ups and downs” the story of Interest has concluded with a happy ending that Interest is applicable only on net liability from the date of introduction of the GST.

However, the question still remains: what will be the treatment of interest paid on gross liability till that time (all these days) by the taxpayers? Will it be available as a refund? Even if it is available as a refund, will the time limit as mentioned under Section 54 of the CGST Act, 2017 apply to such interest payments? The above question are to be clarified by the Board.

Whether interest is to be paid on wrong claim of ITC in the ECL ?

To understand this, one needs to understand the difference between the following terms:

- (a) Availment of ITC – Adding the ITC in ECL or ITC taken in ECL, and
- (b) Utilisation of ITC - Setting off or utilising the available credit in ECL to set off/pay an output tax liability.

Whenever a wrong/ineligible credit is availed, it is credited to the ECL, and if the mistake of wrong availment is realised and corrected either before or after other credit is utilised, it will require payment of interest.

On the other hand, if a wrong or ineligible credit is availed or/and utilised and not reversed and it is noticed by the department, this will attract both interest and penalty on the amount so availed/utilised.

Questions & Answers

Q1. Can the amount lying in the ECL be used to pay interest liability?

Ans. No. As per Section 49(4) of the CGST Act, 2017 the amount available in the ECL may be used for making payment only towards 'output tax' payable. As per Section 2(82) of the CGST Act, 2017, 'Output tax' in relation to a taxable person means the tax chargeable under this Act on taxable supply of goods and/or services made by him or by his agent and excludes tax payable by him on reverse charge basis. Therefore, ITC cannot be used for the payment of interest.

Q2. Suppose, a registered person has supplied goods worth ₹ 1,00,000/- on which tax is amounting to ₹ 18,000/- is payable, and the available ITC is ₹ 12,000 and this person delays filing of his return by 60 days. Is the interest to be paid on ₹ 18,000/- or on ₹ 6,000/- (₹ 18,000–₹ 12,000)?

Ans. As on date as the law stands, interest is to be paid on ₹ 18,000/-

Since the proviso to Section 50(1) will be not yet notified retrospectively. However as per the recommendations of 39th GST Council meeting, interest will be payable on Net Tax Liability.

Q3. If a registered person misses two invoices and thus under reports its outward supply, but realises it later and adds it to the outward supply of the next tax period, will he be required to pay interest on the delayed deposit of output tax? If yes, at what rate?

Ans. Yes, the registered person is required to pay interest under section 50(1) @ 18% p.a.

Q4. If a registered person inadvertently claims ITC of ₹ 1,00,000 instead of ₹ 10,000 and upon realizing the mistake, reverses that credit in the next tax period, will he be required to pay interest? If yes, at what rate?

Ans. Yes. Interest is to be paid @ 18% p. a. under Section 50(1), as this would be excess claim of the ITC.

Q5. If a registered person issues invoices @ 18%, but while filing FORM GSTR-3B shows all outward supplies @ 5%. Later on, when he realises the mistakes he pays the differential amount of tax, will he be required to pay interest on this differential amount? If yes, at what rate?

Ans. Yes. He is required to pay interest on the differential amount of tax, under Section 50 (1), @ 18% p.a.

Q6. A registered person has taken an ineligible credit amounting to ₹ 5,00,000/- in the month of July 2019, and upon realising the mistake reversed the same and added to the output tax liability for the month of August 2019, as per the details given below, will he be required to pay interest? If yes, at what rate?

Month (2019)	Opening Balance of ECL ₹	ITC for the month ₹	Output Tax Liability ₹	Closing Balance of ECL ₹
June	12,00,000	7,00,000	8,00,000	11,00,000
July	11,00,000	6,00,000	7,00,000	10,00,000
August	10,00,000	8,00,000	9,00,000	9,00,000

Ans. In this case, the registered person is required to pay interest @24% p.a while filing the return for the month of August, as the wrong credit availed in the month of July even though not utilised. However, some experts is of a view the same is liable for 18% p.a. as explained above.

Q7. A registered person has taken an ineligible credit amounting to ₹ 5,00,000/- in the month of July 2019, and upon realising the mistake reversed it and added to the output tax liability for the month of August 2019, with the details given below, will he be required to pay interest? If yes, at what rate?

Month (2019)	Opening Balance of ECL ₹	ITC for the month ₹	Output Tax Liability ₹	Closing Balance of ECL ₹
June	2,00,000	7,00,000	8,00,000	1,00,000
July	1,00,000	6,00,000	7,00,000	0
August	0	3,00,000	9,00,000	0

Ans. In this case, the registered person is required to pay interest @24% p.a. while filing the return for the month of August, because wrong credit availed in the month of July was utilised to pay the output tax liability. However, some experts is of a view the same is liable for 18% p.a. as explained above.

II. Interest on delayed deposit of Tax Deducted at Source: Section 51(6) of the CGST Act

(6) If any deductor fails to pay to the Government the amount deducted as tax under sub-section (1), **he shall pay interest in accordance with the provisions of sub-section (1) of section 50**, in addition to the amount of tax deducted.

Related Provision(s):

Section 51(1) of the CGST Act

(1) Notwithstanding anything to the contrary contained in this Act, the Government may mandate, —

- (a) a department or establishment of the Central Government or State Government; or
- (b) local authority; or
- (c) Governmental agencies; or
- (d) such persons or category of persons as may be notified by the Government on the recommendations of the Council,

(hereafter in this section referred to as “the deductor”), to deduct tax at the rate of one per cent. from the payment made or credited to the supplier (hereafter in this section referred to as “the deductee”) of taxable goods or services or both, where the total value of such supply, under a contract, exceeds two lakhs and fifty thousand rupees:

Provided that no deduction shall be made if the location of the supplier and the place of supply is in a State or Union territory which is different from the State or as the case may be, Union territory of registration of the recipient.

Explanation. — For the purpose of deduction of tax specified above, the value of supply shall be taken as the amount excluding the central tax, State tax, Union territory tax, integrated tax and cess indicated in the invoice.

Under Section 51 all notified deductor are required to deduct 1% TDS for specific inward supplies against contracts exceeding ₹ 2,50,000/-, and the amount so deducted is to be deposited with the government within 10 days from the end of the month in which such deduction is made. In case of failure to deposit within 10 days of the following month, interest @ 18% per annum will be payable from the date of default till the date of actual payment.

Questions & Answers

Q1. Is interest applicable on the non-payment of TDS?

Ans. Yes. The deductor shall be liable to pay interest @ 18% p.a. for failure to pay the amount deducted as tax.

Q2. Can TDS and interest on TDS be paid through ECL?

Ans. No. As per Rule 85(4), the amount deducted under Section 51, or the amount collected under Section 52, or the amount payable on reverse charge basis, or the amount payable under Section 10, any amount payable towards interest, penalty, fee or any other amount under the Act **shall be paid by debiting the electronic cash ledger** maintained as per Rule 87 and the electronic liability register shall be credited accordingly.

Q3. A government enterprise received a supply amounting to ₹ 5, 00,000/- in the month of November 2019, against which the payment was made in the month of January 2020. The enterprise deposited TDS on this supply before 10 February 2020. Does it entail any interest payment? If yes, at what rate?

Ans. No. In this case the government enterprise was supposed to deduct TDS in the month of January 2020 when the payment was made, and the deducted amount was to be deposited by 10th February 2020. Therefore, as there is no delay, no interest is to be paid.

Q4. A government undertaking has given a purchase order worth ₹ 4,00,000/- in the month of November 2019, along with 100% advance to M/s ABC Enterprises, to supply stationery in two lots/invoices of ₹ 2,00,000/- each, one each in the month of December 2019 and January 2020. Is TDS to be deducted? If yes, when?

Ans. Yes. This case requires deduction of TDS as the total contract value exceeds ₹ 2,50,000/- TDS should have been deducted at the time of making the advance payment (in the month of November 2019), and should have been deposited by 10 December 2019.

Q5. M/s India Engines, a government undertaking has given a purchase order amounting to ₹ 1 crore to M/s Moon Enterprises, for supply of engine parts. As these engines were finally to be supplied to Indian Railways, under a tri-party agreement, the initial 25% of payment to M/s Moon Enterprises was done by the Indian Railways in the month of July 2019 and balance 75% payment was to be made by M/s India Engines upon complete supply in the month of January 2020. M/s India Engines deducted 1% TDS on the total amount of ₹ 1 crore, in the month of January 2020 and deposited the same by 10th February,2020. Has there been any delay in depositing the TDS?

Ans. In this case even though the initial payment was not made by M/s India Engines, 25% payment was credited in the supplier's account in the month of July 2019, and as per Section 51(1), the TDS is to be deducted at the time of payment made or credited to the account of the supplier. Hence, in this case there is a delay in depositing TDS for which interest has to be paid.

III. Interest on delayed deposit of Tax Collected at Source: Section 52(6) of the CGST Act

(6) If any operator after furnishing a statement under sub-section (4) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars in the statement to be furnished for the month during which such omission or incorrect particulars are noticed, subject to payment of interest, as specified in sub-section (1) of section 50:

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of statement for the month of September following the end of the financial year or the actual date of furnishing of the relevant annual statement, whichever is earlier.

Under Section 52, every electronic commerce operator (hereafter in this Section referred to as the "operator"), not being an agent, shall collect an amount calculated at such rate not exceeding one per cent., as may be notified by the Government on the recommendations of the Council, of the net value of taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator.

The amount so collected is called as Tax Collection at Source (TCS).

Further, the Central Government *vide* Notification No. 52/2018-C.T., dated 20-9-2018 prescribe such rate as half per cent of the net value of intra-State taxable supplies while Notification No. 2/2018-I.T., dated 20-9-2018 stipulates rate of one per cent. of the net value of inter-State taxable supplies

The amount collected under Section 52(1) shall be paid to the Government by the operator within ten days after the end of the month in which such collection is made, in such manner as may be prescribed.

If there is any omission or rectification on part of the operator which results in delay in depositing the collected amount, he shall pay the amount along with interest under section 50(1) while filing the return of the month in which such omission/rectification is noticed and corrected.

IV. Interest on tax liability arising due to mismatch between TCS Statement (Form GSTR-8) and Suppliers Return: Section 52(8), (9), (10) and (11) of the CGST Act

(8) The details of supplies furnished by every operator under sub-section (4) shall be matched with the corresponding details of outward supplies furnished by the concerned supplier registered under this Act in such manner and within such time as may be prescribed.

(9) Where the details of outward supplies furnished by the operator under sub-section (4) do not match with the corresponding details furnished by the supplier under section 37 or section

39, the discrepancy shall be communicated to both persons in such manner and within such time as may be prescribed.

(10) The amount in respect of which any discrepancy is communicated under Sub-section (9) and which is not rectified by the supplier in his valid return or the operator in his statement for the month in which discrepancy is communicated, shall be added to the output tax liability of the said supplier, where the value of outward supplies furnished by the operator is more than the value of outward supplies furnished by the supplier, in his return for the month succeeding the month in which the discrepancy is communicated in such manner as may be prescribed.

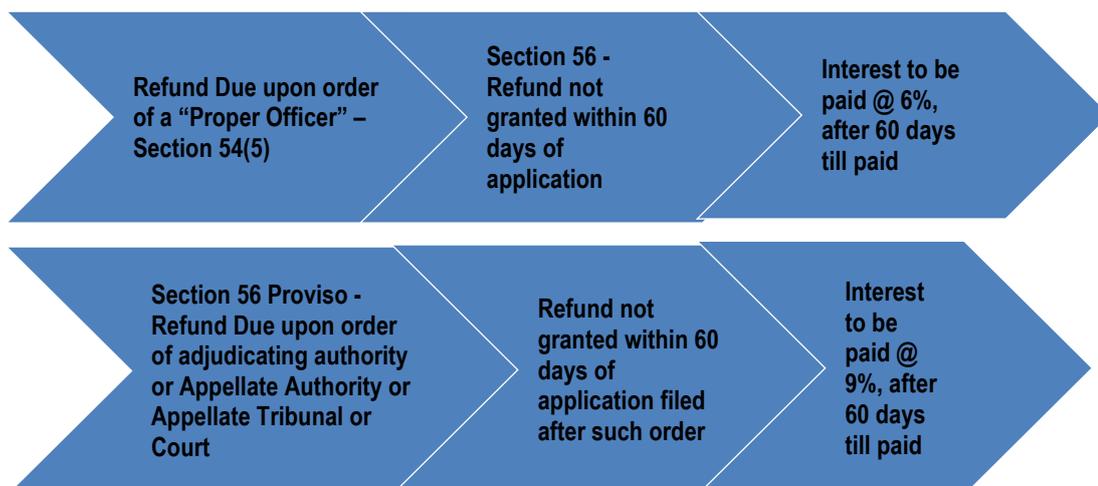
(11) The concerned supplier, in whose output tax liability any amount has been added under sub-section (10), shall pay the tax payable in respect of such supply along with interest, at the rate specified under sub-section (1) of section 50 on the amount so added from the date such tax was due till the date of its payment.

As per the provisions of Section 52, if there is a negative mismatch between the supplier's returns and statement filed by the operator, the supplier is required to add the difference to his output liability and pay the same along with interest under Section 50(1).

V. Interest on delay in issue of Refunds: Section 54(12) of the CGST Act

(12) Where a refund is withheld under Sub-section (11), the taxable person shall, notwithstanding anything contained in section 56, be entitled to interest at such rate not exceeding six per cent. as may be notified on the recommendations of the Council, if as a result of the appeal or further proceedings he becomes entitled to refund.

6% rate of interest was notified vide Notification No. 13/2017-C.T., dated 28-6-2017, for payment of interest under Section 54(12).



Questions & Answers

Q1. Is payment of interest mandatory?

Ans. Yes. It is mandatory to pay interest, because interest is compensatory in nature. Further, Section 50 uses the word 'shall' which indicates that interest is mandatory.

Q2. In case of late payment of tax, can I file my Form GSTR-3B (regular dealers) without payment of interest on such late payment of tax?

Ans. The system allows a regular dealer to file the return even if interest is not paid. Any interest not paid during the financial year should be paid at the time of filing the annual return.

Q3. Is there any interest on interest?

Ans. No. There is no interest on interest.

VI. Other Miscellaneous Provisions

Proviso to Section 16(2) of the CGST Act

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

As per sub-rule (3) of Rule 37 of CGST Rules, 2017 The registered person shall be liable to pay interest at the rate notified under sub-section (1) of section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule (2), is paid.

This provision carries its essence from the erstwhile service tax laws and seeks to act like a deterrent for recipients who delay payments to suppliers. Initially it took time for recipients to understand the impact of this provision but with the passage of time its impact has been well understood.

It is important to understand that this proviso is applicable to outstanding payments against GST invoices only and not to any amount due to suppliers from the Pre-GST period.

Any delay in payment to the supplier beyond a period of 180 days from the date of invoice, the amount of ITC claimed or in case of part payment is made to supplier and balance part is due,

is not made within 180 days, proportionate ITC availed on such amount due shall be added to the output tax liability and the supplier is liable to pay an interest from date of availing ITC till date of payment payment, with interest @18% as per Section 50(1) of the CGST Act. Such addition to output tax liability will be done in the month in which 180 days are exceeded.

Manner of recovery of credit distributed in excess: Section 21 of the CGST Act

Where the Input Service Distributor distributes the credit in contravention of the provisions contained in Section 20 resulting in excess distribution of credit to one or more recipients of credit, the excess credit so distributed shall be recovered from such recipients along with interest, and the provisions of section 73 or section 74, as the case may be, shall, mutatis mutandis, apply for determination of amount to be recovered.

In case due to any reason Input Service Distributor (ISD) distributes excess credit to one or more recipients, the excess credit so distributed shall be recovered from such recipient(s) along with interest under Section 50 of the CGST Act. The excess distribution of credit can be explained with the following two examples:

Example 1

An ISD had total input credit of ₹ 10,00,000/-, whereas it distributed ₹ 12,50,000/- to three different units at Delhi (₹ 6,00,000/-), Bihar (₹ 3,50,000/-), and Maharashtra (₹ 3,00,000/-).

In this case the excess amount of ₹ 2,50,000/- so distributed would be recovered from the recipient along with interest and the provisions of Sections 73 or 74 shall apply mutatis mutandis for effecting such recovery.

Example 2

An ISD had total input credit of ₹ 10,00,000/-, whereas it distributed ₹ 10,00,000/- to three different units at Delhi (₹ 5,00,000/-), Bihar (₹ 3,00,000/-), and Maharashtra (₹ 2,00,000/-), whereas actual credit belonging to the three units was Delhi (₹ 5,00,000/-) Bihar (₹ 3,50,000/-), and Maharashtra (₹ 1,50,000/-)

In this case the excess amount of ₹ 50,000/- distributed to Bihar would be recovered from Bihar, along with interest and the provisions of Sections 73 or 74 shall apply mutatis mutandis for effecting such recovery.

Provisional Assessment: Section 60(4) of the CGST Act

(4) The registered person shall be liable to pay interest on any tax payable on the supply of goods or services or both under provisional assessment but not paid on the due date specified under sub-section (7) of section 39 or the rules made thereunder, at the rate specified under sub-section (1) of section 50, from the first day after the due date of payment of tax in respect of the said supply of goods or services or both till the date of actual payment, whether such amount is paid before or after the issuance of order for final assessment.

The word provision is used where the final amount is not known at a particular time, and when a provisional assessment is done under Section 60 of the CGST Act. The intention is to facilitate a taxable person to discharge his tax liability on a provisional basis, and before the final assessment order is passed.

The amount of tax so paid either on provisional assessment or before and/or after final assessment order, shall attract interest as per Section 50(1) of the CGST Act, from the date the tax was actually due as per the provisions of Section 39(7) of the CGST Act or rules made thereunder, till the date of actual payment of tax.

Example

Mr. A started trading in a unique item about which he had confusion over the applicable tax rate under the GST law. He stopped selling this item after he sold goods valuing ₹ 50,00,000/- in the month of June 2019, charging 5% tax, and at the same time filed an application for provisional assessment under Section 60. He deposited the tax charged @ 5% within the due date (before 20th July 2019). He received the final assessment order on 31st December 2019 that his goods were taxable @ 18%. Now along with differential tax, Mr. A would be required to pay interest @18% on differential tax amount of ₹ 6,50,000 from 21st July 2019 till the date of actual payment.

Tax wrongfully collected and paid to the Central Government or State Government: Section 77(2) of the CGST Act

(2) A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of Central tax and State tax or, as the case may be, the Central tax and the Union territory tax payable.

In cases where an Intra-state supply is wrongly shown as an Inter-state supply and vice-versa, interest is not to be paid. The clear logic behind this provision is that even though the wrong tax was paid, the registered person had already paid the tax. Therefore, no interest should be paid.

Chapter 2

Late Fees

I. Levy of Late Fees: Section 47 of the CGST Act

(1) Any registered person who fails to furnish the details of outward or inward supplies required under Section 37 or Section 38 or returns required under Section 39 or Section 45 by the due date shall pay a late fee of **one hundred rupees* for every day** during which such failure continues, **subject to the maximum of five thousand rupees.**

Important Notifications:

- i. Notification No. 75/2018-C.T., dated 31-12-2018
- ii. Notification No. 76/2018-C.T., dated 31-12-2018
- iii. Notification No. 77/2018-C.T., dated 31-12-2018

*Late fees are applicable under both the CGST and SGST. Total late fee for delay would be ₹ 200 per day.

Section 20 of the Integrated Goods and Services Tax Act, 2017 (“the IGST Act”), provides application of certain provisions of the CGST Act, 2017 or rules made thereunder, shall mutatis mutandis apply, so far as may be, in relation to integrated tax as they apply in relation to central tax as if they are enacted under the IGST Act. One such provision as per Section 20(viii) of the IGST Act is the provision relating to **returns other than late fee**. Hence, it is to be noted that there is no separate late fee under the IGST Act.

Since the introduction of the GST, there have been many instances when late fee has either been waived off or reduced by the government, as per powers conferred in Section 128 of the Act. Some important notifications are shared below:

Vide Notification No. 75/2018-C.T., dated 31-12-2018, the government waived late fee for filing **FORM GSTR-1** for the months/quarters from July 2017 to September 2018, subject to the condition that the return(s) was/were filed between 22nd December 2018 to 31st March 2019.

Vide Notification No. 76/2018-C.T., dated 31-12-2018, the government waived late fee for filing **FORM GSTR-3B** for the months of July 2017 to September 2018, subject to the condition that the return(s) was/were filed between 22nd December 2018 to 31st March 2019.

The same notification also reduced the late fee for filing **FORM GSTR-3B** to ₹ 25 per day till the default continues. And Filers with “Nil” tax liability shall pay late fee of ₹ 10 per day till the default continues.

Vide Notification No. 77/2018-C.T., dated 31-12-2018, the government waived late fee for filing **FORM GSTR-4** for the quarters from July 2017 to September 2018, subject to the condition that the return(s) was/were filed between 22nd December 2018 to 31st March 2019.

(2) Any registered person who fails to furnish the return required under section 44 by the due date shall be liable to pay a late fee of one hundred rupees for every day during which such failure continues subject to a maximum of an amount calculated at a quarter per cent. of his turnover in the State or Union territory.

Section 44 deals with the annual return (**FORM GSTR - 9**) for a financial year, which is to be filed before 31 December, following the end of such financial year. The delay in filing of annual return beyond the due date will attract a late fee of ₹ 100 per day under each Act. Therefore, total late fee for the delay would be ₹ 200 per day, subject to a maximum of 0.25% of the turnover in that State [total under each Act (0.25%+0.25%=0.5%)].

Example

In the year 2017-18, M/s Sun Enterprises had a turnover of ₹ 3 crores in the State of UP, and the last date to file **FORM GSTR - 9** was 5th February 2020. The annual return was actually filed on 15th March 2020. What is the amount of late fee that M/s Sun Enterprises is required to pay?

If we calculate the delay in terms of number of days then the delay would be of 39 days and if we multiply it by 200, the total amount of late fee would be ₹ 7800/- (₹ 3900/- under the CGST Act and ₹ 3900/- under the SGST Act). Whereas if we calculate the late fee based on the turnover in State then the late fee would be 0.5% of ₹ 3,00,00,000, which is ₹ 1,50,000/-.

In this case the late fee would be ₹ 7800/-.

Note: In terms of section 44 read with Rule 80, every registered person whose aggregate turnover during a financial year exceeds two crore rupees shall get his accounts audited as specified under section 35(5) and he shall furnish a copy of audited annual accounts and a reconciliation statement. Further, the Central Goods and Services Tax (Tenth Removal of Difficulties) Order, 2019 - Order No. 10/2019-Central Tax dated 26.12.2019, provided that the annual return for financial year 2017-2018 shall be furnished on or before 31st January, 2019 and for financial year 2018-19 till 31st March, 2020

Thereafter, the Central Government *vide* Notification No. 47/2019-C.T., dated 09-10-2019; had notified that filing of annual return under section 44 (1) of the CGST Act 2017 for financial year 2017-18 and 2018-19 is optional for those registered persons whose aggregate turnover is less than Rs 2 crores and who have not filed the said return before the due date. Provided that the said return shall be deemed to be furnished on the due date if it has not been furnished before the due date.

Thereafter, CBIC *vide* press release dated 14th March 2020 [Release ID: 1606430] had stated that there will be no late fee for delayed filing of the Annual Return for the financial year 2017-18 and 2018-19 for taxpayers with aggregate turnover less than ₹ 2 crores.

Handbook on Interest, Late Fee and Penalties under GST

Subsequently, the Commissioner, on the recommendations of the Council, hereby extends the time limit for furnishing of the annual return specified under section 44 of the said Act read with rule 80 of the said rules, electronically through the common portal, for the financial year 2018-2019 till 30.06.2020 [Notification No. 15/2020-C.T., dated 23-03-2020].

Then, Rule 80 of the CGST Rule is amended *vide* Notification No. 16/2020-C.T., dated 23-03-2020, stipulating that every registered person whose aggregate turnover during the financial year 2018-2019 exceeds five crore rupees shall get his accounts audited as specified under section 35(5) and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in **FORM GSTR-9C** for the financial year 2018- 2019, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

Subsequently, *vide* Notification No. 41/2020-C.T., dated 5-05-2020, annual return for financial year 2018-2019 shall be furnished on or before 30th September,2020.

Summary of the original and revised Late Fee:

Defaulted Return	Late Fees (Original)	Revised Late Fees
FORM GSTR-3B	₹ 100/- per day of delay, subject to maximum ₹ 5,000/-	₹ 10 per day (each for CGST and SGST Act) for "Nil Tax" return, and others ₹ 25 per day (each for CGST and SGST Act).
Compounding Dealer in FORM GSTR-4	Same as above	₹ 10 per day (each for CGST and SGST Act) for "Nil Tax" return, and others ₹ 25 per day (each for CGST and SGST Act).
Input Service Distributor	Same as above	₹ 25/- per day (each for CGST and SGST Act) .
Annual Return – FORM GSTR - 9	100 per day of delay Maximum = 0.25% on Turnover in the state/UT*	100 per day of delay Maximum = 0.25% on Turnover in the State/UT (each for CGST and SGST Act)

Question & Answer

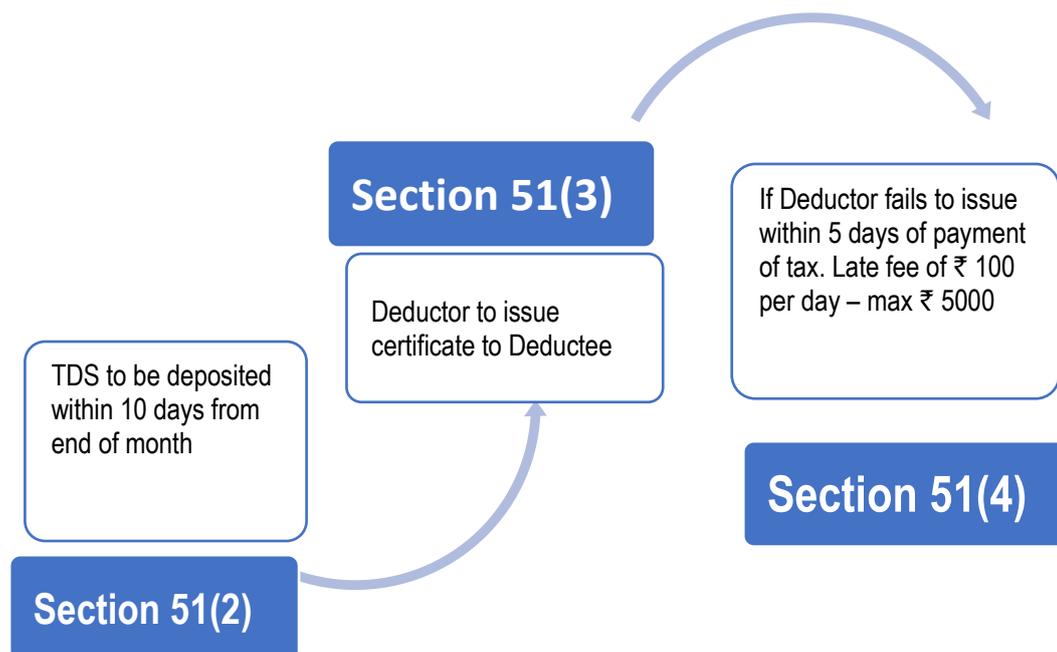
Q1. A taxpayer has filed FORM GSTR-3B for the month of November 2019 (due date being 20th December 2019) on 24th December 2019. How much is the late fee payable?

Ans. The total amount of late fee to be paid:

₹ 50/-₹ per day for 4 days = ₹ 200/- (₹ 100/- CGST + ₹ 100/- SGST)

II. Late Fee for the delay in issuing of TDS Certificate: Section 51(2), (3) and (4) of the CGST Act

- (2) The amount deducted as tax under this section shall be paid to the Government by the deductor within ten days after the end of the month in which such deduction is made, in such manner as may be prescribed.
- (3) The deductor shall furnish to the deductee a certificate mentioning therein the contract value, rate of deduction, amount deducted, amount paid to the Government and such other particulars in such manner as may be prescribed.
- (4) If any deductor fails to furnish to the deductee the certificate, after deducting the tax at source, within five days of crediting the amount so deducted to the Government, the **deductor shall pay, by way of a late fee, a sum of one hundred rupees per day from the day after the expiry of such five days period until the failure is rectified, subject to a maximum amount of five thousand rupees.**



In case of TDS deduction, the late fee could be of two types:

- Late fee for the delay in issuing the Certificate of deduction: ₹ 100/- per day under each Act, subject to a maximum of ₹ 5,000/-
- Late fee for the delay in filing TDS returns: ₹ 100/- per day under each Act, subject to a maximum of ₹ 5,000/-

Chapter 3

Penalties

Introduction

The word penalty is not defined in the GST Law, but as an English word it means punishment (in this case monetary as well as prosecution) given to a person for some wrongdoing. In the context of the GST law, contravention of the provisions of the law would attract a penalty(s). The main purpose of providing penal provisions is the fact that they act as deterrent for people, not to infract the law. (While the courts have consistently laid down several guiding principles for the purpose of imposing penalties, it has been observed that the statutes are so drafted that several punitive penalties have now become mandatory. Penalty is expected to be an area where the law will develop significantly to encourage voluntary compliance.

Some important Aspects of Penalty:

1. Admitting liability to pay tax does not amount to admission of wrongdoing that can attract penalty in all cases. That is, proceedings are independent of tax demand.

It is possible that proceedings may be jointly initiated such that the non-payment of tax may prove the circumstances to impose penalty. But accepting to pay tax cannot ipso facto result in penalty.

Example: RCM liability may be accepted [show cause notice (SCN) issued but not under Section 74] since continuing to dispute this liability may be revenue neutral. Accepting to pay RCM does not satisfy the ingredients to impose penalty. The benefit of resisting RCM liability may be academic when credit is available and output is also taxable.

2. An important change which can be seen in the GST law, as compared to erstwhile laws, is that now the Government does not seem to give discretionary powers to the officers for imposing penalties. This is a welcome step but on the flip side mechanical penal provisions could do injustice in certain cases and it is very difficult to ignore that every case has its own set of circumstances.
3. Especially in the first few years of the GST, the bona fide view on non-taxability is good ground to waive penalties, particularly when the demand for tax is accepted along with interest. Bona fide view means a case where two (adjudicating, appellate or AAR) authorities take contradictory views. Taxpayers cannot be expected to adopt the most farsighted interpretation that eventually prevails in a decision by the higher Court.

Questions & Answers

Q1. What is meant by the term penalty?

Ans. The word “penalty” has not been defined in the CGST/SGST Act, but judicial pronouncements and principles of jurisprudence have laid down that a penalty is:

- (i) a temporary punishment or a sum of money imposed by statute, to be paid as punishment for the commission of a certain offence;
- (ii) a punishment imposed by law or contract for doing or failing to do something that was the duty of a party to do.

Q2. Can the amount lying in ECL be used to pay penalty?

Ans. No. As per Section 49(4) of the CGST Act, 2017 the amount available in the ECL may be used only for making any payment towards ‘output tax’ payable. As per Section 2(82) of the CGST Act, 2017, ‘Output tax’ in relation to a taxable person means the tax chargeable under this Act on taxable supply of goods and/or services made by him or by his agent but excludes tax payable by him on reverse charge basis. Therefore, ITC cannot be used for payment of penalty.

I. Penalty for certain Offences by a Taxable Person: Section 122(1) of the CGST Act

- (1) Where a **taxable person** who -
- (i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;
 - (ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;
 - (iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
 - (iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
 - (v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;
 - (vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

- (vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;
- (viii) fraudulently obtains refund of tax under this Act;
- (ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;
- (x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;
- (xi) is liable to be registered under this Act but fails to obtain registration;
- (xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;
- (xiii) obstructs or prevents any officer in discharge of his duties under this Act;
- (xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;
- (xv) suppresses his turnover leading to evasion of tax under this Act;
- (xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;
- (xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;
- (xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;
- (xix) issues any invoice or document by using the registration number of another registered person;
- (xx) tampers with, or destroys any material evidence or document;
- (xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

¹Amendment vide the Finance Act, 2020

127. In section 122 of the Central Goods and Services Tax Act, after sub-section (1), the following sub-section shall be inserted, namely: —

“(1A) Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.”.

Section 122 is applicable to a taxable person and Section 2(107) defines a “Taxable person” as a person who is registered or liable to be registered under section 22 or section 24. Therefore, all the provisions of Section 122 would also be applicable to those who have not taken registration but are liable to do so.

A careful reading of all the clauses of Section 122(1) give an impression that all infringements mentioned therein are done intentionally and with a negative connotation. If we try to find out the gist of these infringements, they would fall under either of the following categories:

- (a) Activities related to wrongful gain, due to tax evasion with respect to outward supplies
- (b) Activities related to wrongful gain through ITC and Refunds.
- (c) Other legal infringements.

Any infringement of law without a negative intention will generally not be covered under section 122(1) as it primarily talks about infringements by a taxable person who is not registered under the GST, but there are some general infringements which are applicable to a registered person also. Specific infringements by a registered person are covered under Section 122(2).

With a view to prevent fraudulent ITC, section 122 of the CGST Act vide the Finance Act 2020 which is yet to be notified, has been amended [by inserting a new sub-section 122(1A)] to penalise the beneficiary of the transactions of passing on or availing fraudulent ITC similar to the penalty leviable on the person who commits such specified offences.

Questions & Answers

Q1. Do I pay penalty if I issue an invoice or a bill without supplying goods or services or both? If yes, what is the quantum of penalty?

Ans. Yes, under section 122(1)(ii) of the CGST Act, you will have to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded, whichever is higher.

Also, as per section 122(1A) [once effective], anyone who retains the benefit of this transaction and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded.

¹ Effective Date Yet to be Notified.

Q2. Do I pay penalty if I supply goods or services or both without issuing an invoice or an incorrect or false invoice? If yes, what is the quantum of penalty?

Ans. Yes, under section 122(1)(i) of the CGST Act, you have to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded, whichever is higher.

Also, as per section 122(1A) [once effective], anyone who retains the benefit of this transaction and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded.

Q3. If a registered person collects any amount as tax but deposits it with the government after five months, will he have to pay any penalty or only interest on delayed payment of tax?

Ans. As per Section 122(1)(iii), a taxable person who collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due can be penalised with a penalty of ₹ 10,000

Q4. A registered person has made outward supplies for five months, from April 2019 to August 2019, but is yet to file his FORM GSTR-3B. He declares all the supplies till date in the return of September 2019. Will he have to pay any interest or penalty?

Ans. Yes, this situation will certainly attract interest to be paid @ 18% for the delay period and at the same time there is a possibility of penalty being imposed under section 122(1)(iii) of the CGST Act, which is ₹ 10,000 or the amount of tax evaded, whichever is higher. And if there is no tax evasion, there could be a penalty of ₹ 10,000.

Q5. Mr A, who has opened a business in the name of Mr B (his driver), for issuing invoices without actual supply of goods, with the intention of evading tax, is caught by the department. The total evaded tax is to the tune of ₹ 1 crore. In this case, what penalty can be imposed by the department and against whom?

Ans. In the above case, penalty equal to the amount of tax evaded of ₹ 1 crore under section 122(1) will be imposed on Mr B, and a similar amount of penalty under section 122(1A) will be imposed on Mr. A.

II. Penalty for certain Offences by a Registered Person: Section 122(2) of the CGST Act

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised, —

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

- (b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

Questions & Answers

Q1. The GST department has caught Mr. A for supplying taxable goods without GST registration even though his total turnover in FY 2019-20 has exceeded the minimum threshold limit of ₹ 40 lacs. Will he be penalised under Section 122(1) or Section 122(2)?

Ans. In this case, penalty would be imposed under section 122(1), as Section 122(2) is only for registered persons, and even though Mr. A is a “taxable person” (liable to be registered) he is not yet registered under the GST.

Note – Section 2(94) defines registered person as:

“registered person” means a person who is registered under section 25 but does not include a person having a Unique Identity Number;

Q2. Penalty of 10% of the tax can be imposed if:

- (i) a person repeatedly does not appear before the GST officer three times
- (ii) the taxable person does not file returns for six consecutive months or more
- (iii) a taxable person is served with show cause notice repeatedly for three times
- (iv) a registered person does not pay tax under bona fide belief

Ans. (iv) A registered person does not pay tax under bona fide belief.

Q3. Mr. Rakesh is the proprietor of two firm’s M/s Rakesh Enterprises and M/s Sun Marketing and he has taken GST registration in his name mentioning only M/s Rakesh Enterprises as trade name and is showing the turnover of only M/s Rakesh Enterprises. He is caught by the GST department for not showing turnover of his other proprietorship concern M/s Sun Marketing. Under what Section will the department impose penalty on him?

Ans. As he is the proprietor of both firms, he will be considered a registered person and penalty will be imposed under section 122(2).

Q4. Mr. A and Mrs. A are shareholders and directors of two companies: M/s ABC Meditrades Pvt. Ltd. and M/s XYZ Medicare Pvt. Ltd., and even though taxable turnover in both the companies has crossed the minimum threshold limit, still only M/s ABC Meditrades Pvt. Ltd. is registered with the GST. The Department has initiated proceedings against M/s XYZ Medicare Pvt. Ltd. Under what section will the department impose penalty on XYZ Medicare Pvt. Ltd.?

Ans. As a Company is a separate legal entity, M/s XYZ Medicare is unregistered in the eyes of the GST, therefore, penalty will be imposed under section 122(1).

III. Penalty for certain Offences by “Any Person”: Section 122(3) of the CGST Act

<p>(3) Any person who</p> <ul style="list-style-type: none">(a) aids or abets any of the offences specified in clauses (i) to (xxi) of Sub-section (1);(b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;(c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;(d) fails to appear before the officer of the central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account, <p>shall be liable to pay penalty which may go up to twenty-five thousand rupees.</p>
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This Sub-section deals with offences where the person is not directly involved in any evasion of tax but may aid or abet or may be a party to evasion or if he does not attend summons or produce documents. Penalty in such a case will be up to twenty-five thousand rupees.

Example: A warehouse owner who provides warehouse services to multiple clients and keeps proper records of all the goods stored except for one of the clients knowing well that this client is involved in tax evading activities, will be held liable for abetting an offence punishable under the GST law, and penalty up to twenty-five thousand will be imposed on him.

IV. Penalty for failure to furnish information return: Section 123 of the CGST Act

<p>If a person who is required to furnish an information return under section 150 fails to do so within the period specified in the notice issued under sub-section (3) thereof, the proper officer may direct that such person shall be liable to pay a penalty of one hundred rupees for each day of the period during which the failure to furnish such return continues:</p> <p>Provided that the penalty imposed under this section shall not exceed five thousand rupees.</p>
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Related Provision(s):

Obligation to furnish information return:

Section 150(1)

Any person, being—

- (a) a taxable person; or
- (b) a local authority or other public body or association; or
- (c) any authority of the State Government responsible for the collection of value added tax or sales tax or State excise duty or an authority of the Central Government responsible for the collection of excise duty or customs duty; or
- (d) an income tax authority appointed under the provisions of the Income-tax Act, 1961; or
(e) a banking company within the meaning of clause (a) of section 45A of the Reserve Bank of India Act, 1934; or
- (f) a State Electricity Board or an electricity distribution or transmission licensee under the Electricity Act, 2003, or any other entity entrusted with such functions by the Central Government or the State Government; or
- (g) the Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908; or
- (h) a Registrar within the meaning of the Companies Act, 2013; or
- (i) the registering authority empowered to register motor vehicles under the Motor Vehicles Act, 1988; or
- (j) the Collector referred to in clause (c) of section 3 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; or
- (k) the recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956; or
- (l) a depository referred to in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996; or
- (m) an officer of the Reserve Bank of India as constituted under section 3 of the Reserve Bank of India Act, 1934; or
- (n) the Goods and Services Tax Network, a company registered under the Companies Act, 2013; or
- (o) a person to whom a Unique Identity Number has been granted under sub-section (9) of section 25; or
- (p) any other person as may be specified, on the recommendations of the Council, by the Government,

who is responsible for maintaining record of registration or statement of accounts or any periodic return or document containing details of payment of tax and other details of transaction of goods or services or both or transactions related to a bank account or consumption of electricity or transaction of purchase, sale or exchange of goods or property or right or interest in a property under any law for the time being in force, *shall furnish an information return of the same in respect of such periods, within such time, in such form and manner and to such authority or agency as may be prescribed.*

Section 150 requires certain class of persons to maintain records and furnish information return (IR) within a stipulated time [Sub-section (2) & (3) of Section 150] and If any person who is required to furnish any information as per Section 150, by filing an information return, fails to do so, then he will be liable to pay a penalty of ₹ 100/- per day for which failure continues, subject to the maximum penalty of ₹ 5,000/-.

Question & Answer

Q1. Can a bank be asked to maintain specific records and furnish information return to the GST department?

Ans. Yes. Any banking company within the meaning of clause (a) of Section 45A of the Reserve Bank of India Act, 1934 can be asked to furnish information return.

V. Fine for failure to furnish statistics: Section 124 of the CGST Act

If any person required to furnish any information or return under section 151, —

- (a) without reasonable cause fails to furnish such information or return as may be required under that section, or
- (b) wilfully furnishes or causes to furnish any information or return which he knows to be false,

he **shall be punishable with a fine which may extend to ten thousand rupees** and in case of a continuing offence to a **further fine which may extend to one hundred rupees for each day** after the first day during which the offence continues **subject to a maximum limit of twenty-five thousand rupees.**

Related Provision(s):

Section 151 of the CGST Act: Power to collect statistics.

- (1) The Commissioner may, if he considers it necessary to do so, by notification, direct that statistics may be collected relating to any matter dealt with by or in connection with this Act.

(2) Upon such notification being issued, the Commissioner, or any person authorised by him in this behalf, may call upon the concerned persons to furnish such information or returns, in such form and manner as may be prescribed, relating to any matter in respect of which statistics is to be collected.

This provision gives powers to the GST authorities to collect, collate and analyse any data from various sources which would help them in any of the following ways:

- (a) Increasing tax compliance or
- (b) Improving efficiency and effectiveness of the law.
- (c) Removing bottlenecks in the system.
- (d) Any other reason.

Anyone who has been called upon to submit any information or return, fails to submit the same or wilfully submits false information, shall be punishable with a fine up to ₹ 10,000/-, and for continuing default, an additional fine of ₹ 100/- per day till the default continues, subject to the maximum of ₹ 25,000/-.

VI. General Penalty: Section 125 of the CGST Act

Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.

If no separate penalty is prescribed anywhere in the law for any contravention of provisions of this law, then a penalty up to ₹ 25,000/- can be imposed under Section 125.

Examples

1. Rule 18 requires every registered person to display registration certificate and Goods and Services Tax Identification Number on the name board. If a registered person contravenes this provision, a penalty under section 125 of up to ₹ 25,000/- can be imposed.
2. If while filing the GST return, a registered person fails to mention/disclose his exempt supplies, a penalty upto ₹ 25, 000 can be imposed under this section, even if there is no tax evasion.

VII. General disciplines related to penalty: Section 126 of the CGST Act

(1) No officer under this Act shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

Explanation. —For the purpose of this sub-section, —

- (a) a breach shall be considered a 'minor breach' if the amount of tax involved is less than five thousand rupees;
 - (b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.
- (2) The penalty imposed under this Act shall depend on the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach.
- (3) No penalty shall be imposed on any person without giving him an opportunity of being heard.
- (4) The officer under this Act shall while imposing penalty in an order for a breach of any law, regulation or procedural requirement, specify the nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified.
- (5) When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.
- (6) The provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.

A law should be strict enough to deal with defaulters and at the same time it should be fair enough to give an opportunity to the accused of being heard, and lenient enough to make sure that small errors and mistakes are not punished.

Section 126 defines general disciplines for imposing penalty, which includes defining the procedure for giving opportunity to a person, and identifying facts and circumstances of each case before imposing penalty and writing a speaking order mentioning the nature of breach and the applicable law, regulation or procedure under which penalty is imposed.

The nature of penalty and the principles governing imposition of penalties as held by the Courts would be a guiding factor. There are no infallible tests in law which would guide the provisions relating to levy of penalties. Penalties can or may be levied depending on the facts and circumstances of each case.

Various guiding principles laid down by Courts can be summarised as follows:

1. Provisions of penalty must be strictly construed and within the term and language of the statute.
2. Penalty provision should be interpreted as it stands and, in case of a doubt, it should be in a manner favourable to the taxpayer. If the language of a taxing provision is ambiguous or capable of having more than one meaning, one has to adopt the

interpretation favouring the assessee. [*CIT Vs Vegetable Products Ltd.*, (88 ITR 192 (SC))].

3. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the person either acted deliberately in defiance of law or was guilty of conduct, dishonest or acted in conscious disregard of his obligations. Penalty need not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judiciously and by considering all the relevant circumstances. Even if, a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act, or where the breach flows from the belief that the offender is not liable to act in the manner prescribed by the statute. [*Hindustan Steel Ltd., vs State of Orissa* 25 STC 210].
4. Penalty proceedings are apart and separate from assessment proceedings. A person is entitled to adduce any evidence, which he had adduced or not in the assessment proceedings and such evidence has to be duly considered by the authorities. The assessee is also entitled to take up new pleas in the penalty proceedings, which he had not taken up in the course of assessment proceedings.
5. No confiscation can be done unless Tax & Penalty is Quantified [Shree Enterprises Vs CTO reported in 2019-TIOL-1185-HCKAR-GST]

Doctrine of mens rea

Non-compliance of law under a genuine belief or without a guilty mind should not generally invoke penalties. This view is by and large accepted by the Courts. For instance, in the case of Modi Spinning and Weaving Mills (16 STC 310), the Hon'ble Supreme Court held that as the assessee *bona fide* thought that the lift purchased by them would be included in category (b) as well as category (c) of the certificate of registration and as neither the Assessing Officer nor the Appellate Assistant Commissioner had given any finding that the assessee did not or could not have entertained any bona fide doubt, therefore the offence committed, would not attract any penalties.

There is a clear distinction between a representation, which is negligent, and one, which is fraudulent. Normally a Section requires that the representation must have been made falsely i.e., without any belief in its truth. A representation, however negligent, is not necessarily fraudulent. *Although establishment of mens rea is not a requirement but its absence is unmistakable and its existence cannot be presumed.* Some reference to provisions such as Sections 7 and 8 of the Indian Evidence Act may be examined along with the definition of 'evidence', 'fact', 'facts in issue', 'proved', 'disproved', 'not proved', etc., may be perused to understand the extent any of the allegations stand proved in each case.

The applicability of general disciplines relating to the imposition of penalties prescribed under this Section has a limited field of operation since Section 126(6) clearly specifies that the general disciplines are not applicable where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage.

Questions & Answers

Q1. Before imposing any penalty, is it mandatory to give the alleged defaulter an opportunity of being heard personally?

Ans. Section 126(3) of the CGST Act provides that no penalty shall be imposed on any person without giving him an opportunity of being heard.

Q2. What are the general disciplines to be followed while imposing penalties?

Ans.

1. No penalty can be imposed without issuance of a show cause notice along with an opportunity to rebut and proper hearing in the matter.
2. The amount and type of penalty to be imposed has to depend upon the facts and circumstances of each case.
3. The nature of breach has to be mentioned clearly while passing a penalty order.
4. The penalty order has to specify the provision(s) of law under which penalty is imposed.
5. When a person voluntarily discloses to an offence under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person.

Q3. What are the acts that are considered a minor breach?

Ans. In terms of explanation to Section 126(1), a breach shall be considered a 'minor breach' if the amount of tax involved is less than five thousand rupees.

Also, no officer under the CGST Act shall impose any penalty for *minor breaches* of tax regulations or procedural requirements and, in particular, for any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or because of gross negligence.

An omission or mistake in documentation shall be considered easily rectifiable if the same is an error that is noticeable too easily.

Q4. If a person voluntarily discloses information, could this help in reducing the quantum of his penalties?

Ans. As per Section 126(5) where a person voluntarily discloses to a tax authority the circumstances of a breach of the tax law, regulation or procedural requirement prior to

the discovery of the breach by the tax authority, the tax authority may consider this a potential mitigating factor for quantifying a penalty for that person.

Q5. Does a proper officer have the discretion to reduce or waive a penalty?

Ans. Section 126(6) of the CGST Act clearly states that the “provisions of this section shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage”. Therefore, in all those cases where the penalty is either a fixed sum or a fixed percentage, the proper officer has no discretion to reduce the penalty. But in all other cases, as per Section 126(2) of the CGST Act, penalty shall be levied depending on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach.

Q6. Can the department impose two penalties for the same offence?

Ans. No, the department cannot impose two penalties for one offence, but it can, if the offence results into two defaults.

VIII. Power to impose penalty in certain cases: Section 127 of the CGST Act

Where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings under section 62 or section 63 or section 64 or section 73 or section 74 or section 129 or section 130, he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person.

This section gives power to the proper officer to impose penalty, after giving a reasonable opportunity to the person who is involved in any act or omission which is otherwise not covered by any of the penalty provision under this Act.

IX Power to waive penalty or fee or both: Section 128 of the CGST Act

The Government may, by notification, waive in part or full, any penalty referred to in section 122 or section 123 or section 125 or any late fee referred to in section 47 for such class of taxpayers and under such mitigating circumstances as may be specified therein on the recommendations of the Council.

This Section provides for waiver of penalty leviable under Section 122 or Section 123 or Section 125 or late fee payable under Section 47 to those classes of taxpayers or under such mitigating factors as notified by the Government.

Till now, drawing power from this Section, the government has waived off late fee on many occasions.

Some of the notifications issued drawing powers from section 128 are:

1. Notification No. 50/2017-C.T., dated 24-10-2017.
2. Notification No. 74/2019-C.T., dated 26-12-2019.
3. Notification No. 04/2020-C.T., dated 10-11-2020.

X. Detention, seizure and release of goods and conveyances in transit: Section 129 of the CGST Act

(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the **rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released, —**

- (a) on payment of the applicable tax and penalty equal to one hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;
- (b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;
- (c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within seven days of such detention or seizure, further proceedings shall be initiated in accordance with the provisions of section 130:

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of seven days may be reduced by the proper officer.

Related Provisions:

Section 68 of the CGST Act: Inspection of goods in movement

(1) The Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as may be prescribed.

(2) The details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.

(3) Where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.

Rule 55A: Tax Invoice or bill of supply to accompany transport of goods. The person-in-charge of the conveyance shall carry a copy of the tax invoice or the bill of supply issued in accordance with the provisions of rules 46, 46A or 49 in a case where such person is not required to carry an e-way bill under these rules.

Rule 138A: Documents and devices to be carried by a person-in-charge of a conveyance.

(1) The person in charge of a conveyance shall carry—

- (a) the invoice or bill of supply or delivery challan, as the case may be; and
- (b) a copy of the e-way bill in physical form or the e-way bill number in electronic form or mapped to a Radio Frequency Identification Device embedded on to the conveyance in such manner as may be notified by the Commissioner:

Provided that nothing contained in clause (b) of this sub-rule shall apply in case of movement of goods by rail or by air or vessel:

[Provided further that in case of imported goods, the person in charge of a conveyance shall also carry a copy of the bill of entry filed by the importer of such goods and shall indicate the number and date of the bill of entry in **Part A** of **FORM GST EWB-01**.

(2) A registered person may obtain an Invoice Reference Number from the common portal by uploading, on the said portal, a tax invoice issued by him in **FORM GST INV-1** and produce the same for verification by the proper officer in lieu of the tax invoice and such number shall be valid for a period of thirty days from the date of uploading.

(3) Where the registered person uploads the invoice under sub-rule (2), the information in **Part A** of **FORM GST EWB-01** shall be auto-populated by the common portal on the basis of the information furnished in **FORM GST INV-1**.

(4) The Commissioner may, by notification, require a class of transporters to obtain a unique Radio Frequency Identification Device and get the said device embedded on to the conveyance and map the e-way bill to the Radio Frequency Identification Device prior to the movement of goods.

(5) Notwithstanding anything contained in clause (b) of sub-rule (1), where circumstances so warrant, the Commissioner may, by notification, require the person-in-charge of the conveyance to carry the following documents instead of the e-way bill

(a) tax invoice or bill of supply or bill of entry; or

(b) a delivery challan, where the goods are transported for reasons other than by way of supply.

Rule 138B: Verification of documents and conveyances

(1) The Commissioner or an officer empowered by him in this behalf may authorize the proper officer to intercept any conveyance to verify the e-way bill in physical or electronic form for all inter-State and intra-State movement of goods.

(2) The Commissioner shall get Radio Frequency Identification Device readers installed at places where the verification of movement of goods is required to be carried out and verification of movement of vehicles shall be done through such device readers where the e-way bill has been mapped with the said device.

(3) The physical verification of conveyances shall be carried out by the proper officer as authorised by the Commissioner or an officer empowered by him in this behalf:

Provided that on receipt of specific information on evasion of tax, physical verification of a specific conveyance can also be carried out by any other officer after obtaining necessary approval of the Commissioner or an officer authorised by him in this behalf.

Rule 138C: Inspection and verification of goods

(1) A summary report of every inspection of goods in transit shall be recorded online by the proper officer in **Part A** of **FORM GST EWB-03** within twenty-four hours of inspection and the final report in **Part B** of **FORM GST EWB-03** shall be recorded within three days of such inspection.

Provided that where the circumstances so warrant, the Commissioner, or any other officer authorised by him, may, on sufficient cause being shown, extend the time for recording of the final report in **Part B** of **FORM EWB-03**, for a further period not exceeding three days.

Explanation. - The period of twenty-four hours or, as the case may be, three days shall be counted from the midnight of the date on which the vehicle was intercepted.

(2) Where the physical verification of goods being transported on any conveyance has been done during transit at one place within the State or Union territory or in any other State or Union territory, no further physical verification of the said conveyance shall be carried out again in the State or Union territory, unless a specific information relating to evasion of tax is made available subsequently.

Rule 138D: Facility for uploading information regarding detention of vehicle

Where a vehicle has been intercepted and detained for a period exceeding thirty minutes, the transporter may upload the said information in **FORM GST EWB-04** on the common portal.

RULE 138E. Restriction on furnishing of information in **PART A of FORM GST EWB-01**- Notwithstanding anything contained in sub-rule (1) of rule 138, no person (including a consignor, consignee, transporter, an e-commerce operator or a courier agency) shall be allowed to furnish the information in **PART A of FORM GST EWB-01** in respect of a registered person, whether as a supplier or a recipient, who, -

- (a) being a person paying tax under section 10 [or availing the benefit of notification of the Government of India, Ministry of Finance, Department of Revenue No. 2/2019-Central Tax (Rate), dated the 7th March, 2019, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 189, dated the 7th March, 2019, has not furnished the [statement in **FORM GST CMP-08** for two consecutive [quarters]; or
- (b) being a person other than a person specified in clause (a), has not furnished the returns for a consecutive period of two months:

Provided that the Commissioner may, [on receipt of an application from a registered person in **FORM GST EWB-05**, on sufficient cause being shown and for reasons to be recorded in writing, by order in **FORM GST EWB-06**, allow furnishing of the said information in **PART A of FORM GST EWB-01**, subject to such conditions and restrictions as may be specified by him:

Provided further that no order rejecting the request of such person to furnish the information in **PART A of FORM GST EWB-01** under the first proviso shall be passed without affording the said person a reasonable opportunity of being heard:

Provided also that the permission granted or rejected by the Commissioner of State tax or Commissioner of Union territory tax shall be deemed to be granted or, as the case may be, rejected by the Commissioner.

Explanation. — For the purposes of this rule, the expression “Commissioner” shall mean the jurisdictional Commissioner in respect of the persons specified in clauses (a) and (b).

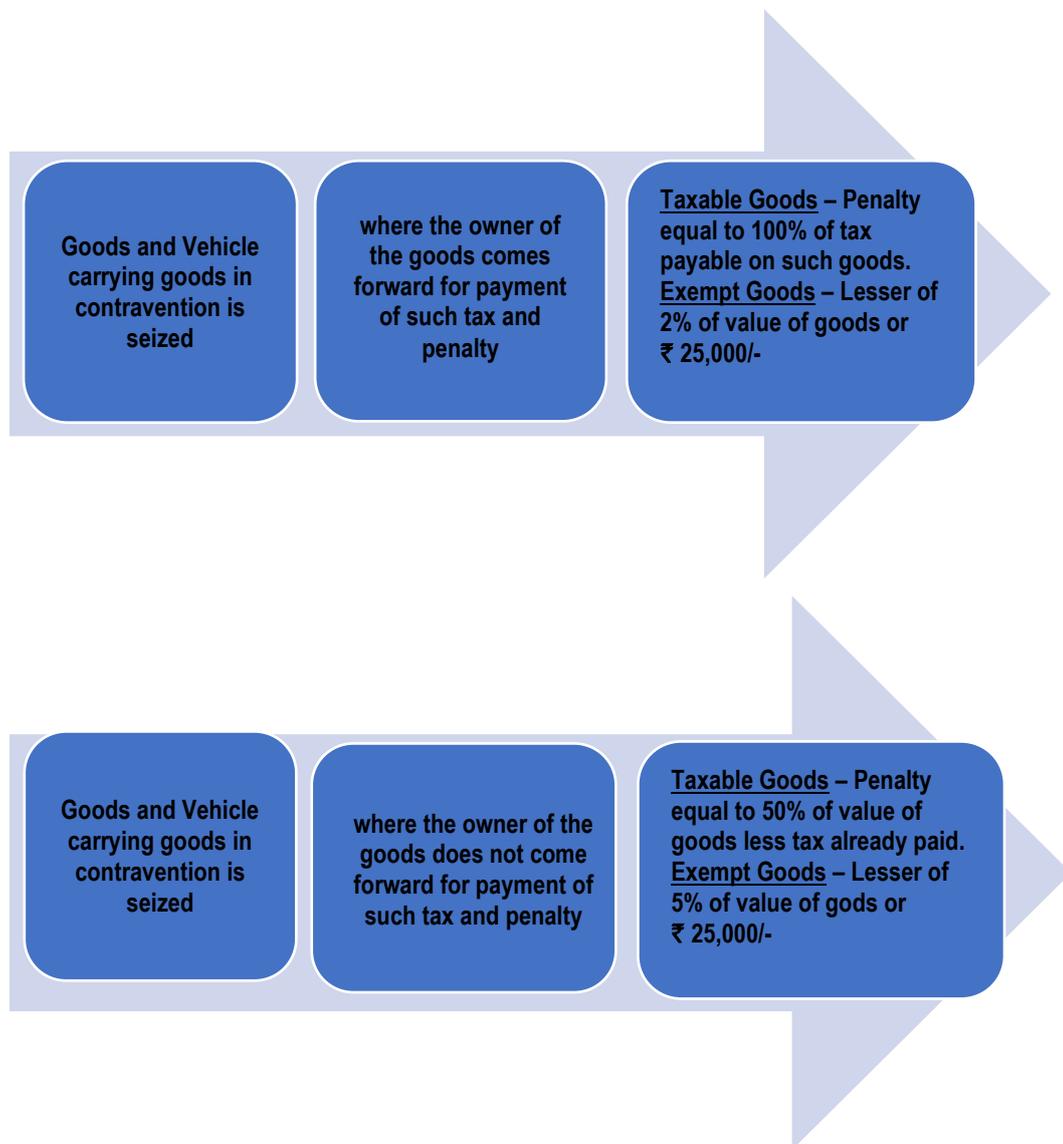
Related Circulars

Circular No. 41/15/2018-GST, dated 13-4-2018

Circular No. 49/23/2018-GST, dated 21-6-2018

Circular No. 64/38/2018-GST, dated 14-9-2018 and

Circular No. 88/07/2019-GST, dated 1-2-2019



Section 68 of the CGST Act requires person in-charge of a conveyance carrying goods to carry such documents and such devices as may be prescribed.

The type of documents to be carried by the person in-charge of the conveyance has been defined in Rule 138A, and procedure for verification has been in given in other Sub-rules of Rule 138.

It is important to note that the provisions of Section 129 can be imposed only when the goods are in-transit, whether while being transported or during in-transit storage. Therefore, once the goods have reached their destination and if there is any infringement of law, then provisions other than those of Section 129 would be applicable.

The same was confirmed in the decision of Patna HC in the case of *Ram Charitra Ram Harihar Prasad vs the State Of Bihar (CWP 11221 of 2019)* where e-way bill generated had expired but another e-way bill was generated just before the vehicle was intercepted, which was produced before the inspecting officer. The Hon'ble High Court held that intercepting officer cannot be questioned if a valid EWB was produced even though, from the facts, the vehicle can be understood to have travelled without a valid EWB but not intercepted. Offence cannot be reconstructed 'in theory'. Penalty under section 129 will arise only when offence is 'in-progress'.

In Circular No. 41/15/2018-GST, dated 13-4-2018, Circular No. 49/23/2018-GST, dated 21-6-2018, Circular No. 64/38/2018-GST, dated 14-9-2018 and Circular No. 88/07/2019-GST, dated 1-2-2019, procedure for interception of conveyance for inspection of goods in movement, detention, release and confiscation of such goods and conveyances is prescribed:

- In clause (g) it is observed that in cases where no discrepancies are found after inspection of the goods and conveyance, the proper officer shall issue forthwith a release order in **FORM GST MOV 05** and allow the conveyance to move further, and
- where the proper officer is of the opinion that the goods and conveyance need to be detained under section 129 of the CGST Act, he shall issue an order of detention in **FORM GST MOV 06** and a notice in **FORM GST MOV 07** in accordance with the provision of Section 129(3), specifying the tax and penalty payable.
- The notice shall be served on the person in-charge of the conveyance.
- In terms of clause (h) where the owner of the goods or any person authorized by him comes forward to make the payment of tax and penalty as applicable under section 129(1)(a) of the CGST Act, or where the owner of the goods does not come forward to make the payment of tax and penalty as applicable under section 129(1) (b), the proper officer shall, after the amount of tax and penalty has been paid in accordance with the provisions of the CGST Act and the CGST Rules, release the goods and conveyance by an order in **FORM GST MOV-05**.
- Further, an order in **FORM GST MOV 09** shall be uploaded on the common portal and the demand accruing from the proceedings shall be added in the electronic liability register of the concerned person.
- In terms of clause(i), where the owner of the goods, or the person authorized by him, or any person other than the owner of the goods comes forward to get the goods and the conveyance released by furnishing a security under clause (c) of sub-section (1) of section 129 of the CGST Act, the goods and the conveyance shall be released, by an order in **FORM GST MOV-05**, after obtaining a bond in **FORM GST MOV-08** along with a security in the form of bank guarantee equal to the amount payable under clause (a) or clause (b) of sub-section (1) of section 129 of the CGST Act. The finalisation of the proceedings under section 129 of the CGST Act shall be taken up on priority by the

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officer concerned and the security provided may be adjusted against the demand arising from such proceedings.

- In terms of clause (j), where any objections are filed against the proposed amount of tax and penalty, the proper officer shall consider the objections and thereafter pass a speaking order on **FORM GST MOV 09**.
- On payment of such tax and penalty, the goods and conveyance shall be released forthwith by an order in **FORM GST MOV 05**.
- As per clause (k), in case the proposed tax is not paid within ²[fourteen days] from the date of the issue of the order of detention in **FORM GST MOV 06**, action under section 130 of the CGST Act shall be initiated.
- Circular No. 49/23/2018-GST, dated 21-6-2018, clarifies with the help of below given illustration that only such goods and/or conveyances should be detained/confiscated in respect of which there is a violation of the provisions of the GST Acts or the Rules made thereunder.

Illustration: Where a conveyance carrying twenty-five consignments is intercepted and the person-in-charge of such conveyance produces valid e-way bills and/or other relevant documents in respect of twenty consignments, but is unable to produce the same with respect to the remaining five consignments, detention/confiscation can be made only with respect to the five consignments and the conveyance in respect of which the violation of the Act or the rules made thereunder has been established by the proper officer.

- Circular No. 64/38/2018-GST, dated 14-9-2018 clarifies that the non-furnishing of information in **Part B** of **FORM GST EWB-01** amounts to the e-way bill becoming not a valid document for the movement of goods by road as per Explanation (2) to Rule 138(3) of the CGST Rules, except in the case where the goods are transported for a distance of up to fifty kilometres within the State or Union territory to or from the place of business of the transporter to the place of business of the consignor or the consignee, as the case may be.
- It further clarifies that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-way bill, proceedings under Section 129 of the CGST Act may not be initiated, inter alia, in the following situations:
 - (a) Spelling mistakes in the name of the consignor or the consignee but the GSTIN, wherever applicable, is correct;

² Amended vide Circular No. 88/07/2019-GST, dated 1-2-2019 w.e.f.1.02.2019. Prior to this substitution it read as: "seven days"

- (b) Error in the pin-code but the address of the consignor and the consignee mentioned is correct, subject to the condition that the error in the PIN code should not have the effect of increasing the validity period of the e-way bill;
- (c) Error in the address of the consignee to the extent that the locality and other details of the consignee are correct;
- (d) Error in one or two digits of the document number mentioned in the e-way bill;
- (e) Error in 4 or 6-digit level of HSN where the first 2 digits of HSN are correct and the rate of tax mentioned is correct;
- (f) Error in one or two digits/characters of the vehicle number.

In case of the above situations, penalty to the tune of ₹ 500/- each under Section 125 of the CGST Act and the respective State GST Act should be imposed (₹ 1000/- under the IGST Act) in **FORM GST DRC-07** for every consignment.

Summary of the various forms involved in procedure for Inspection, Verification and Detention of Goods in Transit:

Form Name	Purpose of the FORM
GST MOV-01	Statement of owner, driver or person in charge of the vehicle
GST MOV-02	Order for physical verification and inspection of goods, conveyance or documents
GST MOV-03	Order for extension of time beyond 3 days for inspection
GST MOV-04	Physical Verification Report by Proper Officer
GST MOV-05	Release Order
GST MOV-06	Order of Detention of Goods or Conveyance
GST MOV-07	Notice specifying Tax and Penalty amount payable
GST MOV-08	Bond for provisional release of Goods or Conveyance
GST MOV-09	Order of demand of Tax and Penalty
GST MOV-10	Notice for the confiscation of Goods
GST MOV-11	Order of confiscation of goods and conveyance and demand of tax, fine and penalty

Any tax and penalty paid under section 129 of the CGST Act for release of goods and vehicle will not be eligible for payment of regular output tax liability, as the total amount so paid is in the nature of a penalty rather than payment of tax. Payment of tax is always upon assessment proceedings whereas Section 129 is only a penalty provision for carrying goods in contravention of Section 68, read with Rule 138A.

Also, Section 17(5)(i) blocks the credit of tax paid under section 129 of the CGST Act.

Questions & Answers

Q1. Can an officer appointed under the GST law detain goods and vehicle citing under-valuation of goods in the invoice?

Ans. No. Section 129 of the CGST Act, read with Rule 138A of the CGST Rules, does not give power to any officer to assess the value of the goods being transported.

The above opinion has been upheld by various courts in the following judgements:

1. *Alfa Group vs. Assistant State Tax Officer (2020) 113 taxmann.com 222 (Kerala).*
2. *Mohd. Sahil Jakir vs. the State of Gujarat (Gujarat High Court).*
3. *K.P Sugandh Ltd. vs. the State of Chhattisgarh (Chhattisgarh High Court).*

Q2. What are the documents a person in-charge of a conveyance is required to carry while transporting goods by road?

Ans. The person in charge of a conveyance shall carry—

- (a) the invoice or bill of supply or delivery challan, as the case may be; and
- (b) a copy of the e-way bill in physical form or the e-way bill number in electronic form or mapped to a Radio Frequency Identification Device embedded on to the conveyance in such manner as may be notified by the Commissioner:
- (c) In case of imported goods, the person in charge of a conveyance shall also carry a copy of the bill of entry filed by the importer of such goods and shall indicate the number and date of the bill of entry in **Part A** of **FORM GST EWB-01**.

Q3. A vehicle is caught transporting goods (taxable @ 18%) valuing ₹ 10,00,000/-, without E-way Bill. What is the amount of penalty applicable in this case?

- (a) ₹ 18,000/-
- (b) ₹ 5,00,000/-
- (c) ₹ 1,80,000/-
- (d) ₹ 90,000/-

Ans. In this case the department can impose a penalty of ₹ 1, 80,000/-, that is 100% of the tax payable ($₹ 10,00,000 * 18\% = ₹ 1,80,000$).

Q4. A person in-charge of a vehicle is caught transporting goods (taxable @ 18%) valuing ₹ 10,00,000/- in contravention of Section 68 of the CGST Act and the department detains the goods as well as the vehicle. As the owner of goods was not coming forward to get the goods released, the transporter decides to pay the tax and penalty as it was effecting his business. What is the amount of penalty applicable in this case?

- (a) ₹ 18,000/-

- (b) ₹ 3,20,000/-
- (c) ₹ 1,80,000/-
- (d) ₹ 90,000/-

Ans. Here, (b) is the correct option, as the department can impose a penalty of ₹ 3,20,000, that is, 50% of the value of goods ($10,00,000 * 50\% = ₹ 5,00,000$) reduced by the amount of tax paid (18% of ₹ 10,00,000/- = ₹ 1,80,000/-). Therefore, the penalty amount to be paid is (₹ 5,00,000-₹ 1,80,000) ₹ 3,20,000/-.

Q5. A vehicle transporting exempted goods valuing ₹ 10,00,000/- is intercepted and found carrying all the required documents, except the E-way Bill. What is the amount of penalty applicable in this case?

- (a) ₹ 18,000/-
- (b) ₹ 20,000/-
- (c) ₹ 25,000/-
- (d) Nil

Ans. Here, (b) is the correct option, as the department can impose a penalty of ₹ 20,000/-, that is 2% of the value of goods ($₹ 10,00,000 * 2\% = ₹ 20,000$), or ₹ 25,000/-, whichever is less.

Q6. A vehicle transporting goods (taxable @ 18%) having invoice value of ₹ 10,00,000/-, was intercepted and upon inspection it was found that the GSTIN of the recipient was wrongly mentioned as 07AAAPA22221ZP, instead of 07AABPA2221ZO. How much penalty would be imposed in this case?

Ans. If a wrong GSTIN is mentioned, then it makes the E-way bill an invalid document, but if it appears on the face of it that actually only a couple of alphabets are wrong due to an error/typing mistake, then as per Circular No. 64/38/2018-GST, dated 14-9-2018, the department shall not initiate any proceedings under Section 129.

Rather a penalty to the tune of ₹ 500/- each under Section 125 of the CGST Act and the respective State GST Act should be imposed (₹ 1000/- under the IGST Act).

Q7. A vehicle upon inspection is found to contain fifteen different consignments and out of them five do not have valid E-way bills. How will the department treat this detention?

Ans. In this case, the department can only initiate detention/confiscation proceedings against the five consignments which are without e-way bills and the conveyance involved therein and mere fact that rest of the consignments were in the same conveyance would not have any impact on consignments with valid documents.

Q8. A vehicle was inspected and found to be in possession of all documents, but PART B of the E-way bill was not updated. Can the department start detention proceedings in this case?

Ans. An e-way bill without **PART B** filled properly is an invalid e-way bill and thus, in this case, the department is well within its right to initiate penalty proceedings under section 129 of the CGST Act.

Q9. The detained goods shall be released only after

- (a) The payment of applicable tax and penalty;
- (b) Furnishing a security;
- (c) The payment of tax and Interest;
- (d) Either (a) or (b).

Ans. Either (a) or (b)

XI. Confiscation of goods and conveyances and levy of penalty: Section 130 of the CGST Act

(1) Notwithstanding anything contained in this Act, if any person—

- (i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (ii) does not account for any goods on which he is liable to pay tax under this Act; or
- (iii) supplies any goods liable to tax under this Act without having applied for registration; or
- (iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or
- (v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122.

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an option to pay in lieu of confiscation, such fine as the said officer thinks fit:

Provided that such fine leviable shall not exceed the market value of the goods confiscated, less the tax chargeable thereon:

Provided further that the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under sub-section (1) of section 129:

Provided also that where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine equal to the tax payable on the goods being transported thereon.

(3) Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax, penalty and charges payable in respect of such goods or conveyance.

(4) No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an opportunity of being heard.

(5) Where any goods or conveyance are confiscated under this Act, the title of such goods or conveyance shall thereupon vest in the Government.

(6) The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession.

(7) The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government.

It is important to note that this Section applies to “any person”, therefore it could be both a registered person or an unregistered person and could even be a transporter who is knowingly involved in any such contravention.

This Section will be invoked if a person is involved in any activity or activities contravening any of the provisions of law, with an intention to evade tax.

There are five precise causes for confiscation of goods and/ or conveyances specified in this Section, which are:

Cause	Consequence
Supply or receive goods in contravention of the provisions of this Act or Rules made thereunder	Resulting in actual evasion of tax
Not accounting for goods	Carrying a liability for payment of tax
Supply of goods liable to tax	Without applying for registration

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Cause	Consequence
Contravention of the provisions of the Act or Rules made thereunder	With intent to evade payment of tax
Use of conveyance as a means of transport for carriage of goods	In contravention of the Act or rules made thereunder

- In all the above cases, goods or conveyance shall be liable for confiscation. However, the conveyance shall not be confiscated where the owner of the conveyance proves that it is without the knowledge or connivance of the owner himself, his agent or person in charge of the conveyance. Further, the person shall be liable to pay penalty under Section 122 of the Act.
- If the goods or conveyance are liable to be confiscated under the provisions of this Act, the proper officer shall give the owner of the goods an option to pay fine in lieu of confiscation.
- The amount of fine shall not exceed the market value of goods as reduced by the amount of tax payable thereon. However, at the same time aggregate of fine and penalty leviable shall not be less than the amount of penalty as leviable under Section 129(1). While Section 129 is applicable on transporters also, Section 130 primarily covers the owner.
- Where the conveyance is used for transportation of goods or passengers on hire, the owner of the conveyance shall be given an option to pay in lieu of confiscation of the conveyance a fine equal to amount of tax payable on the goods transported on his conveyance. It is worthwhile to note that the amount of fine payable is in addition to any tax, penalty and other charges payable on confiscated goods or conveyance.
- The order for confiscation cannot be issued without giving the person an opportunity of being heard.
- The title of the confiscated goods or conveyance shall vest in the Government.
- The proper officer ordering confiscation shall take and hold possession of the things confiscated on behalf of the Government and every officer of police shall assist in taking such hold and possession.
- If the proper officer is satisfied that the confiscated goods/ conveyance are not required in any other proceedings under the Act, then he shall after giving reasonable time not exceeding three months to pay fine in lieu of confiscation, dispose the goods and deposit the sale proceeds with the Government.

Questions & Answers

Q1. Can an order under section 130 be passed upon detention of goods and vehicle

during movement of goods (without valid invoice), without quantifying the tax and penalty order under section 129?

Ans. Once the goods and vehicle are detained while in-transit, it becomes imperative for the proper officer to follow the procedure laid down in Section 129 of the CGST Act. It includes giving opportunity to the person concerned of being heard and opportunity to pay tax, and penalty, before the goods are released. Only when the concerned person fails to pay the tax and penalty within the prescribed period, the department shall initiate proceedings under section 130 of the CGST Act.

Q2. Are all cases of contravention of the provisions of the Act or Rules liable for confiscation?

Ans. No. Confiscation of goods/conveyance is permissible only if the contravention of the provisions results in evasion of taxes or there is evidence of intent to evade the payment of tax.

Q3. What is the maximum amount of fine that can be levied in lieu of confiscation?

Ans. The maximum amount of fine in lieu of confiscation shall not exceed the market price of the goods confiscated, less the tax chargeable thereon.

Q4. Can the option to pay redemption fine in lieu of confiscation of goods be given to any person other than the owner of the goods?

Ans. No. As per Section 130(2) of the CGST Act, the officer adjudging confiscation of any goods shall give to the owner of the goods an option to pay in lieu of confiscation such fine as he thinks fit. Provided that the amount of fine shall not exceed the market value of goods less tax chargeable thereon and also aggregate of fine and penalty leviable shall not be less than the amount of penalty as leviable under section 129(1).

Q5. Can the option to pay fine in lieu of confiscation be exercised anytime?

Ans. The option to pay fine in lieu of confiscation shall be exercised within three months of confiscation.

XII. Confiscation or penalty not to interfere with other punishments: Section 131 of the CGST Act

Without prejudice to the provisions contained in the Code of Criminal Procedure, 1973, no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force.

This is an administrative provision which empowers the Government to initiate other proceedings, as relevant, in addition to confiscation of goods or imposition of penalty.

This Section provides that in addition to confiscation of goods or penalty already imposed, all/ any other proceedings like prosecution, arrest, cancellation of registration etc. may also be initiated or continued under the GST law **or any other law**, as applicable. Therefore, for the same offence both penalty and punishment can be levied.

XIII. Punishment for certain offences: Section 132 of the CGST Act

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| <p>(1) Whoever commits any of the following offences, namely :—</p> <ul style="list-style-type: none">(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;(c) avails input tax credit using such invoice or bill referred to in clause (b);(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;(e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;(g) obstructs or prevents any officer in the discharge of his duties under this Act;(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;(j) tampers with or destroys any material evidence or documents;(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section, <p>shall be punishable—</p> <ul style="list-style-type: none">(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly |
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<p>availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;</p> <p>(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;</p> <p>(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.</p> <p>(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.</p> <p>(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.</p> <p>(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.</p> <p>(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.</p> <p>(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.</p> <p>Explanation — For the purposes of this section, the term “tax” shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.</p>
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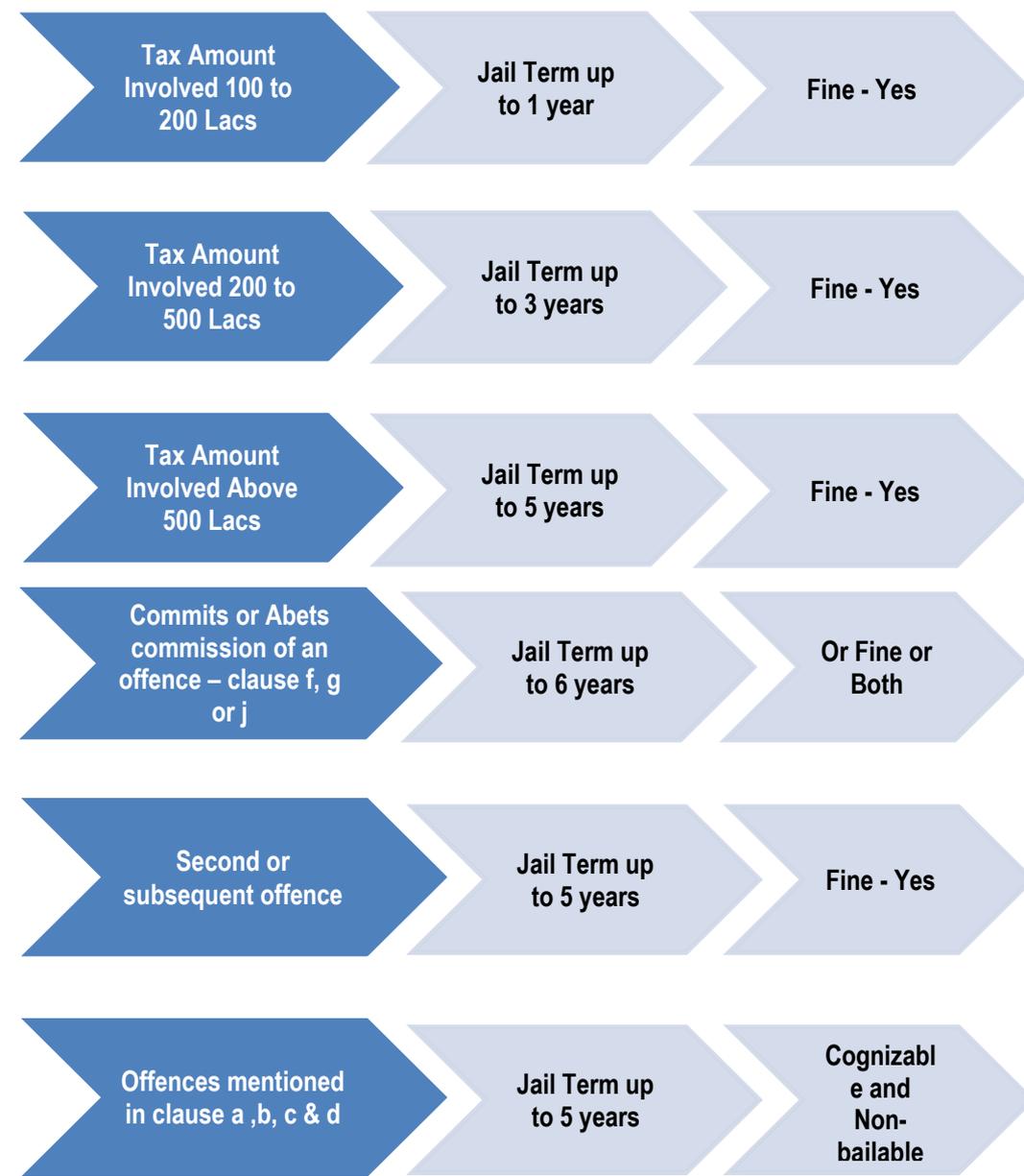
³Amendment vide the Finance Act, 2020

<p>127. In section 132 of the Central Goods and Services Tax Act, in sub-section (1), -</p> <p>(i) for the words “<i>Whoever commits any of the following offences</i>”, the words “<i>Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences</i>” shall be substituted;</p> <p>(ii) for clause (c), the following clause shall be substituted, namely: — “<i>(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;</i>”;</p> <p>(iii) in clause (e), the words “<i>fraudulently avails input tax credit</i>” shall be omitted.</p>

³ Effective Date Yet to be Notified.

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This Section enables the commencement of prosecution proceedings against the offenders, over and above the applicable tax, penalty and interest due to infringement of any provision(s) laid down under the GST Law. It also lists the period of imprisonment and quantum of fine for all such prosecution offences. The punishment under Section 132 depends upon the amount of tax evaded or seriousness of the offence as listed below.



Every prosecution proceeding initiated requires prior sanction of the Commissioner.

The explanation to this Section states that “tax” includes taxes that are levied under the CGST, SGST, UTGST, and GST Compensation Cess Act. Basically, it includes the amount of tax evaded, amount of ITC wrongly availed or utilized or refund wrongly taken under these Act(s).

Reference may be made to the discussion under Section 122 regarding ‘ingredients’ to impose penalty contrasted with the admission of unpaid taxes. Prosecution under Section 132 proceeds as a natural consequence of the establishment of the ingredients in Section 122 (for the stated offences from clause (i) to (iv) in Section 122(1)) and the value being above the threshold specified. Further, it is seen in *Vimal Yashwantgiri Goswami vs State of Gujarat (SCA 13679 of 2019)* where the Hon’ble Gujarat High Court laid down some guidelines against placing persons under arrest under Section 69 in a routine manner and not to detain a person without first establishing the basic ingredients of offence. With the Economic Offences (Inapplicability of Limitation) Act, 1974, there is no urgency to prosecute before completion of adjudication proceedings on the basic tax demand and penalty;

Prosecution must be undertaken in accordance with the due process prescribed under the Code of Criminal Procedure, 1973 (“**Cr.PC**”) before a Magistrate.

Care must be taken to carefully read Section 436 and 438 of the Cr.PC. To detain a person (before conclusion of trial) is to deprive a person of his ‘right to life’ under Article 21. Therefore, for a person to be enlarged (or set free) on bail is a ‘right’ under the Constitution. Denying this right is permitted only in special circumstances. Persons may be arrested under Section 41 of the Cr. PC, if the offence is bailable or non-bailable. In case of bailable offences, immediately after arrest the arresting officer is empowered to release the arrested person on bail. In case of non-bailable offences, the person arrested must be produced within 24 hours before a Magistrate who will set the bail.

In the case of non-bailable offences, anticipatory bail is granted under Section 438. It means that the person must be enlarged ‘at the very moment’ of arrest (*Naresh Kumar Yadav v. Ravindra Kumar (2008) 1 SCC 632*). Conditions imposed while granting anticipatory bail may sometimes be onerous or may restrict travel movements. This may require careful consultations with legal advisors to decide whether the apprehension of arrest is real or not and whether anticipatory bail should or should not be sought. Some States have made amendments to the Cr. PC provisions to render Section 438 inapplicable. For example, in the State of UP, section 438 is omitted in its implementation;

Reference may also be made to Section 441 regarding ‘bonds and sureties’ and various types of ‘remand’. Understanding some of these provisions will take away fear and anxiety and bring in clarity regarding the degree of proof required to (i) detain a person and (ii) prosecute a person. In India, being remanded to police custody or judicial custody is like subjecting a person to social boycott or ostracizing him. If it is resorted to in unmerited cases, it may do

more harm than good. Section 57 of the Cr. PC makes it clear that detention should not be for more than 24 hours and then Section 167 takes over to protect the 'right' of the detainee which states that maximum duration of detention pending investigation cannot exceed 90 days.

The Finance Act, 2020, which is yet to be notified has widen the scope of Section 132 of the CGST Act. Section 132 of the CGST Act has been amended to make the offence of fraudulent availment of ITC without an invoice or bill a cognizable and non-bailable offence; and to make any person who commits, or causes the commission, or retains the benefit of transactions arising out of specified offences liable for punishment

Question & Answer

Q1. What are the cognizable and non-bailable offences punishable under Section 132?

Ans. The following offences covered under Section 132 are cognizable and non-bailable:

- (a) supply of any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the Rules made thereunder, with the intention to evade tax;
- (b) issue of any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the Rules made thereunder leading to wrongful availment or utilisation of ITC or refund of tax;
- (c) availing ITC using the invoice or bill referred to in clause (b);
- (d) collecting any amount as tax but failing to pay the same to the Government beyond a period of three months from the date on which such payment becomes due.

XIV. Liability of officers and certain other persons: Section 133 of the CGST Act

(1) Where any person engaged in connection with the collection of statistics under section 151 or compilation or computerisation thereof or if any officer of central tax having access to information specified under sub-section (1) of section 150, or if any person engaged in connection with the provision of service on the common portal or the agent of common portal, wilfully discloses any information or the contents of any return furnished under this Act or rules made thereunder otherwise than in execution of his duties under the said sections or for the purposes of prosecution for an offence under this Act or under any other Act for the time being in force, he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to twenty-five thousand rupees, or with both.

(2) Any person—

- (a) who is a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Government;

(b) who is not a Government servant shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Related Provisions:

Section 150: Obligation to furnish information return

Section 151: Power to collect Statistics

This is one provision which is applicable on the other side of law for it tries to penalise those persons who are entrusted with the responsibility of collection of statistics, compilation and computerisation of data, services on common portal, agent of common portal, for any wilful disclosure of information/data.

The punishment prescribed is imprisonment upto six months or a fine which may go upto twenty-five thousand rupees or both.

XV. Cognizance of offences: Section 134 of the CGST Act

No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of a Magistrate of the First Class, shall try any such offence.

Any offence under the Act or Rules can be tried only before a Court not lower than the Court of Judicial Magistrate of First Class. Further, previous sanction of the Commissioner is mandatory in every such case.

XVI. Presumption of culpable mental state: Section 135 of the CGST Act

In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. — For the purposes of this section, —

- (i) the expression “culpable mental state” includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;
- (ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

In this section, law makers have cast the responsibility upon the shoulders of the one who is alleged of culpable mental state to prove otherwise

XVII. Relevancy of statements under certain circumstances: Section 136 of the CGST Act

A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —

- (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
- (b) the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Section 136 of the CGST Act provides that a statement recorded during an investigation proceedings or inquiry will be relevant to prove the truthfulness of facts when:

- (a) It is made by a person who is not available in Court on account of his death, incapacity, prevention by another party or when he absconds or when presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable or
- (b) The Court consider the statement as an evidence on examination of the person as a witness

XVIII. Offences by Companies: Section 137 of the CGST Act

(1) Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(3) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, *mutatis mutandis*, apply to such persons.

(4) Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Explanation. — For the purposes of this section, —

- (i) “company” means a body corporate and includes a firm or other association of individuals; and
- (ii) “director”, in relation to a firm, means a partner in the firm.

This section identifies the living persons who are actually responsible for the offence who otherwise want to hide behind the corporate veil.

In case of companies, every person/ director/ manager/ secretary or any other officer who at the time of commitment of the offence was in charge of and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly.

Similarly, in case of Partnership Firm, LLP, HUF or trust, the Partner or Karta or Managing Trustee (as the case may be) shall be deemed to be guilty and liable to be proceeded against and punished.

At the same time, if the accused proves that he was in no way related to the offence being committed or he had exercised all possible measures to prevent commission of such offences, then he is not punishable under this Section.

XIX. Compounding of offences: Section 138 of the CGST Act

(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:

Provided that nothing contained in this section shall apply to—

- (a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;
- (b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;
- (c) a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force;

- (d) a person who has been convicted for an offence under this Act by a court;
- (e) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of section 132; and
- (f) any other class of persons or offences as may be prescribed:

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

(2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than ten thousand rupees or fifty per cent. of the tax involved, whichever is higher, and the maximum amount not being less than thirty thousand rupees or one hundred and fifty per cent. of the tax, whichever is higher.

(3) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

Related Provision(s):

Rule 162: Procedure for compounding of offences

(1) An applicant may, either before or after the institution of prosecution, make an application under sub-section (1) of section 138 in **FORM GST CPD-01** to the Commissioner for compounding of an offence.

(2) On receipt of the application, the Commissioner shall call for a report from the concerned officer with reference to the particulars furnished in the application, or any other information, which may be considered relevant for the examination of such application.

(3) The Commissioner, after taking into account the contents of the said application, may, by order in **FORM GST CPD-02**, on being satisfied that the applicant has cooperated in the proceedings before him and has made full and true disclosure of facts relating to the case, allow the application indicating the compounding amount and grant him immunity from prosecution or reject such application within ninety days of the receipt of the application.

(4) The application shall not be decided under sub-rule (3) without affording an opportunity of being heard to the applicant and recording the grounds of such rejection.

(5) The application shall not be allowed unless the tax, interest and penalty liable to be paid have been paid in the case for which the application has been made.

(6) The applicant shall, within a period of thirty days from the date of the receipt of the order under sub-rule (3), pay the compounding amount as ordered by the Commissioner and shall furnish the proof of such payment to him.

(7) In case the applicant fails to pay the compounding amount within the time specified in sub-rule (6), the order made under sub-rule (3) shall be vitiated and be void.

(8) Immunity granted to a person under sub-rule (3) may, at any time, be withdrawn by the Commissioner, if he is satisfied that such person had, in the course of the compounding proceedings, concealed any material particulars or had given false evidence. Thereupon such person may be tried for the offence with respect to which immunity was granted or for any other offence that appears to have been committed by him in connection with the compounding proceedings and the provisions the Act shall apply as if no such immunity had been granted.

This provision deals with compounding of offences by payment of the prescribed compounding fees. In common parlance, compounding means condonation for a sum of money. Compounding of an offence is understood to be the action of taking a reward for forbearing to prosecute. It could also mean an agreement with the offender not to prosecute him.

Questions & Answers

Q1. What is the time allowed to a Commissioner to accept or reject the application of compounding?

Ans. The Commissioner has to either accept or reject the application within 90 days of the receipt of application.

Q2. Can the Commissioner withdraw the prosecution immunity after granting the same under Rule 162(3) of the CGST Rules?

Ans. If the Commissioner is satisfied that such person had, in the course of the compounding proceedings, concealed any material particulars or had given false evidence, he may withdraw the immunity so granted and the person may be tried for the offence as if no immunity had been granted.

Q3. What are the offences that cannot be compounded under Section 138 of the CGST Act?

Ans. Compounding of offences is not permissible in the following offences:

- (i) A person permitted to compound once in respect of any of the offences specified in clauses (a) to (f) of Section 132(1) and offences specified in clause (l) which are relatable to offences specified in (a) to (f).
- (ii) A person who has been allowed to compound once in respect of any offence, other than those in clause (a), under the CGST Act or under the provisions of any SGST/UTGST/IGST Act in respect of supplies of value exceeding one crore rupees;
- (iii) A person who is convicted by a Court under this Act.

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- (iv) A person who has been accused of committing an offence under the CGST Act which is also an offence under any other law for the time being in force.
- (v) A person who has been accused of committing an offence specified in Section 132(1)(g) or 132(1)(j) or 132(1)(k).
- (vi) Any other class of persons or offences as may be prescribed.



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